

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §§114.650 - 114.654.

Section 114.653 is adopted *with change* to the proposed text as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7472). Sections 114.650 - 114.652, and 114.654 are adopted *without changes* to the proposed text and will not be republished.

The amended sections 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 Rules

Senate Bill 1759, 81st Legislature, 2009, amended the Texas Health and Safety Code (THSC), by adding Chapter 391, Texas Clean Fleet Program (program). This program is designed to encourage eligible fleets to replace diesel vehicles with alternative fuel or hybrid vehicles. House Bill (HB) 3399, 82nd Legislature, 2011, amended THSC, Chapter 391, to revise current eligibility criteria and add additional criteria. The changes made under HB 3399 are as summarized in the following paragraphs.

THSC, §391.002(b), was revised to reduce the number from 25 to 20 of qualifying vehicles that an entity must place in service in the state in order to be eligible to

participate in the program. This provision further allows under THSC, §391.002(c), for commission funding of fewer than 20 vehicles under a grant, as long as an entity's application originally included 20 vehicles for replacement under the program. This provision allows an application to be approvable in the event that the commission does not approve one or more vehicles for funding during the application process.

THSC, §391.004(a), was revised to reduce from 100 to 75 the number of vehicles that any entity must operate in its fleet in the state in order to be eligible to apply for and receive a grant under the program.

Under a new THSC, §391.004(d), the commission is directed to minimize, to the maximum extent possible, the amount of paperwork required for an application. In addition, an applicant may be required to submit a photograph or other documentation of a vehicle identification number, registration information, inspection information, tire condition, or engine block identification only if it is requested after the commission has decided to award a grant to the applicant.

THSC, §391.005(b)(2)(A), was revised to allow a vehicle that has been leased or otherwise commercially financed and registered and operated by the applicant in Texas for at least the two years immediately preceding the submission of a grant application to be replaced under the program. The previous language only allowed vehicles that had

been owned, registered, and operated in Texas by the applicant for the preceding two years to be replaced under the program.

Requirements regarding the operational period of vehicles under this grant program were expanded under THSC, §391.005(c). Previously, vehicles funded through a grant were required to be operated for at least five years from the date of reimbursement of expenses. Under the THSC, §391.005(c) the vehicle must be operated until the earlier of the fifth anniversary of the reimbursement date or until the date the vehicle has been in operation for 400,000 miles.

THSC, §391.005(f), was revised to require the commission to provide a means for an applicant to propose an alternative method of complying with the vehicle or engine destruction requirements of this subsection. The existing requirements include rendering the vehicle permanently inoperable by crushing the vehicle or making a hole in the engine block and permanently destroying the frame of the vehicle.

Finally, THSC, §391.005(i), was added to require the executive director of the TCEQ to waive the requirements of THSC, §301.004(b)(2)(A), upon 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. This subsection includes requirements that an applicant have owned, leased, or otherwise commercially financed,

registered, and operated the vehicle to be replaced in Texas for at least two years immediately preceding the submission of a grant application. The new subsection also requires that, in granting a waiver, the executive director must ensure that the emissions reductions will still be valid and, where applicable, meet the conditions for assignment for credit to the state implementation plan.

These rules incorporate the changes to THSC, Chapter 391, under HB 3399.

Section by Section Discussion

§114.650, Definitions

Revisions to §114.650(2) amend the definition of an "Eligible entity" to reduce the number of vehicles in an entity's fleet that must be registered in Texas from 100 to 75 vehicles and the number of vehicles in an entity's fleet that must be eligible for replacement from 25 to 20 vehicles as required under THSC, §391.004.

§114.651, Applicability

Section 114.651(a) is amended to reduce the number of vehicles that must be included in an application from 25 to 20 vehicles, as required by THSC, §391.002(a).

In addition, amended subsection (b) allows an entity to participate in the program if that entity submits a grant application for 20 or more qualifying vehicles, even if the

commission denies approval for one or more of the vehicles during the application process, as required by THSC, §391.002(b).

§114.652, Qualifying Vehicles

Section 114.652(b) is amended to incorporate changes to the requirement for how long a grant-funded qualifying vehicle must be owned, registered, and operated in Texas by a grant recipient. The ownership and use requirement is changed from a period at least five years from the date of reimbursement of the grant-funded expenses, to until the earlier of the fifth anniversary of the date of reimbursement of the grant-funded expenses or until the date the vehicle has been in operation for 400,000 miles after the date of reimbursement. The amendment is required by THSC, §391.005.

