

The Texas Commission on Environmental Quality (commission or agency) proposes new §§114.650 - 114.658.

The new sections are 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 1759, 81st Legislature, 2009 amended the Texas Health and Safety Code by adding Chapter 391, Texas Clean Fleet Program. This program is designed to encourage eligible fleets to replace diesel vehicles with alternative fuel or hybrid vehicles. Eligible entities that replace 25 or more on-road diesel vehicles with alternative fuel or hybrid vehicles may apply for a grant under the program to offset the cost of replacing those vehicles.

SECTION BY SECTION DISCUSSION

§114.650, Definitions

Section 114.650 establishes the definitions specific to the Texas Clean Fleet Program, as required by Texas Health and Safety Code, §391.001.

§114.651, Applicability

Section 114.651 establishes the applicability requirements as required by Texas Health and Safety Code, §391.002. These requirements outline entities that are eligible to apply for a grant under the program.

§114.652, Qualifying Vehicles

As required by Texas Health and Safety Code, §391.003, this section clarifies the types of vehicles that are and are not eligible for participation in the program.

§114.653, Grant Eligibility

Section 114.653 establishes grant eligibility requirements, as required by Texas Health and Safety Code, §391.005. These requirements establish use and ownership criteria of any vehicles being replaced, as well as the level of emissions that must be achieved in order to receive a grant under the program.

Subsection (d) provides that the executive director may establish additional criteria for purposes of prioritizing projects for selection, which may include, but are not limited to: nonattainment status of the primary location in which the eligible vehicles are used; or cost per ton benefits of the overall emissions being reduced. The commission is considering the establishment of prioritizing criteria that would limit the commission to initially considering only grant projects that include vehicles with a primary location in a county that is located within an eight-hour ozone nonattainment area or a near nonattainment area that has submitted an early action compact plan. The commission seeks public comment on proposed rules regarding the grant eligibility requirements and whether to prioritize grant projects to the initial consideration of only grant projects in counties within nonattainment or near nonattainment areas.

§114.654, Usage and Disposition

As required by Texas Health and Safety Code, §391.005, this section outlines requirements regarding the use of new vehicles purchased through the program, as well as the disposal of vehicles being replaced.

§114.655, Grant Restrictions

As required by Texas Health and Safety Code, §391.006, this section outlines the allowable use of grant

funds awarded under the program.

§114.656, Eligible Grant Amounts

As required by Texas Health and Safety Code, §391.007, this section outlines the various eligible grant amounts allowed under the program based on the age and type of each vehicle being replaced.

§114.657, Reporting Requirements

Section 114.657 identifies the reporting requirements, as required by Texas Health and Safety Code, §391.005.

§114.658, Implementation Schedule

Section 114.658 identifies the expiration date of the program, as stated in Texas Health and Safety Code, §391.008.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The agency will utilize available funding appropriated out of the Texas Emissions Reduction Plan (TERP) Account 5071 to implement the proposed rules. Other state agencies and local governments may experience cost savings as a result of the proposed rules if they are eligible to use the Texas Clean Fleet Program grant funds to replace diesel powered vehicles in their fleets with alternative fuel vehicles.

Senate Bill 1759 requires the agency to create the Texas Clean Fleet Program using a portion of the funds appropriated in TERP Account 5071. The proposed rules would add a new division to 30 TAC Chapter 114 to outline the definitions and requirements for participation in the Texas Clean Fleet Program, which is voluntary. The Texas Clean Fleet Program would be a new type of incentive grant in the overall TERP incentive grant program, and five percent of funding for the diesel emissions reduction incentive program would be allocated to the Texas Clean Fleet Program. To be eligible for grant funding, an entity would be required to have a fleet of at least 100 vehicles, 25 of which are diesel powered and meet other grant criteria for replacement. Grant amounts range from 80% of the cost for replacement of a heavy-duty vehicle to 60% of the cost for replacement of a light-duty diesel vehicle. The agency has been appropriated approximately \$6.8 million in fiscal year 2010 and \$5.2 million in fiscal year 2011 for the Texas Clean Fleet Program. The cost for alternative fuel vehicles is estimated to range from \$20,000 to \$150,000.

State agencies or local governments with fleets and vehicles that meet the criteria for the Texas Clean Fleet Program grant may experience cost benefits if they qualify to receive grant funds to purchase alternative fuel vehicles to replace diesel vehicles. Applying for a grant from the Texas Clean Fleet Program would be voluntary, and it is not known at this time how many state agencies or local governments would do so.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be improved air quality statewide since there will be additional opportunities to apply for grant funds to replace diesel

vehicles with alternative fuel options that have fewer emissions.

Businesses with fleets and vehicles that meet the criteria for the Texas Clean Fleet Program grant may experience cost benefits if they qualify to receive grant funds to purchase alternative fuel vehicles to replace diesel vehicles. Applying for a grant from the Texas Clean Fleet Program would be voluntary and it is not known at this time how many businesses would do so. Grant amounts range from 80% of the cost for replacement of a heavy-duty diesel vehicle to 60% of the cost for replacement of a light-duty diesel vehicle. The agency has been appropriated approximately \$6.8 million in fiscal year 2010 and \$5.2 million in fiscal year 2011 for the Texas Clean Fleet Program. The cost for alternative fuel vehicles is estimated to range from \$20,000 to \$150,000.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. It is not expected that most small businesses will meet the criteria to qualify for the Texas Clean Fleet Program. However, if a small business does qualify for a Texas Clean Fleet Program grant, it would experience the same cost benefits as a large business under the proposed rules.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required, because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

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

The new Chapter 114 rules are proposed in accordance with Senate Bill 1759, which added Texas Health and Safety Code, Chapter 391. The proposed rules add a new voluntary incentive program with the goal of reducing diesel emissions. The program offers financial incentives for the voluntary replacement of diesel engines. Because the proposed rules place no involuntary requirements on the regulated community, the proposed rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Also, none of the proposed rules place additional financial burdens on the regulated community.

