

The Texas Natural Resource Conservation Commission (commission) adopts new §114.620, Definitions; §114.621, Applicability; §114.622, Incentive Program Requirements; §114.626, Monitoring, Recordkeeping, and Reporting Requirements; and §114.629, Affected Counties and Implementation Schedule, in new Division 3, Diesel Emissions Reduction Incentive Program for On-Road and Non-Road Vehicles. These new sections and new division are being adopted in new Subchapter K, Mobile Source Incentive Programs, of Chapter 114 as part of the implementation of Senate Bill (SB) 5 (relating to the Texas Emission Reduction Plan), 77th Texas Legislature, 2001. Sections 114.620 and 114.622 are adopted *with changes* to the proposed text as published in the July 20, 2001 issue of the *Texas Register* (26 TexReg 5362). Sections 114.621, 114.626, and 114.629 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 77th Legislature adopted SB 5 establishing the Texas Emission Reduction Plan (TERP) which provides financial incentives for reducing emissions of on-road and non-road motor vehicles and equipment, grants for the development of new emission control technology, new building energy efficiency standards, and research and development programs. The program is funded through surcharges and fees established in the bill. Senate Bill 5 also requires that the commission delete the operating restriction on construction equipment rules and the Tier 2/Tier 3 accelerated purchase rules on construction equipment from the Dallas/Fort Worth and Houston/Galveston (HGA) state implementation plans (SIP) and replace them with programs from SB 5. The SB 5 programs are estimated to achieve emissions reductions in excess of the reductions expected from the rules that are being repealed. In accordance with SB 5, the SIP will be revised to replace these rules with the TERP.

These rules will establish an incentive program for the repower, retrofit or add-on, use of a qualifying fuel, and the development and demonstration of new technologies in engines used in on-road and non-road diesel equipment that will reduce nitrogen oxides (NO_x) emissions not otherwise required by federal requirements. These rules also establish incentives for the purchase or lease of new non-road equipment and for the implementation of infrastructure projects. The implementation and administration of the incentive programs will be performed by the commission and implemented through establishment of guidelines and criteria for eligible projects. The incentive programs established by these rules are available for use in the nonattainment areas of Texas and other affected areas of the state.

SECTION BY SECTION DISCUSSION

The new Subchapter K includes a new Division 3 which will establish a new Diesel Emissions Reduction Incentive Program for On-Road and Non-Road Vehicles with rules found in the new §§114.620 - 114.622, 114.626, and 114.629. Except where noted in the discussion that follows, the requirements in the new rules are taken from requirements in SB 5. Also, criteria and requirements will be further refined through the guidelines and criteria that will be developed as part of the incentive program, as provided for in SB 5.

The new §114.620 contains definitions applicable to the diesel emission reduction incentive program for on-road and non-road vehicles. These definitions include: cost-effectiveness, incremental cost, motor vehicle, non-road diesel, non-road engine, on-road diesel, qualifying fuel, repower, and retrofit.

Administrative changes were made to indent the first paragraph and to capitalize the first word of the definitions in (3) - (5) and (7) - (9) to conform to *Texas Register* format and style.

The new §114.621 establishes the applicability of persons applying for grants from the diesel emission reduction incentive program for on-road and non-road vehicles. This provision will allow for potential future, as well as current, owners and operators to be eligible for grants from the program.

