

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Rulemaking Adoption

AGENDA REQUESTED: March 28, 2012

DATE OF REQUEST: March 9, 2012

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Charlotte Horn, (512) 239-0779

CAPTION: Docket No. 2011-1219-RUL. Consideration of the adoption of an amendment to 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, Subchapter K, Mobile Source Incentive Programs, Division 3, Diesel Emissions Reduction Incentive Program for On-Road and Non-Road Vehicles, Section 114.622, Incentive Program Requirements, and corresponding revisions to the state implementation plan.

The adoption would implement part of House Bill (HB) 3399, 82nd Legislature, 2011, Regular Session, relating to requirements for receiving an incentive grant under the Diesel Emissions Reduction Incentive Program. The revisions to Chapter 114, as required by HB 3399, incorporate changes and additions to the program eligibility criteria, including: changes to the period over which a grant-funded vehicle must be operated; establish specific criteria for decommissioning a vehicle or vehicle engine under the program; and add provisions to allow a vehicle that has been leased or otherwise commercially financed to be replaced under the program. The revisions also include provisions, as required by HB 3399, that the executive director shall waive eligibility requirements on a finding of good cause. The proposed rules were published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7468). (Steve Dayton, Betsy Peticolas) (Rule Project No. 2011-050-114-EN)

Susana M. Hildebrand, P.E.

Chief Engineer

David Brymer

Division Director

Charlotte Horn

Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** March 9, 2012

Thru: Bridget Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Susana M. Hildebrand, P.E., Chief Engineer

Docket No.: 2011-1219-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 114, Control of Air Pollution from Motor Vehicles
HB 3399: Emissions Reduction Incentive Program Rules
Rule Project No. 2011-050-114-EN

Background and reason(s) for the rulemaking:

House Bill (HB) 3399, 82nd Legislature, 2011, Regular Session, by Representatives Legler, Strama, Reynolds, and Chisum, amends sections of Texas Health and Safety Code (THSC), Chapter 386, Subchapter C. This subchapter establishes the Diesel Emissions Reduction Incentive Program (program) to be funded from the Texas Emissions Reduction Plan (TERP) Fund and administered by the Texas Commission on Environmental Quality (commission). The changes enacted under HB 3399 require amendment of existing rules to revise existing provisions and add new provisions.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do: HB 3399 added new subsections under THSC, §386.104, Eligibility Requirements, for the Diesel Emissions Reduction Incentive Program. The revisions to 30 TAC Chapter 114, as required by HB 3399, incorporate changes and additions to the program eligibility criteria, including: changes to the period over which a grant-funded vehicle must be operated, to either five years or 400,000 miles, whichever occurs earlier; establish specific criteria for decommissioning a vehicle or vehicle engine under the program; and add provisions to allow a vehicle that has been leased or otherwise commercially financed to be replaced under the program. The revisions also include provisions, as required by HB 3399, that the executive director shall waive eligibility requirements on a finding of good cause.

B.) Scope required by federal regulations or state statutes: The adopted rule is required by changes to THSC, Chapter 386, under HB 3399.

C.) Additional staff recommendations that are not required by federal rule or state statute: Staff is not recommending additional provisions beyond what is required under THSC, Chapter 386, as amended by HB 3399.

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Statutory authority:

- Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties;
- TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of the state;
- TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission;
- THSC, §382.107, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act;
- THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air;
- THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and
- THSC, Chapter 386, which establishes the TERP program.

Effect on the:

A.) Regulated community: This rule will not affect regulated entities.

B.) Public: The changes to the eligibility criteria for the grants will potentially expand the number of entities and vehicles eligible to participate in the program. The changes may also make it easier for some entities to participate in the program.

C.) Agency programs: The TERP guidance document, *Guidelines for Emissions Reduction Incentive Grants* (guidelines), will need to be amended. The revised guidelines will need to be adopted by the commission after the rule is adopted. Program processes, criteria, and forms will need to be updated. Also, a process will need to be developed for considering waivers to the eligibility requirements.

Stakeholder meetings:

Stakeholder meetings were not held for this rulemaking.

Public comment:

The proposal was published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7468). A public hearing was scheduled for November 29, 2011; however, since no one registered to provide comments, the hearing was not officially opened. The comment period closed on December 5, 2011. The commission received written comments from Clean Energy Fuels (Clean Energy), Crossroads Equipment Lease & Finance (Crossroads), Pioneer Natural Resources USA, Inc. (Pioneer), and United Parcel Service (UPS) in support of all or part of the rulemaking. The United States Environmental Protection Agency Region 6 (EPA) submitted written comments in support of the rulemaking, but

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expressed concern and suggested changes to part of the proposal. Significant comments and concerns are discussed further.

Clean Energy and Pioneer commented that the proposed rule changes will make the program more effective and efficient for Texas-based fleets by simplifying the application process. Crossroads also stated that the proposed rule changes demonstrated an acknowledgement of the potential challenges entities face when soliciting applicants for funding and that fleets in the designated areas will greatly benefit from the rule changes. No changes were made to the proposed text as a result of these comments.

Clean Energy, Pioneer, and UPS expressed support for the addition of §114.622(h) to provide the executive director the authority to waive eligibility requirements when good cause is demonstrated. No changes were made to the proposed text as a result of these comments.

The EPA expressed concern with the addition of §114.622(h). EPA stated that if, as in the past, Texas intends to continue to credit the reductions from TERP toward the state implementation plan, the provision for the executive director's discretion may be difficult to approve. EPA recommended the rule language be modified to better specify the circumstances under which waivers could be granted so that the impact on such waivers on state implementation plan credit can be determined. EPA also recommended that the commission remove the phrase "or other circumstances" from subsection (h), since it is vague and not well defined. Changes were made to the proposed text in response to these comments, as outlined in the following section regarding significant changes from the proposal.

Significant changes from proposal:

The provision in §114.622(h) implements requirements added by HB 3399. The intent of this provision is to authorize the executive director to consider unique situations that, while not meeting the strict letter of the eligibility requirements, will still meet the intent of the requirements. Therefore, it would be difficult to outline each specific situation where good cause would be determined and a waiver granted. The proposed text was not changed to try to further define or specify the situations where a waiver would be granted. However, additional language was added to subsection (h) since proposal to state that, in granting a waiver, the executive director shall ensure that the projected emissions reductions will still be valid and, where applicable, meet the conditions for assignment for credit to the state implementation plan. This language is intended to clarify the limits on the waiver provisions and to provide assurance that any waiver decision will be made only after considering the impact of the waiver on the potential emissions reductions.

Potential controversial concerns and legislative interest:

The adopted rule incorporates provisions required under THSC, Chapter 386, as amended by HB 3399. The adoption does not go further than what is required to comply with the statutory changes. Therefore, staff does not anticipate any concerns being raised about the

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rule, beyond the comments received on the proposed text. Staff expects that the legislators involved in HB 3399 and stakeholders will be interested in how the commission implements the new provisions.

Does this rulemaking affect any current policies or require development of new policies?

The TERP guidelines will need to be amended to incorporate the changes to the eligibility criteria. Program application materials and contract shells will need to be updated. Also, a process will need to be developed for considering waivers to the eligibility requirements.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

This rulemaking is required to amend the criteria for implementing the Diesel Emissions Reduction Incentive Program under THSC, Chapter 386. If the rulemaking is not completed, implementation of the program under the existing rule would be inconsistent with the statutory provisions. Possible alternatives are not adopting the rule or adopting the rule at a later date and delaying implementation of the program.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** November 4, 2011

Anticipated *Texas Register* publication date: April 13, 2012

Anticipated effective date: April 19, 2012

Six-month *Texas Register* filing deadline: May 4, 2012

Agency contacts:

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Betsy Peticolas, Staff Attorney, 239-1439

Charlotte Horn, Texas Register Coordinator, 239-0779

Attachments

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Steve Dayton
Charlotte Horn

The Texas Commission on Environmental Quality (TCEQ or commission) adopts an amendment to §114.622 *with change* to the proposed text as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7468).

This amendment will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan.