§114.653, Grant Eligibility

Section 114.653(b) is amended to incorporate changes to the grant eligibility requirements to allow a vehicle that has been leased or commercially financed by the applicant to be replaced under the program, as required by THSC, §391.005.

Section 114.653 is also amended to add subsection (e) directing the executive director to waive the requirement that a vehicle have been owned, leased, or commercially financed and registered and operated in Texas by the applicant on a finding of good cause, as required by THSC, §391.005. 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 be still be valid and, where applicable, will meet the conditions for assignment for credit to the state implementation plan.

§114.654, Usage and Disposition

Section 114.654(b) is amended to include specific criteria for how a vehicle replaced under the program must be rendered permanently inoperable and to direct the executive director to provide a means for an applicant to propose an alternative method for rendering a vehicle inoperable, as required by THSC, §391.005.

Under the specific criteria added to subsection (b), a vehicle or engine replaced under the program will need to be rendered permanently inoperable by crushing the vehicle, 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 from operation in this state. The executive director is required to provide a means for an applicant to propose an alternate method for complying with these destruction requirements.

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 rules are adopted in accordance with HB 3399, which amended THSC, Chapter 391. The program offers financial incentives for the voluntary replacement of diesel engines. Because the rules place no involuntary requirements on the regulated community, 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. Also, none of the amendments place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the 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 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 regarding the regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed an analysis of whether the adopted rules are subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with HB 3399. The rules amend the criteria for implementing a voluntary program and only affect motor vehicles which are not considered to be private real property. The promulgation and

enforcement of the 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 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. Clean Energy and Pioneer also 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 background information on its providing financing and assisting entities in California and nationally to obtain funding for 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 for TCEQ's efforts to continually improve and expand mobile source incentive programs.

The commission appreciates the continued support expressed for the TERP programs. No changes were made to the proposed text in response to this comment.

Clean Energy, Pioneer, and UPS expressed support for the addition of §114.653(e) to provide the executive director the authority to waive the requirements of §114.653(b)(1), pertaining to the ownership, registration, and use of the vehicle being replaced, on a finding of good cause.

The commission appreciates the support expressed for the proposed rule changes and for the TERP in general. No changes were made to the proposed text in response to these comments.

EPA expressed concern with the addition of §114.653(e) to provide the executive director the authority to waive the requirements of §114.653(b)(1), pertaining to the ownership, registration, and use of the vehicle being replaced, on a finding of good cause. EPA recommended the commission remove the phrase "or other circumstances" from subsection (e), since it is not well defined.

The intent of the 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 will still meet the intent of the requirements. Therefore, the commission did not remove the term "other circumstances" from the rule language. However, 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 §114.653(e) since proposal to state that in granting a waiver, the executive director shall ensure that the projected emissions reductions will be valid and, where applicable, meet the conditions for assignment for credit to the state implementation plan.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS
DIVISION 5: TEXAS CLEAN FLEET PROGRAM
§§114.650 - 114.654

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These amendments are also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. Finally, these amendments are adopted under THSC, Chapter 391, and are part of the implementation of House Bill 3399.

The amendments implement THSC, §§391.002, 391.004, and 391.005.

§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. When used in this division, this definition is limited to the following: 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 75 [100] or more vehicles that:

(A) are registered in Texas; and

(B) include at least 20 [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 20 [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) Notwithstanding subsection (a) of this section, an entity that submits a grant application for 20 or more qualifying vehicles is eligible to participate in the program even if the commission denies approval for one or more of the vehicles during the application process.

(c) [(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 until the earlier of the fifth anniversary of [for at least five years from] the date of reimbursement of the grant-funded expenses or until the date the vehicle has been in operation for 400,000 miles after the date of reimbursement.

(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, leased, or otherwise commercially financed, and 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.

(e) The executive director shall waive the requirements of subsection (b)(1) of this section 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 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.

§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 by crushing the vehicle, 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 from operation in this state [in accordance with criteria established by the executive director]. The executive director shall provide a means for an applicant to propose an alternative method for complying with the requirements of this subsection.