The new §114.622 establishes the eligibility requirements for the incentive program. The new §114.622(a) lists projects that are eligible for funding which include the following: purchase or lease of non-road diesels; emissions-reducing retrofit projects for on-road or non-road diesels; emissions-reducing repower projects for on-road or non-road diesels; purchase and use of emissions-reducing add-on equipment for on-road or non-road diesels; development and demonstration of practical, low-emissions retrofit technologies, repower options, and advanced technologies for on-road or non-road diesels with lower NO_x emissions; use of qualifying fuels; implementation of infrastructure projects; and other projects with the potential to reduce NO_x emissions from diesel engines. The new §114.622(b) requires that, if a project is funded under this incentive program, at least 75% of the vehicle miles traveled or the hours of operation must take place in a nonattainment or affected county for five years following the grant. It is important that reductions be achieved for purposes of demonstrating attainment by 2007, and the agency will develop guidance accordingly. Furthermore, the new §114.622(c) requires that: old equipment or engines that are replaced must be recycled, scrapped, or otherwise removed from all affected counties. New §114.622(d) states that grants can only be awarded to projects that have a cost-effectiveness not exceeding \$13,000 per ton of NO_x emissions reduced. The phrase “subsection (a)(1) - (7) at this section” was changed to “subsection (a) of this section,” to include all eight eligible projects. New §114.622(e) specifies that projects funded with this grant money cannot be used to generate emission credits. New §114.622(f) specifies that projects are not eligible if required by a state or federal law, rule or regulation,

memorandum of agreement, or other legally binding document. New §114.622(g) states that a retrofit, repower, or add-on equipment project must achieve a reduction of at least 30%. Finally, new §114.622(h) states that if a grant recipient fails to meet the terms of a project grant or the conditions of this division, the grant recipient may be required to return some or all of the funding. All of these requirements are found in SB 5 except the requirement that old equipment or engines must be recycled, scrapped, or removed from the affected counties. The commission included this requirement so that these older equipment and engines are truly replaced with newer ones in order to ensure that all of the estimated emission reductions are actually achieved.

The new §114.626 establishes that grant recipients must meet the reporting requirements of the grant and that reports will not be required more than once in a 12-month period. General reporting requirements may be detailed in guidance that is being developed for this incentive program in addition to project-specific reporting requirements which may be included in the grant terms.

The new §114.629 lists the affected counties in which this program applies. The new §114.629 also establishes that equipment purchased before September 1, 2001 are not eligible for funding. This list of counties includes the nonattainment area counties of Texas as well as other counties which could potentially become nonattainment counties in the near future.

FINAL 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 rulemaking action 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 or 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. These rules are intended to protect the environment or reduce risks to human health from environmental exposure to ozone by providing financial incentives for reducing diesel emissions through the repower, retrofit, or add-on; use of a qualifying fuel; and the development and demonstration of new technologies in engines used in on-road and non-road diesel equipment that would reduce NO_x emissions not otherwise required by federal requirements. These rules also establish incentives for the purchase or lease of new non-road equipment and for the implementation of infrastructure projects. As such, the 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.

Additionally, Texas Government Code, §2001.0225 only applies 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 action does not meet any of these four applicability requirements because the rulemaking action is specifically required by SB 5.

TAKINGS IMPACT ASSESSMENT

The commission assessed the takings impact for this rulemaking action in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rulemaking action is to implement a diesel emissions reduction incentive program. The rules will not burden private real property, because they implement a voluntary program and do not involve changes to private real property. These rules only affect motor vehicles which are not considered to be private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The specific purpose of this rulemaking action is to implement a diesel emission reduction incentive program. No new sources of air contaminants will be authorized and NO_x air emissions will be reduced as a result of these rules. The CMP policy applicable to

this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR 51. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission solicited comments on the consistency of the proposed rules with the CMP during the public comment period and received none.

HEARINGS AND COMMENTERS

The commission held public hearings on this proposal on August 13, 2001 in Houston; on August 14, 2001 in Austin and in Arlington. The comment period closed on August 14, 2001. Comments were received from the Association of Automotive Service Providers (AASP); Behthul & Kean, LLP on behalf of Associated Builders and Contractors of Greater Houston (Associated-Houston); Business Coalition for Clean Air (BCCA); City of Fort Worth (Fort Worth); City of Houston (Houston); Galveston-Houston Association for Smog Prevention (GHASP); Good Company (Good); Houston Sierra Club (Sierra-Houston); Hughes and Luce, LLP, on behalf of the Alliance of Automobile Manufacturers (AAM); JMS Ventures (JMS); Metron Management (Metron); Metropolitan Transit Authority (Metro-Houston); Port of Houston (POH); Power Systems Associates on behalf of Darr Equipment Company, Holt Power Systems, and Mustang Power Systems (PSA); Public Citizen - Texas Office on behalf of the Texas Campaign for the Environment, SEED Coalition, Clean Water Action, Environmental Defense, and Sierra Club, Texas/Arkansas Field Office (Public Citizen); Sierra Club Texas/Arkansas Field Office (Sierra-TX/AR); Sneed Institute (Sneed); Texas Campaign for the Environment (TCE); TXU Business Services