Background and Summary of the Factual Basis for the Adopted Rule

The 77th Legislature, 2001, enacted Senate Bill 5 establishing the Texas Emissions Reduction Plan (TERP). The TERP provides financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment. House Bill (HB) 3399, 82nd Legislature, 2011, Regular Session, amended Texas Health and Safety Code (THSC), Chapter 386, Subchapter C, to revise existing criteria and add additional criteria for receiving an incentive grant under this subchapter. The changes made under HB 3399 are as summarized in the following paragraphs.

Under THSC, §386.104(i), if the commission determines that a heavy-duty motor vehicle or engine must be decommissioned as part of the incentive grant requirements, the new subsection outlines specific criteria for how the vehicle or engine must be destroyed, including making a hole in the engine block and permanently destroying the frame of the vehicle. These requirements are consistent with current practice of the

commission in administering the grant programs. In addition, the new subsection requires the commission to provide a means for an applicant to propose an alternative method for complying with the destruction requirements.

Under THSC, §386.104(j), the executive director of the TCEQ is to waive any eligibility requirements established under THSC, §386.104, on a finding of good cause, which may include a waiver for short lapses in registration or operation attributable to economic conditions, seasonal work, or other circumstances. In addition to the new language outlining how vehicles and engines are to be destroyed under a grant, this section includes requirements for the operation and use of grant-funded vehicles and equipment in nonattainment areas and affected counties for five years, provisions for meeting cost-effectiveness requirements and other provisions pertaining to the emissions reductions to be achieved by a project, and provisions related to grant payments for the incremental costs of a project. Under the additional language of THSC, §386.104(j), any of these provisions could potentially be waived by the executive director on a finding of good cause.

Under THSC, §386.104(k), the commission is to consider an application for the replacement of a vehicle that has been owned, leased, or otherwise commercially financed by the applicant. Under this new subsection, if a vehicle or engine that is leased or otherwise commercially financed must be decommissioned, the commission is

to ensure that the applicant has the legal right to decommission the vehicle or engine before a grant is awarded.

Under THSC, §386.104(l), the commission is to consider an application for a vehicle replacement or fleet expansion for a project with an activity life of five years or more, or 400,000 miles, whichever is earlier. This change modifies the previous requirements that vehicles be operated in the nonattainment areas and eligible counties for at least five years without regard to the accrued mileage.

Finally, under THSC, §386.104(m), the commission is to provide a form that minimizes, to the maximum extent possible, the amount of paperwork required.

The rule incorporates the changes to THSC, §386.104, under HB 3399.

Section Discussion

§114.622, Incentive Program Requirements

Section 114.622 is amended to incorporate changes and additions to the program eligibility criteria under THSC, §386.104(i), (k), and (l). This section is also amended to incorporate the provisions of THSC, §386.622(j), directing the executive director to waive project eligibility requirements on a finding of good cause. Additional language is added since proposal to make it clear that, in granting a waiver, the executive director is

to determine that the emissions reductions attributed to the project will still be valid and, where applicable, will meet the conditions for assignment for credit to the state implementation plan.

Changes are made to subsection (b) and a subsection (c) is added to implement the requirements from THSC, §386.104(l), which requires that the commission consider an application for a vehicle replacement or fleet expansion for a project with an activity life of five years or more, or 400,000 miles, whichever is earlier. Subsection (b) is amended to exclude a project involving replacement of a motor vehicle or a project involving the purchase or lease of a motor vehicle from the provisions of that subsection. Subsection (c) is added to include the requirements from THSC, §386.104(l), for a vehicle replacement, purchase, or lease project.

Subsection (e) is added to establish the requirements for how a vehicle or engine replaced under a grant must be destroyed, in accordance with THSC, §386.104(i). This subsection includes a provision for the executive director of the TCEQ to allow an applicant to propose an alternative method for complying with the destruction requirements, as required by THSC, §386.104(i).

Subsection (f) is added to implement the requirements of THSC, §386.104(k). This subsection requires that a motor vehicle to be replaced under a grant may have been

owned, leased, or otherwise commercially financed by the applicant and that the applicant must have a legal right to replace and recycle or scrap the vehicle and engine before a grant is awarded.

Subsection (h) is added with changes to the proposed text to direct the executive director of the TCEQ to waive eligibility requirements under subsections (b) - (f) on a finding of good cause, as required by THSC, §386.104(j). Additional language is added from the proposed text to make it clear that, in granting a waiver, the executive director will need to determine that the emissions reductions attributed to the project will still be valid and, where applicable, will meet the conditions for assignment of credit to the state implementation plan.

Existing subsections under this section are re-lettered to account for the addition of new subsections.

Final Regulatory Impact Analysis

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rule action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the

environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The amended Chapter 114 rule is adopted in accordance with HB 3399, which amended THSC, Chapter 386. The rule adds or revises eligibility requirements for a voluntary grant. Because the rule places no involuntary requirements on the regulated community, the rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. In addition, this amendment does not place additional financial burdens on the regulated community.

Furthermore, a regulatory impact analysis is not required because the rule does not meet any of the four applicability criteria for requiring a regulatory analysis of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to:

- 1) exceed a standard set by federal law, unless the rule is specifically required by state law;
- 2) exceed an express requirement of state law, unless the rule is specifically required by federal law;
- 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or
- 4) adopt a rule solely under the general

powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and is not adopted solely under the general powers of the agency, but is specifically authorized by the provisions cited in the Statutory Authority section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed an analysis of whether the rule is subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with HB 3399. The rule makes revisions to a voluntary program and only affects motor vehicles and equipment that are not considered to be private real property. The promulgation and enforcement of the rule is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), concerning rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this action for consistency and determined the rulemaking for Chapter 114 does not impact any CMP goals or policies, because it revises a voluntary incentive grant program and does not govern air pollution emissions.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding consistency with the CMP.

Public Comment

A public hearing was scheduled for November 29, 2011; however, since no one registered to provide comments, the hearing was not officially opened. The comment period closed on December 5, 2011. The commission received written comments from Clean Energy Fuels (Clean Energy), Crossroads Equipment Lease & Finance (Crossroads), Pioneer Natural Resources USA, Inc. (Pioneer), and United Parcel Service

(UPS) in support of all or part of the rulemaking. EPA submitted written comments in support of the rulemaking, but expressed concern and recommended changes to part of the proposal.

Response to Comments

Clean Energy, Crossroads, Pioneer, and UPS commented in support of the rule changes. Specifically, Clean Energy and Pioneer commented that the proposed rule changes will make the program more effective and efficient for Texas-based fleets by simplifying the application process. Crossroads provided information on its experience providing financing and assistance to entities in California and nationally to obtain grant funding. Crossroads also stated that the proposed rule changes demonstrated an acknowledgement of the potential challenges entities face when soliciting applicants for funding and that fleets in the designated areas will greatly benefit from the rule changes. EPA expressed appreciation of TCEQ's efforts to improve the control of air pollution from motor vehicles and to tighten the requirements for decommissioning of on-road heavy-duty motor vehicles and non-road vehicles. EPA also applauded TCEQ's efforts to continually improve the state implementation plan.

The commission appreciates the continued support for the TERP programs. No changes were made to the proposed text in response to these comments.

Clean Energy, Pioneer, and UPS expressed support for the addition of subsection (h) in §114.622 to provide the executive director the authority to waive eligibility requirements when good cause is demonstrated.

The commission appreciates the support expressed for this new provision. No changes were made to the proposed text in response to these comments.

EPA expressed concern with the amended §114.622(h). EPA stated that if, as in the past, Texas intends to continue to credit the reductions from TERP toward the state implementation plan, the provision for the executive director's discretion may be difficult to approve. EPA recommended that the rule language be modified to better specify the circumstances under which waivers could be granted so that the impact of such waivers on state implementation plan credit can be determined. EPA also recommended that the commission remove the phrase "or other circumstances" from subsection (h) because it is vague and not well defined.

The commission appreciates the EPA's comments regarding ensuring that the emissions reductions generated from these programs can be credited to the state implementation plan. In response to the recommendation that more specific details be provided regarding the circumstances under which a waiver would be granted, the intent of the waiver provision is to authorize

the executive director to consider unique situations, including situations not yet contemplated, that may not meet the letter of the standard criteria but which will still meet the intent of the program requirements.

Therefore, it would be difficult to further outline each specific instance where good cause may be determined.

