

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Rulemaking Adoption

AGENDA REQUESTED: June 10, 2020

DATE OF REQUEST: May 22, 2020

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Kris Hogan, Rule/Agenda Coordinator, (512) 239-6812

CAPTION: Docket No. 2019-1091-RUL. Consideration of the adoption of amended Sections 114.622 and 114.629 of 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, and corresponding revisions to the State Implementation Plan.

The adopted rulemaking implements House Bill (HB) 1346 and HB 1627, from the 86th Texas Legislature, 2019, Regular Session, relating to the Diesel Emissions Reduction Incentive Program, to allow the commission to lower the required minimum usage in a nonattainment area or affected county for grant-funded vehicles and equipment from 75% to as low as 55% and to remove Victoria County from the list of affected counties. The proposed rules were published in the January 31, 2020, issue of the *Texas Register* (45 TexReg 688). (Amancio Gutierrez, Sierra Redding) (Rule Project No. 2019-122-114-AI)

Tonya Baer
Deputy Director

Mike Wilson, P.E.
Division Director

Kristina M. Hogan
Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** May 22, 2020

Thru: Bridget C. Bohac, Chief Clerk
Toby Baker, Executive Director

From: Tonya Baer, Deputy Director
Office of Air

Docket No.: 2019-1091-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 114, Control of Air Pollution from Motor Vehicles
HB 1346 and HB 1627: Diesel Emissions Reduction Incentive Program
Rule Project No. 2019-122-114-AI

Background and reason(s) for the rulemaking:

The Texas Emissions Reduction Plan (TERP) was established under Texas Health and Safety Code (THSC), Chapter 386, by Senate Bill 5, during the 77th Texas Legislature, 2001. The TERP was created to provide financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment, with the Diesel Emissions Reduction Incentive Program (DERIP) established under THSC, Chapter 386, Subchapter C as the primary incentive program. The DERIP includes the Emissions Reduction Incentive Grants Program, Rebate Grants Program, and third-party grants.

The adopted rulemaking amends Chapter 114 in accordance with the amendments to THSC, Chapter 386 as a result of House Bill (HB) 1346 and HB 1627, 86th Texas Legislature, 2019. HB 1346 provided the commission with the authority to set a minimum percentage of vehicle miles traveled or hours of operation required to take place in a nonattainment area or affected county under the TERP DERIP as low as 55%. HB 1627 removed Victoria County from the list of affected counties eligible for grants under the TERP DERIP.

Scope of the rulemaking:

The adopted rulemaking amends DERIP provisions to align current regulations with statute.

A.) Summary of what the rulemaking will do:

The adopted rulemaking amends §114.622 to change the minimum percentage of usage in a nonattainment area or affected county from 75% to 55% and amends §114.629 to remove Victoria County from the list of affected counties eligible for grants under the TERP DERIP.

B.) Scope required by federal regulations or state statutes:

The adopted rulemaking implements HB 1346 and HB 1627.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Re: Docket No. 2019-1091-RUL

Statutory authority:

The rulemaking 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. The rulemaking is also adopted under 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 TERP.

Effect on the:

A.) Regulated community:

The programs affected by this rulemaking are voluntary programs. The adopted rulemaking is not anticipated to have any implications on the regulated community.

B.) Public:

Public entities located within Victoria County are no longer eligible for these programs.

C.) Agency programs:

Agency publications and websites relating to these programs will need to be updated.

Stakeholder meetings:

The commission did not hold any stakeholder meetings related to this rulemaking.

Public comment:

The commission offered a public hearing on February 25, 2020. The comment period closed on March 3, 2020. No comments were received regarding the rulemaking.

Significant changes from proposal:

None.

Potential controversial concerns and legislative interest:

There are no potential controversial concerns or legislative interest.

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

The rulemaking requires current internal policies and procedures for DERIP to be revised to align with amended rules. Existing guidelines available to the public will also need to be updated.