(TXU); Texas Clean Air Working Group (TCAWG); Texas Department of Transportation (TxDOT); Texas State Inspection Association (TSIA); TranStar Energy Company (TranStar); United States Environmental Protection Agency (EPA); and seven individuals.

RESPONSE TO COMMENTS

All the commenters were generally supportive of SB 5 and the associated rules with some exceptions. Most commenters suggested changes.

BCCA, Houston, TCAWG, Public Citizen, and Good suggested that the repowering provisions of the proposed regulations are not feasible. BCCA advised the commission to consult the TERP Advisory Board (Advisory Board) to ensure that all projects can be reimbursed, providing repower projects achieve a net NO_x reduction of at least 30%.

The rules for repower projects mirror the provisions of SB 5. The commission understands that the intent of the legislature in adopting the repower provisions was to measure the reduction against the engine being removed instead of the replacement engine. The commission has proposed such an interpretation of the statute and rules in the proposed TERP guidelines. The guidelines require a 30% reduction from the original engine's emissions if repowering with an engine manufactured later than 1987, and a 50% reduction from the original engine's emissions if repowering with an 1987 or earlier engine. The guidelines and criteria are currently available for public comment. After receiving public comment and in consultation with the Advisory Board, the commission will consider approval of the guidelines.

Sierra-Houston commented that a minimum 30% reduction is not enough for retrofit, repower, and add-on projects.

The commission is not recommending a change at this time. The statute itself, §386.104(f), sets the minimum reduction at 30%. If after the first year of the program an alternative percentage needs to be evaluated, the commission, in consultation with the Advisory Board, may make a recommendation to change the minimum percentage.

BCCA, Houston, and TCAWG commented that infrastructure projects should apply to marine vessels.

The rules allow marine infrastructure projects to be considered for grants.

BCCA, Houston, and TCAWG commented that the infrastructure projects should not be subject to the \$13,000/ton cost effectiveness threshold.

The commission interprets the legislation to require all projects to have the cost effectiveness threshold of \$13,000/ton applied and will initially require the \$13,000/ton to apply to infrastructure projects. However, after study of available emission reduction technologies and costs and after public notice and comment, the commission, in consultation with the Advisory Board, may change the values of the maximum grant award criteria to account for inflation or to improve the ability of the program to achieve its goals.

Public Citizen commented that the infrastructure program should be fleshed out by the commission. For example, infrastructure programs at ports, large warehouse operations, and truck stops should include electric outlets so that vehicle equipment that has been modified to run on electricity, such as truck cab air conditioning, have a place to plug in. This will reduce emissions because the engines do not have to idle 24 hours a day to keep the driver who is sleeping in the back cool.

The commission has a more detailed discussion of infrastructure projects contained within the draft guidelines document. The commission will be completing guidelines and criteria for infrastructure programs concurrent with all the other grant programs, and expects to have these finalized by mid-October.

EPA commented that infrastructure projects could promote the use of diesel emulsions. These fuels have been identified by commission and the Houston-Galveston Area Council as one of the innovative measures for future development and SIP credit. EPA pointed out that they have not approved diesel emulsions for on-highway use, and therefore would oppose the state funding this as an on-road NO_x reduction strategy unless it was considered for a voluntary mobile source emissions reduction program or a demonstration program. EPA expressed concern that an infrastructure project for fueling non-road and on-road engines could result in the illegal use of an unapproved fuel for on-road sources.

The commission would appreciate the EPA expediting the approval process of new innovative fuels such as diesel emulsion. Until these fuels are approved for on-road use, projects for on-

road infrastructure involving those fuels will be segregated to ensure that on-highway fueling does not occur.