Additionally, the eligibility criteria that may be affected by a waiver under this section is already more specific than the criteria outlined in the EPA's guidelines for using an Economic Incentive Program to achieve creditable emissions reductions, *Improving Air Quality with Economic Incentive Programs* (EPA-452/R-01-001), and the EPA's guidelines for diesel retrofit programs, *Diesel Retrofits: Quantifying and Using Their Benefits in SIPs and Conformity* (EPA420-B-06-005).

No change was made to the proposed language to further identify specific instances for when a waiver may be granted. The reference to "other circumstances" is also retained. However, in order to clarify the limits on the waiver provisions and to provide assurance that any waiver decision will be made only after considering the impact of the waiver on the emissions reductions, additional language was added to §114.622(h) from proposal to state that in considering granting a waiver, the executive

director shall ensure that the emissions reductions attributable to the project will still be valid and, where applicable, meet the conditions for assignment for credit to the state implementation plan.

**SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS
DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM
FOR ON-ROAD AND NON-ROAD VEHICLES
§114.622**

Statutory Authority

This amendment is adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. This amendment is also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, Chapter 386, which establishes the Texas Emission Reduction Program. Finally, this amendment is part of the implementation of House Bill 3399.

This amendment implements THSC, §386.104.

§114.622. Incentive Program Requirements.

(a) Eligible projects include:

(1) purchase or lease of on-road and non-road diesels;

(2) emissions-reducing retrofit projects for on-road or non-road diesels;

(3) emissions-reducing repower projects for on-road or non-road diesels;

(4) purchase and use of emissions-reducing add-on equipment for on-road or non-road diesels;

(5) development and demonstration of practical, low-emissions retrofit technologies, repower options, and advanced technologies for on-road or non-road diesels with lower nitrogen oxides (NO_x) emissions;

(6) use of qualifying fuel;

(7) implementation of infrastructure projects;

(8) replacement of on-road and non-road diesels with newer on-road and non-road diesels; and

(9) other projects that have the potential to reduce anticipated NO_x emissions from diesel engines.

(b) For a proposed project as listed in subsection (a) of this section, other than a project involving a marine vessel or engine, [or] a project involving non-road equipment used for natural gas recovery purposes, a project involving replacement of a motor vehicle, or a project involving the purchase or lease of a motor vehicle, not less than 75% of vehicle miles traveled or hours of operation projected for the five years immediately following the award of a grant must be projected to take place in a nonattainment area or affected county of this state. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside a nonattainment area or affected county to count towards the percentage of use requirement.

(c) For a proposed motor vehicle replacement, purchase, or lease project, the period used to determine the emissions reductions and cost-effectiveness of each replacement, purchase, or lease activity included in the project must extend for five years or more, or 400,000 miles, whichever occurs earlier. Not less than 75% of the vehicle miles traveled projected for the period used to determine the emissions

reductions must be projected to take place in a nonattainment area or affected county of this state. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside of a nonattainment county or affected county to count towards the percentage of use requirement.

(d) [(c)] For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled or scrapped provided, however, that the executive director may allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

(e) For a proposed project to replace a motor vehicle, the vehicle and engine must be decommissioned by crushing the vehicle and engine, by making a hole in the engine block and permanently destroying the frame of the vehicle, or by another method approved by the executive director that permanently removes the vehicle and engine from operation in this state. For a proposed project to repower a motor vehicle, the engine being replaced must be decommissioned in a manner consistent with the requirements for decommissioning an engine as part of a vehicle replacement project. The executive director shall allow an applicant for a motor vehicle replacement or

repower project to propose an alternative method for complying with the requirements of this subsection.

(f) For a project to replace a motor vehicle, the vehicle being replaced may have been owned, leased, or otherwise commercially financed by the applicant. The applicant must have a legal right to replace and recycle or scrap the vehicle and engine before a grant is awarded for that project.

(g) [(d)] To be eligible for a grant, the cost-effectiveness of a proposed project as listed in subsection (a) of this section, except for infrastructure projects and infrastructure purchases that are part of a broader retrofit, repower, replacement, or add-on equipment project, must not exceed a cost-effectiveness of \$15,000 per ton of NO_x emissions reduced. The commission may set lower cost-effectiveness limits as needed to ensure the best use of available funds. The commission may also base project selection decisions on additional measures to evaluate the effectiveness of projects in reducing NO_x emissions in relation to the funds to be awarded.

(h) The executive director shall waive eligibility requirements established under subsections (b) - (f) of this section on a finding of good cause, which may include a waiver of any ownership and use requirements established for replacement of a motor vehicle for short lapses in registration or operation attributable to economic conditions,

seasonal work, or other circumstances. **In determining good cause and deciding whether to grant a waiver, the executive director shall ensure that the emissions reductions that will be attributed to the project will still be valid and, where applicable, meet the conditions for assignment for credit to the state implementation plan.**

(i) [(e)] Projects funded with a grant from this program may not be used for credit under any state or federal emissions reduction credit averaging, banking, or trading program except as provided under Texas Health and Safety Code, §386.056.

(j) [(f)] A proposed project as listed in subsection (a) of this section is not eligible if it is required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document. This subsection does not apply to:

(1) an otherwise qualified project, regardless of the fact that the state implementation plan assumes that the change in equipment, vehicles, or operations will occur, if on the date the grant is awarded the change is not required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document; or

(2) the purchase of an on-road diesel or equipment required only by local law or regulation or by corporate or controlling board policy of a public or private entity.

(k) [(g)] A proposed retrofit, repower, replacement, or add-on equipment project must achieve a reduction in NO_x emissions to the level established in the commission's *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388) for that type of project compared with the baseline emissions adopted by the commission for the relevant engine year and application.

(l) [(h)] If a grant recipient fails to meet the terms of a project grant or the conditions of this division, the executive director can require that the grant recipient return some or all of the grant funding to the extent that emission reductions are not achieved or cannot be demonstrated.

(m) [(i)] Criteria established in the guidelines, including revisions to the commission's *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388), apply to the Texas Emissions Reduction Plan program. Notwithstanding the provisions of this chapter, as authorized under Texas Health and Safety Code, §386.053(d), revisions to the guidelines may include, among other changes, adding additional pollutants; adding stationary engines or engines used in stationary applications; adding vehicles and equipment that use fuels other than diesel; or adjusting eligible program categories; as appropriate, to ensure that incentives established under this program achieve the maximum possible emission reductions.

ORDER ADOPTING AMENDED RULE AND REVISIONS TO THE STATE IMPLEMENTATION PLAN

Docket No. 2011-1219-RUL

On March 28, 2012, the Texas Commission on Environmental Quality (Commission), during a public meeting, considered adoption of amended §114.622. The Commission adopts this amendment in Chapter 114, 114, Control of Air Pollution from Motor Vehicles, Subchapter K, Mobile Source Incentive Programs, Division 3, Diesel Emissions Reduction Incentive Program for On-Road and Non-Road Vehicles; and corresponding revision to the state implementation plan (SIP). The revisions to Chapter 114 incorporate changes and additions to the program eligibility criteria and add provisions stating that the executive director shall waive eligibility requirements on a finding of good cause. Under Tex. Health & Safety Code Ann. §§ 382.011, 382.012, and 382.023 (Vernon 2001), the Commission has the authority to control the quality of the state's air and to issue orders consistent with the policies and purposes of the Texas Clean Air Act, Chapter 382 of the Tex. Health & Safety Code. The proposed rule was published for comment in the November 4, 2012, issue of the *Texas Register* (36 TexReg 7568).

Pursuant to Tex. Health & Safety Code Ann. § 382.017 (Vernon 2001), Tex. Gov't Code Chapter 2001 (Vernon 2008), and 40 Code of Federal Regulations § 51.102, and after proper notice, the Commission conducted a public hearing to consider the amended rule and revision to the SIP. Proper notice included prominent advertisement in the areas affected at least 30 days prior to the date of the hearing. A public hearing was held in Austin, Texas, on November 29, 2011.

The Commission circulated hearing notices of its intended action to the public, including interested persons, the Regional Administrator of the EPA, and all applicable local air pollution control agencies. The public was invited to submit data, views, and recommendations on the proposed amended rule and SIP revision, either orally or in writing, at the hearing or during the comment period. Prior to the scheduled hearing, copies of the proposed amended rule and SIP revision were available for public inspection at the Commission's central office and on the Commission's Web site.

