

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

The amended section is proposed to be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Senate Bill 12 (SB 12), 80th Legislature, 2007, amended the Texas Health and Safety Code, Chapter 386, Texas Emissions Reduction Plan (TERP) Program. Most of the new provisions add to existing project categories and do not require amendment of the rules for implementation. The TERP Guidelines will be revised to include the additional grant criteria established by SB 12.

The proposed rulemaking amends §114.622 to implement the cost-effectiveness increase from \$13,000 per ton of nitrogen oxides reduced to \$15,000 per ton under Texas Health and Safety, §386.106(a), as required by SB 12. Senate Bill 12 also authorizes the commission to designate highways and roadways or portions of a highway or roadway on which travel by grant-funded vehicles may count towards the requirement that vehicles be operated at least 75 percent of the annual miles in the nonattainment areas and affected counties.

In addition to the amendment proposed to implement SB 12, the rule will be amended to remove the option for grant recipients to permanently remove from the State of Texas the old equipment or engines replaced under a grant project. With this amendment, grant recipients will be required to recycle or scrap the old equipment or engine. This amendment has been implemented for grants issued beginning in fiscal

year 2007 and the rule change is intended to align the rules with current practice.

SECTION BY SECTION DISCUSSION

The proposed amendment would increase the cost-effectiveness of eligible projects and allow the commission to designate vehicle travel on highways and roadways to count towards the percentage of use requirement. The proposed amendment will also omit the option to move replaced equipment from the State of Texas. For proposed projects that include the replacement or repower of equipment, the old equipment or engine must be recycled or scrapped.

§114.622. Incentive Program Requirements.

The proposed amendment to §114.622(b) allows the commission to designate highways and roadways or portions of a highway or roadway on which travel by grant-funded vehicles may count towards the requirement that vehicles be operated at least 75 percent of the annual miles in the nonattainment areas and affected counties. Section 114.622(b) currently establishes a usage commitment of 75 percent for vehicle miles traveled or hours of operation to occur in a nonattainment area or affected county.

The proposed amendment to §114.622(c) requires grant recipients to recycle or permanently scrap old equipment and engines. Section 114.622(c) currently includes an option for grant recipients to permanently remove from the state equipment or engines replaced under the program, in lieu of recycling or scrapping. Beginning with grants issued in fiscal year 2007, the commission has not allowed grant recipients to use the removal option and has required that the old equipment or engine to be recycled or scrapped. After evaluating the implementation of the replacement and repower grants for several years,

staff found that it was difficult to ensure that old equipment and engines were actually removed from the state and, if removed, would not be returned to the state in the future. Staff determined that the best way to ensure that the reductions in emissions of nitrogen oxides are achieved is to not allow this option and to require that the old equipment and engines be recycled or scrapped.

The proposed amendment to §114.622(d) increases the cost-effectiveness for projects from the current \$13,000 per ton of nitrogen oxides emissions reduced to \$15,000 per ton of nitrogen oxides emissions reduced.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency and or other units of state or local government due to administration or enforcement of the proposed rule. The proposed rule implements portions of SB 12, 80th Legislature, 2007, Regular Session, relating to the TERP program. The proposed amendment would expand the authorized area of use of grant-funded vehicles, ensure old equipment and engines are recycled or scrapped, and increase the cost-effectiveness limits for TERP grant funded projects.

Senate Bill 12 amended Texas Health and Safety Code, Chapter 386, relating to the TERP program, including changes to the diesel emissions reduction incentive grant programs. The proposed amendment would implement portions of SB 12 by allowing travel on highways and roadways designated by the commission, to count towards the requirement that grant-funded vehicles operate at least 75 percent of the

annual miles in the eligible counties; and raise the cap of the cost-effectiveness criteria for grant funded projects from \$13,000 per ton of nitrogen oxides reduced to \$15,000 per ton.

In addition to the changes required under SB 12, staff recommends changes to §114.622 to remove the option that vehicles, equipment, and engines replaced under the program may be removed from the state in lieu of being recycled or scrapped.