Public Citizen, Good, and an individual commented that the commission should consider funding low-sulfur diesel programs as some of the low-emissions technology may require such fuel to be effective.

The commission agrees with the commenter and will consider funding projects to supply low-sulfur diesel under the TERP grant program to the extent it is not already mandated by federal law. It must also meet the \$13,000/ton cost effectiveness threshold, however.

Public Citizen suggested the commission require a minimum of three bids for cost reimbursement of low-sulfur diesel.

The commission will consider this comment as part of the guidelines documents which are expected to be adopted in mid-October.

BCCA commented that the commission should specify parameters for the evaluation of demonstration projects as well as clarify the Advisory Board role in regard to the Texas Council on Environmental Technology and the commission overall.

The commission has proposed parameters for demonstration projects as part of its guidelines documents, and encourages the commenter to submit comments on these documents. This issue will be addressed outside this rulemaking process.

BCCA commented that clarifications should be made regarding the price of qualifying fuels and diesel fuel.

The commission appreciates the comment and has addressed these issues as part of its guidelines documents. The comment period for those documents closes on September 28, 2001, and the commission would appreciate the commenters thoughts on the draft interpretation of the issues contained in these documents.

BCCA commented that the commission should clarify applicability of the new equipment conditions and requested input on how the program is going to be enforced. Associated-Houston commented similarly that the commission should examine its approach to recovery of grant funds where projects do not achieve or demonstrate emission reductions. Sierra-Houston commented that the commission should request all the money back if the recipient does not reduce emissions as required. Public Citizen commented that the commission should require logbooks to be kept for auditing and that grant recipients should reimburse the commission if they don't meet the 75% use factor.

The commission will make every effort to ensure grant funds are only allocated for projects with a high degree of certainty of success and has the ability to pursue reimbursement for those

projects which fall short. The commission plans to include provision for reimbursement within the grant contract itself.

Sierra-Houston commented that many of the programs funded under the TERP will not make sufficient emission reductions to make a difference in the HGA area attainment by the 2007 deadline. Sierra-Houston further commented that the commission should not use a large portion of the money for research and development programs as these programs will not lead to any real reductions.

The commission disagrees with the comment. The commission will be able to directly link dollars spent under the TERP program to emission reductions achieved in the HGA area. The commission will evaluate closely the amount money spent solely on development-type programs and make efforts to maximize commercialization of successful demonstration programs.

BCCA, Houston, and TCAWG observed that the incentives as provided as part of this rulemaking do not apply to engines less than 50 horsepower (hp), agricultural pumps, and landscape equipment. BCCA suggested the commission complete a study regarding these sources by September 1, 2002 for review by the Advisory Board, TCAWG, state leaders, and the Texas Legislature.

The commission is obligated to coordinate a report to the legislature each biennium. The commission agrees that part of this report may include ways to improve the program and could include the items listed by the commenter. If it is determined the program can be improved by

including the above categories, the commission will make such recommendations to the Advisory Board, state leaders, and the legislature.

Good commented that the 50 hp minimum for grant projects be considered to allow for more than one engine less than 50 hp such that two 25 hp engines could qualify for a grant.

There is no 50 hp minimum in these rules and therefore this comment is beyond the scope of this rulemaking. The draft guidance document does propose a 50 hp minimum and this comment will be considered as part of the guidelines and criteria document development.

BCCA, Houston, TCAWG, and an individual commented specifically on the funding allocation structure proposed elsewhere by the commission.

The commission appreciates the comments and will keep them in mind when it determines the allocation for the first year. That determination is not being made as part of this rulemaking or the guidelines and criteria.

Houston and TCAWG commented that they support the commission's intent to require removed engines and replaced equipment to be removed from the affected areas and further recommended that the commission go further and require the engines/vehicles to be scrapped or identify penalties to apply to grant recipients who do not comply.

The commission will make every effort to enforce the requirement that engines either be scrapped or removed from the affected areas. Penalties can be assessed in the form of requiring that the grant be returned if the provisions of the contract are not met. However, the commission disagrees that all engines/vehicles should be scrapped as part of being eligible for a grant.