Commissioners

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Re: Docket No. 2019-1091-RUL

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

HB 1346 and HB 1627 require the commission to amend DERIP provisions. This rulemaking complies with that requirement and there are no alternatives to rulemaking. If the rulemaking does not move forward, commission rules will not align with statute.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** January 31, 2020

Anticipated *Texas Register* adoption publication date: June 26, 2020

Anticipated effective date: July 2, 2020

Six-month *Texas Register* filing deadline: July 31, 2020

Agency contacts:

Amancio Gutierrez, Rule Project Manager, Air Grants Division, (512) 239-3770

Sierra Redding, Staff Attorney, (512) 239-2496

Kris Hogan, Texas Register Rule/Agenda Coordinator, (512) 239-6812

Attachments:

HB 1346

HB 1627

cc: Chief Clerk, 2 copies
Executive Director's Office
Jim Rizk
Morgan Johnson
Brody Burks
Office of General Counsel
Amancio Gutierrez
Kris Hogan

AN ACT

relating to the eligibility requirements for the diesel emissions reduction incentive program.

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

SECTION 1. Section 386.104, Health and Safety Code, is amended by amending Subsection (c) and adding Subsections (c-1) and (c-2) to read as follows:

(c) Except as otherwise provided by this subsection, for
[For] a proposed project as described by Section 386.102(b), other
than a project involving a marine vessel or engine, not less than 75
percent 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 set the minimum percentage
of vehicle miles traveled or hours of operation required to take
place in a nonattainment area or affected county at a percentage and
for a period that is different from the percentage and period
specified by this subsection, provided that the commission may not
set the minimum percentage at a level that is less than 55 percent.

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 in this subsection.

1 (c-1) For a proposed project involving a marine vessel or
2 engine, the vessel or engine must be operated in the intercoastal
3 waterways or bays adjacent to a nonattainment area or affected
4 county of this state for a sufficient amount of time over the
5 lifetime of the project, as determined by the commission, to meet
6 the cost-effectiveness requirements of Section 386.105.

7 (c-2) For a proposed project involving non-road equipment
8 used for natural gas recovery purposes, the equipment must be
9 operated in a nonattainment area or affected county for a
10 sufficient amount of use over the lifetime of the project, as
11 determined by the commission, to meet the cost-effectiveness
12 requirements of Section 386.105.

13 SECTION 2. This Act takes effect September 1, 2019.

President of the Senate

Speaker of the House

I certify that H.B. No. 1346 was passed by the House on April 24, 2019, by the following vote: Yeas 141, Nays 4, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 1346 on May 22, 2019, by the following vote: Yeas 121, Nays 21, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 1346 was passed by the Senate, with amendments, on May 15, 2019, by the following vote: Yeas 30, Nays 1.

Secretary of the Senate

APPROVED: _____

Date

Governor

1 AN ACT

2 relating to the removal of certain counties from the Texas
3 emissions reduction plan.

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

5 SECTION 1. Section 386.001(2), Health and Safety Code, is
6 amended to read as follows:

7 (2) "Affected county" includes:

- 8 (A) Bastrop County;
- 9 (B) Bexar County;
- 10 (C) Caldwell County;
- 11 (D) Comal County;
- 12 (E) Ellis County;
- 13 (F) Gregg County;
- 14 (G) Guadalupe County;
- 15 (H) Harrison County;
- 16 (I) Hays County;
- 17 (J) Henderson County;
- 18 (K) Hood County;
- 19 (L) Hunt County;
- 20 (M) Johnson County;
- 21 (N) Kaufman County;
- 22 (O) Nueces County;
- 23 (P) Parker County;
- 24 (Q) Rockwall County;

1 (R) Rusk County;
2 (S) San Patricio County;
3 (T) Smith County;
4 (U) Travis County;
5 (V) Upshur County;
6 (W) [~~Victoria County,~~
7 [~~X~~] Williamson County;
8 (X) [~~Y~~] Wilson County; and
9 (Y) [~~Z~~] any other county designated as an
10 affected county by commission rule because of deteriorating air
11 quality.

12 SECTION 2. This Act takes effect immediately if it receives
13 a vote of two-thirds of all the members elected to each house, as
14 provided by Section 39, Article III, Texas Constitution. If this
15 Act does not receive the vote necessary for immediate effect, this
16 Act takes effect September 1, 2019.

President of the Senate

Speaker of the House

I certify that H.B. No. 1627 was passed by the House on April 18, 2019, by the following vote: Yeas 146, Nays 1, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 1627 was passed by the Senate on May 10, 2019, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amended §114.622 and §114.629.

The amendments to §114.622 and §114.629 are adopted *without changes* to the proposed text as published in the January 31, 2020, issue of the *Texas Register* (45 TexReg 688), and, therefore, will not be republished.