Data, views, and recommendations of interested persons regarding the proposed amended rule and SIP revision were submitted to the Commission during the comment period, and were considered by the Commission as reflected in the analysis of testimony incorporated by reference to this Order. The Commission finds that the analysis of testimony includes the names of all interested groups or associations offering comment on the proposed amended rule and the SIP revision and their position concerning the same.

IT IS THEREFORE ORDERED BY THE COMMISSION that the amended rule and revision to the SIP incorporated by reference to this Order are hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rule necessary to comply with *Texas Register* requirements. The adopted rule and the preamble to the adopted rule and the revision to the SIP are incorporated by reference in this Order as if set forth at length verbatim in this Order.

IT IS FURTHER ORDERED BY THE COMMISSION that on behalf of the Commission, the Chairman should transmit a copy of this Order, together with the adopted rule and revision to the SIP, to the Regional Administrator of the EPA as a proposed revision to the Texas SIP pursuant to the Federal Clean Air Act, codified at 42 U.S. Code Ann. §§ 7401 - 7671q, as amended.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Tex. Gov't Code, § 2001.033 (Vernon 2008).

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

Date issued: March 28, 2012

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman

(b) The temporary suspensions or adjustments must be made on water rights in the smallest area practicable that is necessary to allow the senior or superior water right holder to obtain water.

§36.4. Suspension or Adjustment Order.

The executive director's temporary suspension or adjustment under §36.3 of this title (relating to Executive Director Action) must be made by a Suspension or Adjustment Order, as defined in §36.2(5) of this title (relating to Definitions).

§36.5. Conditions for Issuance of Suspension or Adjustment Order.

(a) The executive director may issue a Suspension or Adjustment Order or modify or extend an existing order under §36.4 of this title (relating to Suspension or Adjustment Order) if the following conditions have been met:

(1) at the time of issuance of the order, all or part of the river basin is in a drought, or an emergency shortage of water exists;

(2) senior water rights are unable to divert the water they need that is authorized under a water right;

(3) senior water rights can beneficially use water as defined in Texas Water Code, §11.002(4); and

(4) suspending or adjusting junior water rights would result in conditions under which the senior water right holder may divert water for a beneficial use.

(b) The executive director shall ensure that the order:

(1) maximizes the beneficial use of water;

(2) minimizes the impact on water rights holders;

(3) prevents the waste of water;

(4) considers the efforts of the affected water right holders to develop and implement the water conservation plans and drought contingency plans required by Texas Water Code, Chapter 11;

(5) to the greatest extent practicable, conforms to the order of preferences established by Texas Water Code, §11.024; and

(6) does not require the release of water that, at the time the order is issued, is lawfully stored in a reservoir under water rights associated with that reservoir.

§36.6. Contents of a Suspension or Order.

A Suspension or Adjustment Order issued under §36.4 of this title (relating to Suspension or Adjustment Order) must contain:

(1) the specific water rights subject to the order, and the location, including the river basin and county, of the suspension or adjustment;

(2) an explanation of the reasons for the suspension or adjustment; and

(3) the duration of the suspension or adjustment.

(A) The duration of a Suspension or Adjustment Order may not be longer than 180 days unless otherwise specified in a Suspension or Adjustment Order.

(B) A Suspension or Adjustment Order may be extended for up to 90 days for each extension.

(C) A Suspension or Adjustment Order may be modified by the executive director based on changed conditions and the requirements of this chapter.

§36.7. Implementation of Water Conservation Plans and Drought Contingency Plans.

(a) The efforts of affected water right holders to develop and implement water conservation and drought contingency plans that the executive director will consider when deciding whether to issue an order under §36.4 of this title (relating to Suspension or Adjustment Order) include but are not limited to:

(1) the water right holder's compliance with commission regulations in Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements) and approval of the plans by the commission and Texas Water Development Board; and

(2) the water right holder's implementation and enforcement of the plans.

(b) If the executive director decides not to suspend or adjust a junior water right based on public welfare concerns, the executive director may require the implementation of water conservation and drought contingency plans at more restrictive levels than required by the junior water right's water conservation and drought contingency plans at the time of issuance of the order.

§36.8. Notice of and Opportunity for Hearing on the Issuance of a Suspension or Adjustment Order.

(a) An order under this chapter may be issued by the executive director without notice and an opportunity for hearing.

(b) If an order is issued under this chapter without notice or a hearing, the order shall set a time and place for a hearing before the commission to affirm, modify, or set aside the order to be held as soon as practicable after the order is issued.

(c) Notice of the hearing at which the commission determines whether to affirm, modify or set aside the Suspension or Adjustment Order is not subject to the requirements of Texas Water Code, §11.132, but notice shall be given to all holders of water rights that were suspended or adjusted under the order.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 21, 2011.

TRD-201104483

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: December 4, 2011

For further information, please call: (512) 239-2548

◆ ◆ ◆
CHAPTER 114. CONTROL OF AIR
POLLUTION FROM MOTOR VEHICLES
SUBCHAPTER K. MOBILE SOURCE
INCENTIVE PROGRAMS
DIVISION 3. DIESEL EMISSIONS
REDUCTION INCENTIVE PROGRAM
FOR ON-ROAD AND NON-ROAD VEHICLES
30 TAC §114.622

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §114.622.

If adopted, the amendment will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan.

Background and Summary of the Factual Basis for the Proposed Rule

The 77th Legislature, 2001, enacted Senate Bill 5 establishing the Texas Emissions Reduction Plan (TERP). The TERP provides financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment. House Bill (HB) 3399, 82nd Legislature, 2011, amended Texas Health and Safety Code (THSC), Chapter 386, Subchapter C, to revise existing criteria and add additional criteria for receiving an incentive grant under this subchapter. The changes made under HB 3399 are as summarized in the following paragraphs.

Under THSC, §386.104(i), if the commission determines that a heavy-duty motor vehicle or engine must be decommissioned as part of the incentive grant requirements, the new subsection outlines specific criteria for how the vehicle or engine must be destroyed, including making a hole in the engine block and permanently destroying the frame of the vehicle. These requirements are consistent with current practice of the commission in administering the grant programs. In addition, the new subsection requires the commission to provide a means for an applicant to propose an alternative method for complying with the destruction requirements.

Under THSC, §386.104(j), the executive director of the TCEQ is to waive any eligibility requirements established under THSC, §386.104, on a finding of good cause, which may include a waiver for short lapses in registration or operation attributable to economic conditions, seasonal work, or other circumstances. In addition to the new language outlining how vehicles and engines are to be destroyed under a grant, this section includes requirements for the operation and use of grant-funded vehicles and equipment in nonattainment areas and affected counties for five years, provisions for meeting cost-effectiveness requirements and other provisions pertaining to the emissions reductions to be achieved by a projects, and provisions related to grant payments for the incremental costs of a project. Under the additional language of THSC, §386.104(j), any of these provisions could potentially be waived by the executive director, on a finding of good cause.

Under THSC, §386.104(k), the commission is to consider an application for the replacement of a vehicle that has been owned, leased, or otherwise commercially financed by the applicant. Under this new subsection, if a vehicle or engine that is leased or otherwise commercially financed must be decommissioned, the commission is to ensure that the applicant has the legal right to decommission the vehicle or engine before a grant is awarded.

Under THSC, §386.104(l), the commission is to consider an application for a vehicle replacement or fleet expansion for a project with an activity life of five years or more, or 400,000 miles, whichever is earlier. This change modifies the previous requirements that vehicles be operated in the nonattainment areas and eligible counties for at least five years, without regard to the accrued mileage.

Finally, under THSC, §386.104(m), the commission is to provide a form that minimizes, to the maximum extent possible, the amount of paperwork required.

The proposed rule incorporates the changes to THSC, §386.104, under HB 3399.

Section Discussion

§114.622, *Incentive Program Requirements*

Section 114.622 would be amended to incorporate changes and additions to the program eligibility criteria under THSC, §386.104(i), (k), and (l). This section would also be amended to incorporate the provisions of THSC, §386.622(j), directing the executive director to waive project eligibility requirements on a finding of good cause.

