

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** March 9, 2012

Thru: Bridget Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Susana M. Hildebrand, P.E., Chief Engineer

Docket No.: 2011-1220-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 114, Control of Air Pollution from Motor Vehicles
HB 3399: Texas Clean Fleet Program Rules
Rule Project No. 2011-051-114-EN

Background and reason(s) for the rulemaking:

House Bill (HB) 3399, 82nd Legislature, 2011, Regular Session, by Representatives Legler, Strama, Reynolds, and Chisum, amends sections of Texas Health and Safety Code (THSC), Chapter 391. This chapter establishes the Texas Clean Fleet Program (program) to be funded from the Texas Emissions Reduction Plan (TERP) Fund and administered by the Texas Commission on Environmental Quality (commission). The changes under HB 3399 require amendment of existing rules to revise current provisions and add new provisions.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do: HB 3399 added new subsections and revised existing sections of THSC, Chapter 391, Texas Clean Fleet Program. The revisions to 30 TAC Chapter 114, as required by HB 3399, incorporate changes and additions to the program eligibility criteria, including: changes to the number of vehicles that must be included in a grant and that may be awarded funding by the commission; changes to allow a vehicle that has been leased or commercially financed to be replaced under the program; changes to the time period over which a grant-funded vehicle must be operated, to either five years or 400,000 miles, whichever occurs earlier; and establishing criteria for decommissioning a vehicle or vehicle engine replaced under the program. The revisions also include provisions, as required under HB 3399, that the executive director shall waive the ownership and use requirements for the vehicle being replaced, upon a finding of good cause.

B.) Scope required by federal regulations or state statutes: The adopted rules are required by changes to THSC, Chapter 391, under HB 3399.

C.) Additional staff recommendations that are not required by federal rule or state statute: Staff is not recommending additional provisions beyond what is required under THSC, Chapter 391, as amended by HB 3399.

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Statutory authority:

- Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties;
- 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 the state;
- TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission;
- THSC, §382.107, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act;
- 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;
- THSC, Chapter 386, which establishes the TERP program; and
- THSC, Chapter 391, which establishes the Texas Clean Fleet Program.

Effect on the:

A.) Regulated community: These rules will not affect regulated entities.

B.) Public: The changes to the eligibility criteria for the grants will potentially expand the number of entities and vehicles eligible to participate in the grants. The changes may also make it easier for some entities to participate in the program.

C.) Agency programs: Program processes, criteria, and forms will need to be updated. Also, a process will need to be developed for considering waivers to the eligibility requirements.

Stakeholder meetings:

Stakeholder meetings were not held for this rulemaking.

Public comment:

The proposal was published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7472). 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. The United States Environmental Protection Agency Region 6 (EPA) submitted written comments in support of the rulemaking, but expressed concern and recommended changes to part of the proposal. Significant comments and concerns are discussed further.

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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 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. No changes were made to the proposed text in response to these comments.

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. No changes were made to the proposed text in response to these comments.

The EPA expressed concern with the addition §114.653(e). EPA recommended the commission remove the phrase "or other circumstances" from subsection (e), since it is not well defined. Changes were made to the proposed text in response to these comments, as outlined in the following section regarding significant changes from the proposal.

Significant changes from proposal:

The provision in §114.653(e) implements requirements added by HB 3399. The intent of this provision is to authorize the executive director to consider unique situations that, while not meeting the strict letter of the eligibility requirements, will still meet the intent of the requirements. Therefore, the term "other circumstances" was not removed from §114.653(e) in response to the EPA's comment. However, additional language was added to subsection (e) from the proposed text 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. This addition is intended 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.

Potential controversial concerns and legislative interest:

The rules incorporate provisions required under THSC, Chapter 391, as amended by HB 3399. The rules do not go further than what is required to comply with the statutory changes. Therefore, staff does not anticipate any concerns being raised about the rules, beyond the comments received on the proposed text. Staff expects that the legislators involved in HB 3399 and stakeholders will be interested in how the commission implements the new provisions.

Does this rulemaking affect any current policies or require development of new policies?

Program application materials and contract shells will need to be updated. Also, a process will need to be developed for considering waivers to the eligibility requirements.

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What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

This rulemaking is required to amend the criteria for implementing the Texas Clean Fleet Program under THSC, Chapter 391. If the rulemaking is not completed, implementation of the program under existing rules would be inconsistent with the statutory provisions. Possible alternatives are not adopting the rules or adopting the rules at a later date and delaying implementation of the program.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** November 4, 2011

Anticipated *Texas Register* publication date: April 13, 2012

Anticipated effective date: April 19, 2012

Six-month *Texas Register* filing deadline: May 4, 2012

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Attachments

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