The adopted amendments to §114.622 and §114.629 will be submitted to the United States Environmental Protection Agency as revisions to the State Implementation Plan.

Background and Summary of the Factual Basis for the Adopted Rules

The Texas Emissions Reduction Plan (TERP) was established under Texas Health and Safety Code (THSC), Chapter 386, by Senate Bill 5, during the 77th Texas Legislature, 2001. The TERP was created to provide financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment, with the Diesel Emissions Reduction Incentive Program (DERIP) established under THSC, Chapter 386, Subchapter C as the primary incentive program. The DERIP includes the Emissions Reduction Incentive Grants Program, Rebate Grants Program, and third-party grants.

House Bill (HB) 1346, 86th Texas Legislature, 2019, amended THSC, Chapter 386, Subchapter C to provide that the commission may not set the minimum percentage of vehicle miles traveled or hours of operation required to take place in a nonattainment

area or affected county as less than 55%. HB 1627, 86th Texas Legislature, 2019 amended THSC, Chapter 386, Subchapter A to remove Victoria County from the list of affected counties eligible for grants under the TERP DERIP.

The adopted rulemaking revises §114.622 and §114.629 to implement HB 1346 and HB 1627.

Section by Section Discussion

The commission adopts non-substantive changes, such as grammatical corrections. These changes are non-substantive and are not specifically discussed in this preamble.

§114.622, Incentive Program Requirements

The commission adopts amended §114.622(b) and (c) to change the minimum percentage of usage in a nonattainment area or affected county from 75% to 55% to implement HB 1346.

§114.629, Affected Counties and Implementation Schedule

The commission adopts amended §114.629(a) to remove Victoria County from the list of affected counties eligible for grants under the TERP DERIP to implement HB 1627.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis

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

The amendments to §114.622 and §114.629 are adopted in accordance with HB 1346 and HB 1627, which amended THSC, Chapter 386, Subchapters A and C. The adopted rulemaking revises, eligibility criteria for a voluntary grant program. Because the adopted rules place no involuntary requirements on the regulated community, the adopted rules will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. In addition, none of these amendments place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the adopted rulemaking does not meet any of the 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 authority of the commission. This rulemaking does not exceed a standard set by federal law. Additionally, this rulemaking does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the THSC that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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

Under Texas Government Code, §2007.002(5), taking means: A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the United States Constitution, Fifth and Fourteenth Amendments or Texas Constitution, Article I, Section 17 or 19; or B) a governmental action that: i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

Promulgation and enforcement of the adopted rulemaking will be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with the amendments to THSC, Chapter 386 as a result of HB 1346 and HB 1627. The adopted rules revise a voluntary program and only affect motor vehicles that are not considered to be private real property. The adopted rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right

to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these adopted rules will 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) or (4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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

Public Comment

The commission offered a public hearing on February 25, 2020. The comment period closed on March 3, 2020. No comments were received regarding this rulemaking.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

**DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR ON-ROAD
AND NON-ROAD VEHICLES**

§114.622, §114.629

Statutory Authority

The amendments are 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. The amendments are 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 Emissions Reduction Plan.

The amendments are adopted as part of the implementation of THSC, Chapter 386, Subchapters A and C, as amended by House Bill (HB) 1346 and HB 1627, 86th Texas Legislature, 2019.

§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, 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 55% [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 55% [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) 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 [State] of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the state [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) The commission may set 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 may 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) 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) 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) 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) 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) 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. Regardless of [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.

§114.629. Affected Counties and Implementation Schedule.

(a) Applicable counties in the incentive program include: Bastrop, Bexar, Brazoria, Caldwell, Chambers, Collin, Comal, Dallas, Denton, El Paso, Ellis, Fort Bend, Galveston, Gregg, Guadalupe, Hardin, Harris, [Hardin,] Harrison, Hays, Henderson, Hood, Hunt, Jefferson, Johnson, Kaufman, Liberty, Montgomery, Nueces, Orange, Parker, Rockwall, Rusk, San Patricio, Smith, Tarrant, Travis, Upshur, [Victoria,] Waller, Williamson, Wilson, Wise, and any other county located within an area of Texas designated as a nonattainment area for ground-level ozone under Federal Clean Air Act, §107(d), as amended.

(b) Equipment purchased before September 1, 2001 is not eligible for a grant under this program.



TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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, §114.629

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §114.622 and §114.629.

If adopted, the amendments to §114.622 and §114.629 will be submitted to the United States Environmental Protection Agency as revisions to the State Implementation Plan.

Background and Summary of the Factual Basis for the Proposed Rules

The Texas Emissions Reduction Plan (TERP) was established under Texas Health and Safety Code (THSC), Chapter 386, by Senate Bill 5, during the 77th Texas Legislature, 2001. The TERP was created to provide financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment, with the Diesel Emissions Reduction Incentive Program (DERIP) established under THSC, Chapter 386, Subchapter C as the primary incentive program. The DERIP includes the Emissions Reduction Incentive Grants Program, Rebate Grants Program, and third-party grants.

House Bill (HB) 1346, 86th Texas Legislature, 2019, amended THSC, Chapter 386, Subchapter C to provide that the commission may not set the minimum percentage of vehicle miles traveled or hours of operation required to take place in a nonattainment area or affected county as less than 55%. HB 1627, 86th Texas Legislature, 2019 amended THSC, Chapter 386, Subchapter A to remove Victoria County from the list of affected counties eligible for grants under the TERP DERIP.

The proposed rulemaking would revise §114.622 and §114.629 to implement HB 1346 and HB 1627.

Section by Section Discussion

The commission proposes to make changes, such as grammatical corrections. These changes are non-substantive and are not specifically discussed in this preamble.

§114.622, *Incentive Program Requirements*

The commission proposes to amend §114.622(b) and (c) to change the minimum percentage of usage in a nonattainment area or affected county from 75% to 55% to implement HB 1346.

§114.629, *Affected Counties and Implementation Schedule*

The commission proposes to amend §114.629(a) to remove Victoria County from the list of affected counties eligible for grants under the TERP DERIP to implement HB 1627.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of the state as a result of administration or enforcement of the proposed rules.

This rulemaking addresses necessary changes required to implement two pieces of legislation, HB 1346 and HB 1627. The proposed rulemaking affects the rules for the TERP DERIP, reduces the minimum percentage of usage in a nonattainment area or affected county from 75% to 55%, and removes Victoria County from the list of counties eligible for grants under the program.

Because units of local government are eligible under certain circumstances to receive grants from the program, they may experience a positive fiscal impact. Units of local government in Victoria County may be affected by the proposed rulemaking because the rulemaking implements state law which removed the county from the list of eligible counties.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be compliance with state law.

Because the proposed rulemaking has the potential to increase the applicant pool by reducing the minimum percentage of usage in an eligible area, it may result in a net increase of the number of individuals or businesses who experience a positive fiscal impact upon receipt of a grant. The removal of Victoria County from the list of affected counties will affect the eligibility of certain businesses and individuals for the grant program.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The proposed rulemaking relates to an optional grant program.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, or require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does the proposed rulemaking increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rules should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

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

The amendments to §114.622 and §114.629 are proposed in accordance with HB 1346 and HB 1627, which amended THSC, Chapter 386, Subchapters A and C. The proposed rulemaking revises eligibility criteria for a voluntary grant program. Because the proposed rules place no involuntary requirements on the regulated community, the proposed rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. In addition, none of these amendments place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the proposed rulemaking does not meet any of the 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 authority of the commission. This rulemaking does not exceed a standard set by federal law. Additionally, this rulemaking does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the THSC that are cited in the Statutory

Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

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

Under Texas Government Code, §2007.002(5), taking means: (A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution, Article I, Section 17 or 19; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

Promulgation and enforcement of the proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with the amendments to THSC, Chapter 386 as a result of HB 1346 and HB 1627. The proposed rules would revise a voluntary program and only affect motor vehicles that are not considered to be private real property. The proposed rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these proposed rules would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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 February 25, 2020, 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 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, 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: <https://www6.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 2019-122-114-AI. The comment period closes on March 3, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Amancio Gutierrez, Grant Development and Management Section, (512) 239-3770.

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. The 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; 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 Emissions Reduction Plan.

The amendments are proposed as part of the implementation of THSC, Chapter 386, Subchapters A and C, as amended by House Bill (HB) 1346 and HB 1627, 86th Texas Legislature, 2019.

§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, 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 55% [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 55% [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) 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 [State] of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the state [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) The commission may set 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 may 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) 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) 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) 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) 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) 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. Regardless of [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.

