

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

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

Background and Summary of the Factual Basis for the Adopted Rule

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

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

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

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

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

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

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

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

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

Section Discussion

§114.622, Incentive Program Requirements

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

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

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

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

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

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

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

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

Final Regulatory Impact Analysis

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

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

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

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

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

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

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

Takings Impact Assessment

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

Consistency with the Coastal Management Program

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

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

Public Comment

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

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

Response to Comments

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

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

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

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

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

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

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

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

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

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

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

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

Statutory Authority

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

This amendment implements THSC, §386.104.

§114.622. Incentive Program Requirements.

(a) Eligible projects include:

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

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

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

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

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

(6) use of qualifying fuel;

(7) implementation of infrastructure projects;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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