Changes are proposed to subsection (b) and a subsection (c) is proposed to implement the requirements from THSC, §386.104(l), which require that for a project involving the replacement, purchase, or lease of a motor vehicle, at least 75% of the vehicle mileage traveled must occur within a nonattainment area or affected county, and including designated highways and roadways, for five or more years, or 400,000 miles, whichever occurs earlier.

Subsection (e) is proposed to establish the requirements for how a vehicle or engine replaced under a grant must be destroyed, in accordance with THSC, §386.104(i). This proposed subsection would also include a provision for the executive director of the TCEQ to allow an applicant to propose an alternative method for complying with the destruction requirements, as required by THSC, §386.104(i).

Subsection (f) is proposed to implement the requirements of THSC, §386.104(k). The proposed subsection would require that a motor vehicle to be replaced under a grant may have been owned, leased, or otherwise commercially financed by the applicant and that the applicant must have a legal right to replace and recycle or scrap the vehicle and engine before a grant is awarded.

Subsection (h) is proposed to direct the executive director of the TCEQ to waive eligibility requirements under subsections (b) - (f) on a finding of good cause, as required by THSC, §386.104(j).

Existing subsections under this section would also be renumbered to account for the addition of subsections.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. The agency will continue to utilize available funding appropriated out of the TERP - Account 5071 to implement the changes made to the program in the proposed rule. For the 2012 - 2013 biennium, appropriated funding for TERP incentive grants is approximately \$32 million each year.

The proposed rule would amend Chapter 114 to implement parts of HB 3399. Specifically, the proposed rule will: establish the criteria for decommissioning a heavy-duty motor vehicle or engine; allow the executive director to consider an alternative method of decommissioning; allow the replacement of leased or commercially financed on-road motor vehicles; change the projected period of use for on-road motor vehicles purchased with TERP funds from five years to the earlier of five years or 400,000 miles; and allow the executive director to waive eligibility requirements on a finding of good cause.

Under current TERP grant guidelines, the projected period of use is five years or more regardless of mileage, and the replacement of leased vehicles is not allowed. State agencies and local governments with leased vehicles or vehicles that meet the new use

criteria could experience cost benefits if they qualify for a grant that allows them to purchase or lease a replacement vehicle at a reduced cost. Some examples of qualifying vehicles include commercial trucks, school buses, and transit buses. Applying for a grant would be voluntary, and it is not known at this time how many state agencies or local governments would do so. Under current rules, the typical grant award ranges from \$50,000 to \$100,000.

Public Benefits and Costs

Nina Chamness also determined that for each of the first five years the proposed rule is in effect, the anticipated public benefit will be an improvement in air quality in the 41 counties eligible to receive TERP incentive grant funding since a greater number of vehicles will become eligible for replacement using grant funds.

The proposed rule may not have a significant fiscal impact on individuals unless they qualify for a TERP grant. Individuals that can utilize TERP funding should experience the same cost benefits as a local government or large business.

Businesses that operate leased vehicles and vehicles that meet the reduced period of use under the proposed rule could experience cost benefits if they are eligible to purchase replacement vehicles or engines with TERP funds. Under current rule, the typical grant award for replacement vehicles or engines ranges from \$50,000 to \$100,000. Sellers of replacement vehicles or engines could see revenue increase since the proposed rule has the potential to increase the sales volumes of qualifying vehicles. Staff is not able to determine how many additional businesses or individuals would experience increases in sales or become eligible to apply for a grant as a result of these changes.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule may make it easier for a small or micro-business to qualify for a grant under the program, especially if they lease qualifying vehicles or their vehicles meet the revised period of use criteria. Small or micro-businesses are expected to experience the same benefits as a large business either when buying a vehicle or replacement engine or when selling or leasing a replacement vehicle or engine. Staff is not able to determine how many additional small and micro-businesses may become eligible to apply for a grant or experience increased sales as a result of these changes.

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 is required by state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rule action is not subject

to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The amended Chapter 114 rule is proposed in accordance with HB 3399, which amended THSC, Chapter 386. The proposed rule adds or revises eligibility requirements for a voluntary grant. Because the proposed rule places no involuntary requirements on the regulated community, the proposed rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. In addition, this amendment does not place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the proposed rule does not meet any of the four applicability criteria for requiring a regulatory analysis of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and is not proposed solely under the general powers of the agency, but is specifically authorized by the provisions cited in the Statutory Authority section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invites public comment on the draft regulatory impact analysis determination. 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 this rulemaking action and performed an analysis of whether the proposed rule is subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with HB 3399. The rule makes revisions to a voluntary program and only affects motor vehicles and equipment that are not considered to be private real property. The promulgation and enforcement of the proposed rule is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), concerning rules subject to the Texas Coastal Management Program

(CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this action for consistency and determined the rulemaking for Chapter 114 does not impact any CMP goals or policies, because it revises a voluntary incentive grant program and does not govern air pollution emissions.

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 Hearing

The commission will hold a public hearing on this proposal in Austin on November 29, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-050-114-EN. The comment period closes December 5, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Stephen Dayton, Implementation Grants Section, (512) 239-6824.

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, Chapter 386, which establishes the Texas Emission Reduction Program. Finally, the amendment is proposed as part of the implementation of House Bill 3399.

The proposed amendment implements THSC, §386.104.

§114.622. Incentive Program Requirements.

- (a) Eligible projects include:

- (1) purchase or lease of on-road and non-road diesels;
- (2) emissions-reducing retrofit projects for on-road or non-road diesels;
- (3) emissions-reducing repower projects for on-road or non-road diesels;
- (4) purchase and use of emissions-reducing add-on equipment for on-road or non-road diesels;
- (5) development and demonstration of practical, low-emissions retrofit technologies, repower options, and advanced technologies for on-road or non-road diesels with lower nitrogen oxides (NO_x) emissions;
- (6) use of qualifying fuel;
- (7) implementation of infrastructure projects;
- (8) replacement of on-road and non-road diesels with newer on-road and non-road diesels; and
- (9) other projects that have the potential to reduce anticipated NO_x emissions from diesel engines.

(b) For a proposed project as listed in subsection (a) of this section, other than a project involving a marine vessel or engine, ~~or~~ a project involving non-road equipment used for natural gas recovery purposes, a project involving replacement of a motor vehicle, or a project involving the purchase or lease of a motor vehicle, not less than 75% of vehicle miles traveled or hours of operation projected for the five years immediately following the award of a grant must be projected to take place in a nonattainment area or affected county of this state. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside a nonattainment area or affected county to count towards the percentage of use requirement.

(c) For a proposed motor vehicle replacement, purchase, or lease project, the period used to determine the emissions reductions and cost-effectiveness of each replacement, purchase, or lease activity included in the project must extend for five years or more, or 400,000 miles, whichever occurs earlier. Not less than 75% of the vehicle miles traveled projected for the period used to determine the emissions reductions must be projected to take place in a nonattainment area or affected county of this state. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside of a nonattainment county or affected county to count towards the percentage of use requirement.

(d) ~~[(e)]~~ For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled or scrapped provided, however, that the executive director may allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

(e) For a proposed project to replace a motor vehicle, the vehicle and engine must be decommissioned by crushing the vehicle and engine, by making a hole in the engine block and permanently destroying the frame of the vehicle, or by another method approved by the executive director that permanently removes the vehicle and engine from operation in this state. For a proposed project to repower a motor vehicle, the engine being replaced must be decommissioned in a manner consistent with the requirements for decommissioning an engine as part of a vehicle replacement project. The executive director shall allow an applicant for a motor vehicle replacement or repower project to propose an alternative method for complying with the requirements of this subsection.

(f) For a project to replace a motor vehicle, the vehicle being replaced may have been owned, leased, or otherwise commercially financed by the applicant. The applicant must have a legal right to replace and recycle or scrap the vehicle and engine before a grant is awarded for that project.

(g) ~~[(d)]~~ To be eligible for a grant, the cost-effectiveness of a proposed project as listed in subsection (a) of this section, except for infrastructure projects and infrastructure purchases that are part of a broader retrofit, repower, replacement, or add-on equipment project, must not exceed a cost-effectiveness of \$15,000 per ton of NO_x emissions reduced. The commission may set lower cost-effectiveness limits as needed to ensure the best use of available funds. The commission may also base project selection decisions on additional measures to evaluate the effectiveness of projects in reducing NO_x emissions in relation to the funds to be awarded.