Houston and TCAWG commented that the new purchase of on-road equipment is limited to the Texas Health and Safety Code, §386.113, and that this is reflected in the commission's proposed rules and guidance. Houston suggested that this provision should be evaluated to determine if such purchases can be calculated on a cost-per-basis and be eligible under the Diesel Emission Reduction Incentive Program.

The commission disagrees with the comment. It is the commission's understanding that new purchases of on-road diesel vehicles are only eligible for the On-Road Diesel Purchase or Lease Incentive Program and cannot be included under the Diesel Emission Reduction Incentive Program.

Associated-Houston commented that should be no barriers imposed to the adaptability of potential retrofit candidates and that development of retrofit devices must be encouraged. Associated-Houston and TCAWG commented that the commission should strongly encourage EPA to expedite the certification process.

The commission agrees in principal with the comment. The commission will make every effort to ensure retrofit devices are identified which can be used as part of the TERP program. However, the commission will continue to require a high standard of certification for devices deemed eligible for the TERP program; requiring EPA or California Air Resources Board certification or possibly, commission acceptance before a device will be deemed eligible. The commission will continue to encourage the EPA to complete a streamlined certification process.

TCAWG commented that the TERP program needs to be structured to help existing Texas nonattainment areas meet federal health-based standards in accordance with established time frames; to assist Texas' near-nonattainment areas avoid nonattainment status; to maximize emission reductions, particularly for ozone and its precursors, fine particulates (PM), and toxics; and to facilitate the development of new technologies.

The commission agrees that these are all objectives of the TERP program. Further, the commission will make every effort to ensure these objectives are met subject to the funding levels generated by the TERP program.

TCAWG commented that the commission should clarify the proposed rules and guidance documents to make clear that generators that satisfy the definition of being a mobile source are eligible to be purchased, leased, retrofitted, or repowered with financial support from the TERP program.

The commission agrees with the commenter that only on-road and non-road engines are eligible for the grant program. Generators which satisfy the definition of non-road engines are eligible to be considered for funding. The commission guidelines documents will explain in greater detail the requirement for sources to be mobile or moveable in order to be eligible for a grant.

TCAWG commented that the commission should favorably consider funding for engine retrofit technologies that meet the NO_x reduction targets and also provide PM reductions with a nominal increase in cost. The commenter pointed out that the Carl Moyer program in California funds PM reduction technologies when they are associated with NO_x reduction strategies. Public Citizen commented that the commission should fund engine retrofits that also provide PM benefits if they are within 20% of the cost of a NO_x-only retrofit. An individual and Good also commented that PM should be looked at as a targeted pollutant.

The commission will review the program on an as needed basis, and will aggressively recommend changes to the Advisory Board when warranted. The statute does not specifically address PM emissions, however, it does allow the commission to consider reductions of other types of emission in conjunction with the reduction of NO_x. If PM emissions become a significant threat to air quality in the future, the commission will consult with the Advisory Board as needed to make changes to the program.

POH commented that the commission should not require marine projects to have a minimum of 75% operation in affected county waters. Instead, POH suggested that the commission require a sufficient amount of use to demonstrate the cost-effectiveness criteria.

The commission has proposed in the guidelines and criteria that vessels operate a minimum of 75% of the time in the intercoastal waterway and/or the bays adjacent to an affected county. This comment will be considered when the commission considers the guidelines and criteria for adoption.

POH commented that MARPOL 73/78, as mentioned in the guidelines documents, has been subject to legal challenge.

The commission will confirm the status of this legal challenge and will make appropriate changes to the guidelines documents upon adoption, which is which is expected to be in mid-October.

TxDOT commented that it will be difficult to for state agencies to plan for grants if they are administered on a first come first served basis.

The commission understands the concern. The grant program will not be operated on a first come first served basis, but will be selected based upon their potential to reduce emission in the most cost effective manner. In any event, due to the unpredictable nature of the funding

mechanisms for this program, the commission cannot guarantee approval of any project prior to receiving funding.