§114.629. *Affected Counties and Implementation Schedule.*

(a) Applicable counties in the incentive program include: Bastrop, Bexar, Brazoria, Caldwell, Chambers, Collin, Comal, Dallas,

Denton, El Paso, Ellis, Fort Bend, Galveston, Gregg, Guadalupe, Hardin, Harris, [~~Hardin~~] Harrison, Hays, Henderson, Hood, Hunt, Jefferson, Johnson, Kaufman, Liberty, Montgomery, Nueces, Orange, Parker, Rockwall, Rusk, San Patricio, Smith, Tarrant, Travis, Upshur, [~~Victoria~~] Waller, Williamson, Wilson, Wise, and any other county located within an area of Texas designated as a nonattainment area for ground-level ozone under Federal Clean Air Act, §107(d), as amended.

(b) Equipment purchased before September 1, 2001 is not eligible for a grant under this program.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 16, 2020.

TRD-202000182

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: March 1, 2020

For further information, please call: (512) 239-6812



CHAPTER 328. WASTE MINIMIZATION AND RECYCLING

SUBCHAPTER K. GOVERNMENTAL ENTITY RECYCLING AND PURCHASING OF RECYCLED MATERIALS

30 TAC §§328.200 - 328.204

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§328.200 - 328.204.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking is proposed to add new rules that would apply to certain governmental entities to establish recycling programs and purchasing preferences for products made of recycled materials.

Senate Bill (SB) 1376, 86th Texas Legislature, 2019, amended Texas Health and Safety Code (THSC), §361.425 and §361.426 to exempt certain governmental entities from compliance with recycling requirements, if the commission finds that compliance would create a hardship on the governmental entity. SB 1376 also requires the commission to exempt certain governmental entities from compliance with purchasing preferences for recycled materials, if the commission finds that compliance would create a hardship on the governmental entity.

The rulemaking proposes new Chapter 328, Subchapter K, Governmental Entity Recycling and Purchasing of Recycled Materials, to establish requirements for a governmental entity to create a recycling program, to give preference in purchasing to products made of recycled materials, and to create an exemption that would apply to certain governmental entities, if compliance with these rules would create a hardship.

Section by Section Discussion

Texas Commission on Environmental Quality



ORDER ADOPTING AMENDED RULES AND REVISIONS TO THE STATE IMPLEMENTATION PLAN

Docket No. 2019-1091-RUL
Rule Project No. 2019-122-114-AI

On June 10, 2020, the Texas Commission on Environmental Quality (Commission), during a public meeting, considered adoption of amended §114.622 and §114.629. The Commission adopts this amendment in 30 Texas Administrative Code Chapter 114, Control of Air Pollution from Motor Vehicles; and corresponding revisions to the state implementation plan (SIP). The adopted amendments implement House Bill (HB) 1346 and HB 1627, from the 86th Texas Legislature, 2019, relating to the Diesel Emissions Reduction Incentive Program, to allow the commission to lower the required minimum usage in a nonattainment area or affected county for grant-funded vehicles and equipment from 75% to as low as 55% and to remove Victoria County from the list of affected counties. Under Tex. Health & Safety Code Ann. §§ 382.011, 382.012, and 382.023 (West 2016), 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 rules were published for comment in the January 31, 2020, issue of the *Texas Register* (45 TexReg 688).

Pursuant to Tex. Health & Safety Code Ann. § 382.017 (West 2016), Tex. Gov't Code Ann., Chapter 2001 (West 2016), and 40 Code of Federal Regulations § 51.102, and after proper notice, the Commission offered a public hearing to consider the amended rules and revisions 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 offered in Austin on February 25, 2020.

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 rules and SIP revisions, either orally or in writing, at the hearing or during the comment period. Prior to the scheduled hearing, copies of the proposed amended rules and SIP revisions were available for public inspection at the Commission's central office and on the Commission's website.

No comments were received regarding the amended rules and SIP revisions.

IT IS THEREFORE ORDERED BY THE COMMISSION that the amended rules and revisions 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 rules necessary to comply with *Texas Register* requirements. The adopted rules and the preamble to the adopted rules and the revisions 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 rules and revisions to the SIP, to the Regional Administrator of 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 Ann., Chapter 2001 (West 2016).

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.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Jon Niermann, Chairman

Date Signed