(h) The executive director shall waive eligibility requirements established under subsections (b) - (f) of this section on a finding of good cause, which may include a waiver of any ownership and use requirements established for replacement of a motor vehicle for short lapses in registration or operation attributable to economic conditions, seasonal work, or other circumstances.

(i) ~~[(e)]~~ Projects funded with a grant from this program may not be used for credit under any state or federal emissions reduction credit averaging, banking, or trading program except as provided under Texas Health and Safety Code, §386.056.

(j) ~~[(f)]~~ A proposed project as listed in subsection (a) of this section is not eligible if it is required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document. This subsection does not apply to:

(1) an otherwise qualified project, regardless of the fact that the state implementation plan assumes that the change in equipment, vehicles, or operations will occur, if on the date the grant is awarded the change is not required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document; or

(2) the purchase of an on-road diesel or equipment required only by local law or regulation or by corporate or controlling board policy of a public or private entity.

(k) ~~[(g)]~~ A proposed retrofit, repower, replacement, or add-on equipment project must achieve a reduction in NO_x emissions to the level established in the commission's *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388) for that type of project compared with the baseline emissions adopted by the commission for the relevant engine year and application.

(l) ~~[(h)]~~ If a grant recipient fails to meet the terms of a project grant or the conditions of this division, the executive director can require that the grant recipient return some or all of the grant funding to the extent that emission reductions are not achieved or cannot be demonstrated.

(m) ~~[(i)]~~ Criteria established in the guidelines, including revisions to the commission's *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388), apply to the Texas Emissions Reduction Plan program. Notwithstanding the provisions of this chapter, as authorized under Texas Health and Safety Code, §386.053(d), revisions to the guidelines may include, among other changes, adding additional pollutants; adding stationary engines or engines used in stationary applications; adding vehicles and equipment that use fuels other than diesel; or adjusting eligible program categories; as appropriate, to ensure that incentives established under this program achieve the maximum possible emission reductions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 21, 2011.

TRD-201104481
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 4, 2011
For further information, please call: (512) 239-0779

◆ ◆ ◆
DIVISION 5. TEXAS CLEAN FLEET PROGRAM

30 TAC §§114.650 - 114.654

The Texas Commission on Environmental Quality (TCEQ, commission, or agency) proposes amendments to §§114.650 - 114.654.

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

Background and Summary of the Factual Basis for the Proposed Rules

Senate Bill 1759, 81st Legislature, 2009, amended the Texas Health and Safety Code (THSC), by adding Chapter 391, Texas Clean Fleet Program (program). This program is designed to encourage eligible fleets to replace diesel vehicles with alternative fuel or hybrid vehicles. House Bill (HB) 3399, 82nd Legislature, 2011, amended THSC, Chapter 391, to revise current eligibility criteria and add additional criteria. The changes made under HB 3399 are as summarized in the following paragraphs.

THSC, §391.002(b), was revised to reduce the number of qualifying vehicles that an entity must place in service in the state in order to be eligible to participate in the program from 25 to 20 vehicles. This provision is then qualified under THSC, §391.002(c), to allow for commission funding of fewer than 20 vehicles under a grant, as long as an entity's application originally included 20 vehicles for replacement under the program. This provision allows an application to be approvable in the event that the commission does not approve one or more vehicles for funding during the application process.

THSC, §391.004(a), was revised to reduce from 100 to 75 the number of vehicles that any entity must operate in its fleet in the state in order to be eligible to apply for and receive a grant under the program.

Under a new THSC, §391.004(d), the commission is directed to minimize, to the maximum extent possible, the amount of paperwork required for an application. In addition, an applicant may be required to submit a photograph or other documentation of a vehicle identification number, registration information, inspection information, tire condition, or engine block identification only if it is requested after the commission has decided to award a grant to the applicant.

THSC, §391.005(b)(2)(A), was revised to allow a vehicle that has been leased or otherwise commercially financed and registered

and operated by the applicant in Texas for at least the two years immediately preceding the submission of a grant application to be replaced under the program. The previous language only allowed vehicles that had been owned, registered, and operated in Texas by the applicant for the preceding two years to be replaced under the program.

A change was made to THSC, §391.005(c), to revise the requirement that a vehicle funded under the program be operated in the state by grant recipient for at least five years from the date of reimbursement, to require that the vehicle be operated in the state under the earlier of the fifth anniversary of the reimbursement date or until the date the vehicle has been in operation for 400,000 miles after the date of reimbursement.

THSC, §391.005(f), was revised to require the commission to provide a means for an applicant to propose an alternative method of complying with the vehicle or engine destruction requirements of this subsection. The existing requirements include rendering the vehicle permanently inoperable by crushing the vehicle or making a hole in the engine block and permanently destroying the frame of the vehicle.

Finally, a new THSC, §391.005(i), was added to require the executive director of the TCEQ to waive the requirements of THSC, §301.004(b)(2)(A), upon a finding of good cause, which may include a waiver for short lapses in registration or operation attributable to economic conditions, seasonal work, or other circumstances. This subsection includes requirements that an applicant have owned, leased, or otherwise commercially financed, registered, and operated the vehicle to be replaced in Texas for at least two years immediately preceding the submission of a grant application.

These proposed rules incorporate the changes to THSC, Chapter 391, under HB 3399.

Section by Section Discussion

§114.650, Definitions

Proposed revisions to §114.650(2) would amend the definition of an "Eligible Entity" to reduce the number of vehicles in an entity's fleet that must be registered in Texas from 100 to 75 vehicles and the number of vehicles in an entity's fleet that must be eligible for replacement from 25 to 20 vehicles as required under THSC, §391.004.

§114.651, Applicability

Section 114.651(a) would be amended to reduce the number of vehicles that must be included in an application from 25 to 20 vehicles, as required by THSC, §391.002(a).

In addition, proposed subsection (b) would allow an entity to participate in the program if that entity submits a grant application for 20 or more qualifying vehicles, even if the commission denies approval for one or more of the vehicles during the application process, as required by THSC, §391.002(b).

§114.652, Qualifying Vehicles

Section 114.652(b) would be amended to incorporate changes to the requirement for how long a grant-funded qualifying vehicle must be owned, registered, and operated in Texas by a grant recipient. The ownership and use requirement would be changed from a period at least five years from the date of reimbursement of the grant-funded expenses, to until the earlier of the fifth anniversary of the date of reimbursement of the grant-funded expenses or until the date the vehicle has been in operation for

400,000 miles after the date of reimbursement. The amendment is required by THSC, §391.005.

§114.653, Grant Eligibility

The proposed rule would amend §114.653(b) to incorporate changes to the grant eligibility requirements to allow a vehicle that has been leased or commercially financed by the applicant to be replaced under the program, as required by THSC, §391.005.

The proposed rule would also amend §114.653 to add subsection (e) directing the executive director to waive the requirement that a vehicle have been owned, leased, or commercially financed and registered and operated in Texas by the applicant on a finding of good cause, as required by THSC, §391.005.

§114.654, Usage and Disposition

Section 114.654(b) would be amended to include specific criteria for how a vehicle replaced under the program must be rendered permanently inoperable and to direct the executive director to provide a means for an applicant to propose an alternative method for rendering a vehicle inoperable, as required by THSC, §391.005.

Under the specific criteria that would be added to subsection (b), a vehicle or engine replaced under the program would need to be rendered permanently inoperable by crushing the vehicle, by making a hole in the engine block and permanently destroying the frame of the vehicle, or by another method approved by the executive director that permanently removes the vehicle from operation in this state. The executive director would be required to provide a means for an applicant to propose an alternate method for complying with these destruction requirements.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The agency will implement the proposed rules using currently available resources. Other units of state or local government may experience cost benefits from the proposed rules if they qualify for grant funds to replace a diesel vehicle with a vehicle that qualifies for grant funding under the program in Account 5071 - Texas Emission Reduction Plan (TERP). Appropriations for the program are an estimated \$2.8 million in each year of the 2012 - 2013 biennium.