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

The commission invites public comment on the draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the proposed rules are subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with Senate Bill 1759. The new rules implement a voluntary program and only affect motor vehicles, which are not considered to be private real property. Therefore,

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

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

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

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on November 16, 2009 at 2:00 p.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 Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Jessica Rawlings, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-047-114-EN. The comment period closes on November 23, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Stephen Dayton, Implementation Grants Section, 512-239-6824.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 5: TEXAS CLEAN FLEET PROGRAM

§§114.650 - 114.657

STATUTORY AUTHORITY

These new rules are 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; 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 Texas Water Code, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These new rules are 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; Texas Health and Safety Code, Texas Clean Air Act §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and Texas Health and Safety Code, Texas Clean Air Act, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. Finally, the proposed new rules are specifically authorized by Senate Bill 1759.

The proposed new rules implement Texas Health and Safety Code, Chapter 391.

§114.650. Definitions.

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission,

the terms used in this subchapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA and §§3.2, 101.1, and 114.1 of this title (relating to Definitions), the following words and terms, when used in this division will have the following meanings, unless the context clearly indicates otherwise.

(1) Alternative fuel--A fuel, other than gasoline or diesel fuel, including electricity, compressed natural gas, liquefied natural gas, hydrogen, propane, or a mixture of fuels containing at least 85% methanol by volume.

(2) Eligible entity--Any person or entity with a fleet of 100 or more vehicles that:

(A) are registered in Texas; and

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

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

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

(5) Hybrid vehicle--A motor vehicle with at least two different energy converters and two

different energy storage systems on board the vehicle for the purpose of propelling the vehicle.

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

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

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

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

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

(C) is a four-wheeled motor vehicle;

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

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

(F) is not a golf cart.

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

§114.651. Applicability.

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

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

§114.652. Qualifying Vehicles.

(a) A qualifying vehicle is one that:

(1) is certified to current federal emissions standards;

(2) replaces a diesel-powered on-road vehicle of the same weight classification and use;

and

(3) is a hybrid vehicle or fueled by an alternative fuel.

(b) As a condition of receiving a grant the qualifying vehicle must be continuously owned, registered, and operated in Texas by the grant recipient for at least five years from the date of reimbursement of the grant-funded expenses.

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

(1) is a neighborhood electric vehicle;

(2) has been used as a qualifying vehicle to qualify for a grant under this division for a previous reporting period or by another entity; or

(3) has qualified for a similar grant or tax credit in another jurisdiction.

§114.653. Grant Eligibility.

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

(1) the baseline emission level set by the executive director; and

(2) the certified emission rate of the new vehicle or engine.

(b) The vehicle being replaced must:

(1) be an on-road vehicle that has been owned, registered, and operated by the applicant in Texas for at least the two years immediately preceding the submission of a grant application;

(2) satisfy any minimum average annual mileage or fuel usage requirements established by the executive director;

(3) satisfy any minimum percentage of annual usage requirements established by the executive director; and

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

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

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

(1) nonattainment status of the primary location in which the eligible vehicles are used; or

(2) cost per ton benefits of the overall emissions being reduced.

§114.654. Usage and Disposition.

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

(b) A vehicle or engine replaced under this program must be rendered permanently inoperable in accordance with criteria established by the executive director.

§114.655. Grant Restrictions.

A recipient of a grant under this division shall use the grant to pay the costs of the project for which the grant is made, which may include the initial cost of the alternative fuel or hybrid vehicle. The recipient shall not use the grant to pay the recipient's administrative expenses.

§114.656. Eligible Grant Amounts.

(a) The eligible grant amount for each heavy-duty on-road vehicle being replaced is determined as follows:

(1) 80% of the cost for replacement of a vehicle that:

(A) was manufactured prior to implementation of federal or California emission standards; and

(B) is not certified to meet a specific emission level by either the United States Environmental Protection Agency or the California Air Resources Board;

(2) 70% of the cost for replacement of a vehicle with an engine certified to meet 1990 through 1997 federal emission standards;

(3) 60% of the cost for replacement of a vehicle with an engine certified to meet 1998 through 2003 federal emission standards; and

(4) 50% of the cost for replacement of a vehicle with an engine certified to meet 2004 and later federal emission standards.

(b) The eligible grant amount for each light-duty on-road vehicle being replaced is determined as follows:

(1) 80% of the cost for replacement of a light-duty diesel vehicle that:

(A) was manufactured prior to the implementation of certification requirements;

and

(B) is not certified to meet either mandatory or voluntary emission certification

standards;

(2) 70% of the cost for replacement of a light-duty diesel vehicle certified to meet federal

Tier 1 emission standards phased in between 1994 and 1997; and

(3) 60% of the cost for replacement of a light-duty diesel vehicle certified to meet federal

Tier 2 emission standards phased in between 2004 and 2009.

(c) The executive director may revise the standards for determining grant amounts as needed to reflect changes to federal emission standards and decisions on pollutants of concern.

§114.657. Reporting Requirements.

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

§114.658. Implementation Schedule.

This division expires on August 31, 2017.