TxDOT commented that the commission should allow for electronic reporting. Sierra-Houston commented that there should be more reporting requirements as part of the rulemaking.

Minimum reporting requirements are contained in the rules and will be elaborated upon in the guidelines documents. The commission would like to allow electronic reporting and will take steps to have electronic reporting in place in the future.

TxDOT commented that penalties for failure to meet usage goals would undermine the intention of actually reducing emissions.

The commission disagrees and believes that the ability to penalize grant recipients for failure to comply with grant terms is essential in assuring that emissions are actually reduced. The commission does anticipate requiring an estimate of usage as part of being deemed eligible for a grant. If the actual usage falls significantly short of the estimate, then penalties will be considered. The commissions recognizes the cyclical nature of construction processes which can be sometimes dominated by economic ups and downs. With this in mind, the commission will use discretion when considering penalties for overestimates of usage.

TxDOT commented that, although the commission will require manufacturers to report on the types of equipment available for rebates and grants, it may take them a while to provide this information to the commission, reducing TxDOT's ability to take advantage of the program.

The commission will use every means possible to get information out regarding vehicles and equipment which are eligible for grants. The commission notes that only manufacturers of light-duty vehicles are required to report eligible vehicles to the commission. If a manufacturer is late in reporting, the commission will seek to get the information through other means such as inquiring of EPA regarding engine families which are eligible for rebates.

TxDOT commented regarding the provision requiring old engines, equipment, and vehicles to be removed as a requirement of being granted money under this program. TxDOT suggested a provision be made for short-term emergency use.

The commission disagrees with the comment. If the equipment is replaced, newer or cleaner equipment will take its place, which can then be used in the event of an emergency. The commission is cognizant of major disasters and can employ some type of enforcement discretion if absolutely necessary.

TxDOT commented that truck trailers appear to be subject to collection of fees to pay for the TERP program, and disagreed that this is the case.

The commission will not be collecting fees as part of this program. It is the responsibility of other state agencies to determining how fees are assessed and collected as part of this program.

EPA commented that the state rules must explicitly provide or be interpreted to provide that any credits from projects receiving SB 5 incentives must comply with state rules such as the discrete emission reduction credit (DERC) or the mobile discrete emission reduction credit (MDERC) rules, and that those rules must be approved by the EPA.

The commission will require all incentives purchased under §386.056 to comply fully with the commission's DERC and MDERC rules. The commission has submitted the DERC and MDERC rules to EPA as part of the SIP and looks forward to approval of those rules.

JMS commented that the rules should allow sources to qualify for more than one emission reduction program and have incentives defined for each area. As JMS read the rules, equipment participating in another program is excluded from participating in the TERP program.

The commission is not opposed in general from allowing participants to participate in multiple programs. However, when calculating the cost effectiveness of projects, the commission is only concerned about the costs that will be used for cost effectiveness and incremental cost calculations. Incentives received from other programs must be included in these calculations.

JMS commented regarding contracted use of equipment inside chemical factories and requested to know who owns the credits generated from any clean projects there and who is eligible for a grant: the chemical plant, the contractor, or the leasing company that owns the equipment.

Based upon the limited information provided by the commenter, it appears that the entity leasing the equipment would be eligible for a grant. The state would get the entire amount of credit to be retired towards the SIP.

An individual commented that the commission should rely on the EPA NONROAD model to establish load factors. Further, the commenter suggested that the guidance should be updated as new information becomes available.

This issue is addressed as part of the guidelines documents. If alternative load factors can be scientifically justified, the commission is open to considering them. The commission appreciates the comment and will make efforts to keep its guidance document current.

An individual commented that the commission should require fuel consumption meters if using fuel consumption as a gauge of emissions.

The commission appreciates the comment. The commission will make every effort to optimize the program such that it is as flexible as possible, while achieving emission reductions that are

enforceable, quantifiable, and real. Details such as this will be handled either through the guidance document or in the grant agreement itself.

An individual commented that recreational equipment should qualify for a grant if used for commercial purposes.

The legislature specifically excluded recreational equipment. If equipment can be demonstrated to be used for commercial purposes, the commission will consider that portion of use as being eligible for a grant. However, equipment used solely for commercial purposes will likely have a better cost effectiveness calculation and would qualify first before partial commercial equipment.

An individual commented that equipment purchased prior to September 2001 is not eligible for a grant and that equipment is not defined and could mean non-road engine, motor vehicle, repower, or retrofit. The commenter expressed the belief that the commission means the latter, however, the commenter considered the rules to mean no retrofits for engines built before the 2002 model year.

The commission agrees that the September 2001 limit applies to those devices (repowers, retrofits, new vehicles/engines, etc.) which would be reimbursed as part of the grant program. It is not the original purchase of the equipment that is limited, but the purchase by the grantee as part of an eligible project.

An individual commented that the grant program should cover diesel-powered generator replacement with fuel cells. Public Citizen and Good commented that moveable equipment, even if it stays in place for more than one year, should be eligible for grants if it is stationary for a defined amount of time. Good commented that stationary agriculture pumps be considered for grants.

The commission agrees that backup diesel generators can be replaced with fuel cells, provided they meet the definition of non-road engines. Generally non-road engines include equipment that moves within the period of one year. The purpose of the program was to fund reductions from non-road and on-road sources of emissions. The commission disagrees, at this time, that it should consider funding moveable equipment that is immobile for more than one year. Agriculture pumps which do not move are not considered eligible for grant consideration due to their immobile nature. The commission is, however, open to bringing these types of equipment before the Advisory Board if there is significant demand for these types of grants.

Good commented that the commission should make it clear that electric generators are eligible for funding.

The commission agrees that diesel-powered electric generators are eligible, provided they are moveable and move within a year.

Good commented that grants should be considered for replacement of gasoline engines as well as diesel engines.

The commission disagrees with the comment. The grant program is set up for the improvement of diesel emissions.

Sneed commented that they will be seeking funding for a fuel cell locomotive project, and that the rule should be clarified to include eligible entities that may partner with the owner or operator of a piece of equipment.

The commission has drafted the guidance document to allow demonstration projects to be granted to entities that do not own or operate the equipment. However, in general, due to the ongoing operational requirements that will become part of the grant agreement, the commission is requiring that other types of grants be awarded only to the owner or lessee. As long as one partner is eligible to apply for the grant, the commission will leave the distribution of the grant money up to the partners through private agreement.

An individual commented requesting additional information about the program.

The commission has posted all the relevant information on its website at

<http://home.tnrcc.state.tx.us/oprd/sips/terp.html>.

Sierra-TX/AR and Public Citizen commented that the program should also address greenhouse gases and fuel efficiency. An individual and TranStar commented the program should also address other pollutants such as global warming gases and volatile organic compounds.

The commission will review the program on an as needed basis, and will aggressively recommend changes to the Advisory Board when warranted. The statute does not specifically address PM or global warming emissions, however, it does allow the commission to consider reductions of other types of emission in conjunction with the reduction of NO_x. If PM or global warming emissions become a significant threat to air quality in the future, the commission will consult with the Advisory Board as needed to make changes to the program. Currently the statute does not address fuel type as part of the light-duty program.

Sierra-TX/AR commented that the TERP program should have a dedicated person to administer the program.

The commission has assigned dedicated staff to implement the TERP program and will continue to allot adequate staff to continue its success.

Sierra-TX/AR commented that there should be much publicity associated with the TERP program, including television and radio spots. Public Citizen commented that there needs to be more public education and information about this program provided.

The commission will make every effort to promote this program as it has the potential to be one of the most effective programs for improving air quality around the state. The commission will do all it can within its budget for getting the word out regarding the TERP program.

An individual submitted information on the effects of diesel exhaust and the Carl Moyer program in California.

The commission appreciates the information.

AASP, TSIA, and Metron commented that the collection of the green sheet fee will be difficult and likely cause lawsuits.

The comment is beyond the scope of this rulemaking. This rulemaking does not address the collection of fees under SB 5, only the eligibility for receiving incentives. The Texas Department of Public Safety has jurisdiction over the collection of the \$225 fee.

STATUTORY AUTHORITY

These new sections are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These new sections are also adopted under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §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; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of

the state's air; and Chapter 386, which establishes the TERP. Finally, these adopted new sections are part of the implementation of SB 5, acts of the 77th Legislature, 2001.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

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

§§114.620 - 114.622, 114.626, 114.629

§114.620. Definitions.

Unless specifically defined in the 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 which 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 shall have the following meanings, unless the context clearly indicates otherwise.

(1) Cost-effectiveness - The total dollar amount expended divided by the total number of tons of nitrogen oxides emissions reduction attributable to that expenditure.

(2) Incremental cost - The cost of an applicant's project less a baseline cost that would otherwise be incurred by an applicant in the normal course of business and may include added lease or fuel costs as well as additional capital costs.

(3) 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.

(4) Non-road diesel - A piece of equipment, excluding a motor vehicle or on-road diesel, that is powered by a non-road engine, including: non-road non-recreational equipment and vehicles; construction equipment; locomotives; marine vessels; and other high-emitting diesel engine categories.

(5) Non-road engine - An internal combustion engine that is in or on a piece of equipment that is self-propelled or that propels itself and performs another function, excluding a vehicle that is used solely for competition, or a piece of equipment this is intended to be propelled while performing its function, or a piece of equipment designed to be and capable of being carried or moved from one location to another.

(6) On-road diesel - An on-road diesel-powered motor vehicle that has a gross vehicle weight rating of 10,000 pounds or more.

(7) Qualifying fuel - Any liquid or gaseous fuel or additives registered or verified by the EPA that is ultimately dispensed into a motor vehicle or on-road or non-road diesel that provides reductions of nitrogen oxides emissions beyond reductions required by state or federal law.

(8) Repower - To replace an old engine powering an on-road or non-road diesel with:

(A) a new engine that emits at least 30% less than the nitrogen oxides (NO_x) emissions standard required by federal regulation for the current model year for that engine;

(B) an engine manufactured later than 1987 that emits at least 30% less than the NO_x emissions standard emitted by a new engine certified to the baseline NO_x emissions standard for that engine;

(C) an engine manufactured before 1988 that emits not more than 50% of the NO_x emissions standard emitted by a new engine certified to the baseline NO_x emissions standard for that engine; or

(D) electric motors, drives, or fuel cells.

(9) **Retrofit** - To equip an engine and fuel system with new emissions-reducing parts or technology verified by the EPA after manufacture of the original engine and fuel system.

§114.621. Applicability.

Any person that owns or leases, or intends to own or lease, one or more on-road or non-road diesels that operate, or will operate, within an affected county as defined by §114.629 of this title (relating to Affected Counties and Implementation Schedule) may apply for a grant under the diesel emissions reduction incentive program.

§114.622. Incentive Program Requirements.

(a) Eligible projects include:

- (1) purchase or lease of 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; and

(8) 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, 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.

(c) For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled, scrapped, or otherwise removed from all affected counties as defined by §114.629 of this title (relating to Affected Counties and Implementation Schedule).

(d) To be eligible for a grant, the cost-effectiveness of a proposed project as listed in subsection (a) of this section must not exceed \$13,000 per ton of NO_x emissions.

(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.

(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.

(g) A proposed retrofit, repower, or add-on equipment project must achieve a reduction in NO_x emissions of at least 30% compared with the baseline emissions adopted by the commission for the relevant engine year and application.

(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.

§114.626. Monitoring, Recordkeeping, and Reporting Requirements.

Grant recipients must meet the reporting requirements of their grant which must occur no less frequently than annually.

§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, Harris, Hardin, Harrison, Hays, Jefferson, Johnson, Kaufman, Liberty, Montgomery, Nueces, Orange, Parker, Rockwall, Rusk, San Patricio, Smith, Tarrant, Travis, Upshur, Victoria, Waller, Williamson, and Wilson.

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