The proposed rules would amend Chapter 114 per the requirements of HB 3399, to amend the criteria for the program. The proposed rules will change the definition of an eligible entity. The change in the definition will allow more entities statewide to apply for TERP funding by reducing the size of the fleet the entity must have from 100 vehicles or more to 75 vehicles or more and by reducing the number of vehicles eligible for replacement from at least 25 to at least 20. The proposed rules also revise the required period of use for a qualifying vehicle to be the earliest of the fifth anniversary of reimbursement or 400,000 miles instead of at least five years. The proposed rules will also allow leased or otherwise commercially financed vehicles to be eligible for replacement. The proposed rules also allow the executive director to waive the two-year ownership or lease and registration requirements for the vehicle being replaced upon a finding of good cause. The proposed rules also specify the method by which a motor vehicle or engine must be destroyed while providing a

means by which an applicant can propose an alternate method of destruction.

State agencies or units of local government may experience cost benefits from the proposed rules if they qualify for grant funds to replace a light-duty or heavy-duty diesel vehicle with a vehicle that qualifies for grant funding under the program. The proposed rules are expected to increase the number of eligible grantees and replacement vehicles and motors. The program is a statewide voluntary incentive program, and staff is not able to determine how many state agencies or units of local government would become eligible to apply for a grant at this time. Under current rules, an award from the program ranges from \$15,000 to \$140,000 depending on the type of vehicle or motor replaced.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be improved air quality in the state. The proposed rules are expected to expand the universe of potential grantees and vehicles eligible for replacement.

The program is a voluntary statewide grant incentive program. The proposed rules may not have a direct fiscal benefit for individuals, since it is unlikely that an individual would meet the requirement that an applicant own and operate at least 75 vehicles in Texas. However, any eligible individual or entity should experience the same cost savings as those experienced by a local government or large business. Most eligible grantees are expected to be governmental agencies or businesses that own vehicle fleets.

The proposed rules are expected to increase the number of businesses and the number of vehicles and motors that qualify for a grant under the program. Costs for vehicles could range from \$30,000 for a light-duty vehicle to \$180,000 or more for a large heavy-duty truck. Currently, eligible grant awards offsetting the replacement costs of these vehicles range from \$15,000 to \$140,000. Under the proposed rules, grantees are expected to experience similar cost savings. The grant program is a voluntary program, and staff is not able to determine how many state agencies or units of local government would become eligible to apply for a grant at this time.

The proposed rules could increase revenue for sellers and lessors of qualifying replacement vehicles and motors since there should be more entities that qualify for grants and allow them to purchase eligible vehicles and motors at a lower cost.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. If a small business meets the eligibility requirements, it should experience the same type of cost savings or increased revenue as a large business. Currently, eligible grant awards offsetting the replacement costs of eligible vehicles range from \$15,000 to \$140,000.

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 rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rule action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The amended Chapter 114 rules are proposed in accordance with HB 3399, which amended THSC, Chapter 391. The program offers financial incentives for the voluntary replacement of diesel engines. Because the proposed rules place no involuntary requirements on the regulated community, the proposed rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Also, none of the proposed amendments place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the proposed rules do not meet any of the four applicability criteria for requiring a regulatory analysis of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and is not proposed solely under the general powers of the agency, but is specifically authorized by the provisions cited in the Statutory Authority section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invites public comment on the draft regulatory impact analysis determination. 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 this rulemaking action and performed an analysis of whether the proposed rules are subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with HB 3399. The rules amend the criteria for implementing a voluntary program and only affect motor vehicles which are not considered to be private real property. The promulgation and

enforcement of the proposed rules is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, the rules do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), concerning rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this action for consistency and determined the rulemaking for Chapter 114 does not impact any CMP goals or policies, because it amends a voluntary incentive grant program and does not govern air pollution emissions.

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 Hearing

The commission will hold a public hearing on this proposal in Austin on November 29, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-051-114-EN. The comment period closes December 5, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adapt.html. For further information, please contact Stephen Dayton, Implementation Grants Section, (512) 239-6824.

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These amendments are also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level

of quality to be maintained in the state's air and to control the quality of the state's air; and THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. Finally, these amendments are proposed under THSC, Chapter 391, and are part of the implementation of House Bill 3399.

The proposed amendments implement THSC, §§391.002, 391.004, and 391.005.

§114.650. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used in this subchapter 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 and §§3.2, 101.1, and 114.1 of this title (relating to Definitions), the following words and terms, when used in this division will have the following meanings, unless the context clearly indicates otherwise.

(1) Alternative fuel--A fuel, other than gasoline or diesel fuel. When used in this division, this definition is limited to the following: electricity, compressed natural gas, liquefied natural gas, hydrogen, propane, or a mixture of fuels containing at least 85% methanol by volume.

(2) Eligible entity--Any person or entity with a fleet of 75 [400] or more vehicles that:

(A) are registered in Texas; and

(B) include at least 20 [25] vehicles that are eligible for replacement.

(3) Golf cart--A motor vehicle designed by the manufacturer primarily for transporting persons on a golf course.

(4) Heavy-duty vehicle--A motor vehicle with a gross vehicle weight rating greater than 8,500 pounds and containing an engine certified to the United States Environmental Protection Agency's heavy-duty engine standards.

(5) Hybrid vehicle--A motor vehicle with at least two different energy converters and two different energy storage systems on board the vehicle for the purpose of propelling the vehicle.

(6) Light-duty motor vehicle--A motor vehicle with a gross vehicle weight rating of less than 10,000 pounds and certified to the United States Environmental Protection Agency's light-duty vehicle emission standards.

(7) Motor vehicle--A self-propelled device designed for transporting persons or property on a public highway that is required to be registered under Texas Transportation Code, Chapter 502.

(8) Neighborhood electric vehicle--A motor vehicle that:

(A) is originally manufactured to meet, and does meet, the equipment requirements and safety standards established for "low-speed vehicles" in Federal Motor Vehicle Safety Standard No. 500 (49 Code of Federal Regulations §571.500);

(B) is a slow-moving vehicle, as defined by Texas Transportation Code, §547.001 that is able to attain a speed of more than 20 miles per hour but not more than 25 miles per hour in one mile on a paved, level surface;

(C) is a four-wheeled motor vehicle;

(D) is powered by electricity or alternative power sources;

(E) has a gross vehicle weight rating of less than 3,000 pounds; and

(F) is not a golf cart.

(9) Program--The Texas Clean Fleet Program established under this division.

§114.651. Applicability.

(a) Any eligible entity that will replace 20 [25] or more on-road diesel vehicles within a twelve-month period with qualifying vehicles may apply for a grant under the Texas Clean Fleet Program to offset the cost of replacing those vehicles with alternative fuel or hybrid vehicles.

(b) Notwithstanding subsection (a) of this section, an entity that submits a grant application for 20 or more qualifying vehicles is eligible to participate in the program even if the commission denies approval for one or more of the vehicles during the application process.

(c) ~~[(b)]~~ The commission may allow a regional planning commission, council of governments, or similar regional planning agency created under Local Government Code, Chapter 391, or a private non-profit organization to apply for and receive a grant to improve the ability of the program to achieve its goals.

§114.652. Qualifying Vehicles.

(a) A qualifying vehicle is one that:

- (1) is certified to current federal emissions standards;
- (2) replaces a diesel-powered on-road vehicle of the same weight classification and use; and
- (3) is a hybrid vehicle or fueled by an alternative fuel.

(b) As a condition of receiving a grant the qualifying vehicle must be continuously owned, registered, and operated in Texas by the grant recipient until the earlier of the fifth anniversary of [for at least five years from] the date of reimbursement of the grant-funded expenses or until the date the vehicle has been in operation for 400,000 miles after the date of reimbursement.

(c) A vehicle is not a qualifying vehicle if it:

- (1) is a neighborhood electric vehicle;
- (2) has been used as a qualifying vehicle to qualify for a grant under this division for a previous reporting period or by another entity; or
- (3) has qualified for a similar grant or tax credit in another jurisdiction.

§114.653. Grant Eligibility.

(a) To be eligible for a grant under the program a project must result in a reduction in emissions of nitrogen oxides of at least 25%, based on:

- (1) the baseline emission level set by the executive director; and
- (2) the certified emission rate of the new vehicle or engine.