The proposed amendment will expand the authorized area of use for grant funded vehicles, and this change is expected to result in a greater number of vehicle owners that may qualify for a grant. In addition, the proposed rule will increase the cost-effectiveness limits for eligible projects potentially bringing more types of projects into the program. As a result of both of these changes, the pool of eligible grant applicants is anticipated to expand. The agency was appropriated approximately \$147 million in fiscal year 2008 and approximately \$150 million in fiscal year 2009 for incentive payments for the Diesel Emissions Reduction Program. In addition, the agency was appropriated approximately \$2.2 million in fiscal year 2008 and \$2.2 million in fiscal year 2009 to administer the program. The proposed rule changes are not anticipated to affect the overall grant funding amounts nor costs to the agency for implementation of the program.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be an improvement in air quality due to an expanded pool of eligible grant applicants for diesel emissions reduction incentive

grants.

No fiscal implications are anticipated for businesses and individuals as a result of the proposed rule. The proposed rulemaking is related to a voluntary incentive grant program. The changes expand the authorized area of use of grant-funded vehicles, ensure old equipment and engines are recycled or scrapped, and increase the cost-effectiveness limits for eligible grants. The proposed changes do not directly impact businesses and individuals, except to the extent those entities may apply for a grant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses as a result of the proposed rule. Participation in the program is voluntary. The proposed changes do not directly impact businesses and individuals, except to the extent those entities may apply for a grant.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rule action is not subject to §2001.0025 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major

environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed amendment to Chapter 114 modifies the existing rules in accordance with SB 12, 80th Legislature, which amended Texas Health and Safety Code, Chapter 386. The proposed rule amendment is part of a voluntary incentive program with the goal of reducing diesel emissions and as such, the proposed rule will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

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

not exceed an express requirement of state law and is not proposed solely under the general powers of the agency, but is specifically authorized by the provisions cited in the STATUTORY AUTHORITY section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the proposed rule is subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with SB 12, 80th Legislature. The amendment implements a voluntary program and only affects motor vehicles and equipment which are not considered to be private real property. Therefore, promulgation and enforcement of this proposed rule is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

adds criteria to a voluntary incentive grant program and does not govern air pollution emissions. Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARINGS

Public hearings on this proposal will be held in Austin, Texas, on September 11, 2007, at 11:00 a.m., in Building F, Room 2210, at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle; in Houston, Texas, on September 11, 2007, at 3:30 p.m. at the Houston-Galveston Area Council located at 3555 Timmons Lane, Suite 120, Room A; and in Arlington, Texas, on September 11, 2007, at 3:30 p.m. at the North Central Texas Council of Governments at 616 Six Flags Drive, Centerpoint II, in the Metroplex Conference Room. The hearings will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons planning to attend the hearings, who have special communication or other accommodation needs, should contact Patricia Durón, Office of Legal Services, at (512) 239-6087. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808.

Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments>. File size

restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-022-114-EN. The comment period closes September 12, 2007.

Copies of the proposed rule can be obtained from the commission's Web site at

http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Donna

Huff, Air Quality Division, at (512) 239-6628.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR ON-ROAD

AND NON-ROAD VEHICLES

§114.622

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.102, which provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code 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. The amendment is also proposed under Texas Health and Safety Code, Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; §382.002, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §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, the amendment is proposed as part of the implementation of SB 12, 80th Legislature, 2007.

The proposed amendment implements Texas Clean Air Act, §§382.002, 382.011, 382.012, 382.017, Chapter 386 of the Texas Health and Safety Code, and SB 12, 80th Legislature, 2007.

§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, not less than 75% of vehicle miles traveled or hours of operation projected for the five years immediately following the award of a grant must be projected to take place in a nonattainment area or affected county of this state. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside a nonattainment area or affected county to count towards the percentage of use requirement.

(c) For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled or [,] scrapped [, or otherwise permanently removed from the State of Texas].

(d) To be eligible for a grant, the cost-effectiveness of a proposed project as listed in subsection (a) of this section, except for infrastructure projects and infrastructure purchases that are part of a broader retrofit, repower, replacement, or add-on equipment project, must not exceed a cost-effectiveness of \$15,000 [\$13,000] per ton of NO_x emissions reduced. The commission may set lower cost-effectiveness limits as needed to ensure the best use of available funds. The commission may also

base project selection decisions on additional measures to evaluate the effectiveness of projects in reducing NO_x emissions in relation to the funds to be awarded.

(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, 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.

(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.

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