(b) The vehicle being replaced must:

- (1) be an on-road vehicle that has been owned, leased, or otherwise commercially financed, and registered[,] and operated by the applicant in Texas for at least the two years immediately preceding the submission of a grant application;
- (2) satisfy any minimum average annual mileage or fuel usage requirements established by the executive director;
- (3) satisfy any minimum percentage of annual usage requirements established by the executive director; and

(4) be in operating condition with at least two years of remaining useful life, as determined in accordance with criteria established by the executive director.

(c) At the discretion of the executive director, projects that result in a 25% reduction in other pollutants may be considered eligible for funding under this program.

(d) The executive director may establish additional criteria for purposes of prioritizing projects for selection. Such criteria may include, but are not limited to:

- (1) nonattainment status of the primary location in which the eligible vehicles are used; or
- (2) cost per ton benefits of the overall emissions being reduced.

(e) The executive director shall waive the requirements of subsection (b)(1) of this section on a finding of good cause, which may include a waiver for short lapses in registration or operation attributable to economic conditions, seasonal work, or other circumstances.

§114.654. Usage and Disposition.

(a) Not less than 75% of the annual use of the qualifying vehicle, either mileage or fuel use as determined by the executive director, must occur in Texas.

(b) A vehicle or engine replaced under this program must be rendered permanently inoperable by crushing the vehicle, by making a hole in the engine block and permanently destroying the frame of the vehicle, or by another method approved by the executive director that permanently removes the vehicle from operation in this state [in accordance with criteria established by the executive director]. The executive director shall provide a means for an applicant to propose an alternative method for complying with the requirements of this subsection.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 21, 2011.

TRD-201104482
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 4, 2011
For further information, please call: (512) 239-0779

◆ ◆ ◆
DIVISION 6. ALTERNATIVE FUELING FACILITIES PROGRAM

30 TAC §§114.660 - 114.662

The Texas Commission on Environmental Quality (commission or agency) proposes new §§114.660 - 114.662.

If adopted, the new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan.

Background and Summary of the Factual Basis for the Proposed Rules

AN ACT

relating to the requirements for grant programs funded through the Texas emissions reduction plan.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 386.104, Health and Safety Code, is amended by adding Subsections (i), (j), (k), (l), and (m) to read as follows:

(i) If the commission determines that a heavy-duty motor vehicle or engine under this chapter must be decommissioned, the commission shall require the decommissioning to be carried out by crushing the vehicle, by making a hole in the engine block and permanently destroying the frame of the vehicle, or by another method approved by the commission that permanently removes the vehicle from operation in this state. The commission shall provide a means for an applicant to propose an alternative method for complying with the requirements of this subsection. The commission shall enforce the requirements of this subsection.

(j) The executive director shall waive any eligibility requirements established under this section on a finding of good cause, which may include a waiver for short lapses in registration or operation attributable to economic conditions, seasonal work, or other circumstances.

(k) The commission shall consider an application under this chapter for the replacement of a vehicle that has been owned,

1 leased, or otherwise commercially financed by the applicant. If
2 the commission determines that a heavy-duty motor vehicle or engine
3 that is leased or otherwise commercially financed must be
4 decommissioned, the commission shall ensure that the applicant has
5 a legal right to decommission the vehicle or engine before awarding
6 a grant to the applicant.

7 (l) The commission shall consider an application for a
8 vehicle replacement or a fleet expansion for a project with an
9 activity life of five years or more, or 400,000 miles, whichever is
10 earlier.

11 (m) The commission shall provide a form that minimizes, to
12 the maximum extent possible, the amount of paperwork required.

13 SECTION 2. Section 391.002, Health and Safety Code, as
14 added by Chapter 1232 (S.B. 1759), Acts of the 81st Legislature,
15 Regular Session, 2009, is amended by amending Subsection (b) and
16 adding Subsection (c) to read as follows:

17 (b) An entity that places 20 [~~25~~] or more qualifying
18 vehicles in service for use entirely in this state during a calendar
19 year is eligible to participate in the program.

20 (c) Notwithstanding Subsection (b), an entity that submits
21 a grant application for 20 or more qualifying vehicles is eligible
22 to participate in the program even if the commission denies
23 approval for one or more of the vehicles during the application
24 process.

25 SECTION 3. Section 391.004, Health and Safety Code, as
26 added by Chapter 1232 (S.B. 1759), Acts of the 81st Legislature,
27 Regular Session, 2009, is amended by amending Subsection (a) and

1 adding Subsection (d) to read as follows:

2 (a) An entity operating in this state that operates a fleet
3 of at least 75 [~~100~~] vehicles may apply for and receive a grant
4 under the program.

5 (d) The commission shall minimize, to the maximum extent
6 possible, the amount of paperwork required for an application. An
7 applicant may be required to submit a photograph or other
8 documentation of a vehicle identification number, registration
9 information, inspection information, tire condition, or engine
10 block identification only if the photograph or documentation is
11 requested by the commission after the commission has decided to
12 award a grant to the applicant under this chapter.

13 SECTION 4. Section 391.005, Health and Safety Code, as
14 added by Chapter 1232 (S.B. 1759), Acts of the 81st Legislature,
15 Regular Session, 2009, is amended by amending Subsections (b), (c),
16 (d), and (f) and adding Subsection (i) to read as follows:

17 (b) To be eligible for a grant under the program, a project
18 must:

19 (1) result in a reduction in emissions of nitrogen
20 oxides or other pollutants, as established by the commission, of at
21 least 25 percent, based on:

22 (A) the baseline emission level set by the
23 commission under Subsection (g); and

24 (B) the certified emission rate of the new
25 vehicle; and

26 (2) replace a vehicle that:

27 (A) is an on-road vehicle that has been owned,

1 leased, or otherwise commercially financed and registered~~[7]~~ and
2 operated by the applicant in Texas for at least the two years
3 immediately preceding the submission of a grant application;

4 (B) satisfies any minimum average annual mileage
5 or fuel usage requirements established by the commission;

6 (C) satisfies any minimum percentage of annual
7 usage requirements established by the commission; and

8 (D) is in operating condition and has at least
9 two years of remaining useful life, as determined in accordance
10 with criteria established by the commission.

11 (c) As a condition of receiving a grant, the qualifying
12 vehicle must be continuously owned, registered, and operated in the
13 state by the grant recipient until the earlier of the fifth
14 anniversary of [~~for at least five years from~~] the date of
15 reimbursement of the grant-funded expenses or until the date the
16 vehicle has been in operation for 400,000 miles after the date of
17 reimbursement. Not less than 75 percent of the annual use of the
18 qualifying vehicle, either mileage or fuel use as determined by the
19 commission, must occur in the state.

20 (d) The commission shall include and enforce the usage
21 provisions in the grant contracts. The commission shall monitor
22 compliance with the contract [~~ownership and usage~~] requirements,
23 including submission of reports on at least an annual basis, or more
24 frequently as determined by the commission.

25 (f) A vehicle or engine replaced under this program must be
26 rendered permanently inoperable by crushing the vehicle, by [~~or~~]
27 making a hole in the engine block and permanently destroying the

1 frame of the vehicle, or by another method approved by the
2 commission that permanently removes the vehicle from operation in
3 this state. The commission shall provide a means for an applicant to
4 propose an alternative method of complying with the requirements of
5 this subsection. [~~The commission shall establish criteria for~~
6 ~~ensuring the permanent destruction of the engine and vehicle.~~] The
7 commission shall [~~monitor and~~] enforce the [~~destruction~~]
8 requirements of this subsection.

9 (i) The executive director shall waive the requirements of
10 Subsection (b)(2)(A) on a finding of good cause, which may include a
11 waiver for short lapses in registration or operation attributable
12 to economic conditions, seasonal work, or other circumstances.

13 SECTION 5. Sections 386.104, 391.002, 391.004, and 391.005,
14 Health and Safety Code, as amended by this Act, apply only to a
15 grant application submitted to the Texas Commission on
16 Environmental Quality on or after the effective date of this Act. A
17 grant application submitted to the Texas Commission on
18 Environmental Quality before the effective date of this Act is
19 governed by the law in effect on the date the application was
20 submitted, and the former law is continued in effect for that
21 purpose.

22 SECTION 6. This Act takes effect September 1, 2011.

President of the Senate

Speaker of the House

I certify that H.B. No. 3399 was passed by the House on May 11, 2011, by the following vote: Yeas 148, Nays 1, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 3399 was passed by the Senate on May 25, 2011, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor