

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §114.622 and §114.629 *without changes* to the proposed text as published in the November 22, 2013, issue of the *Texas Register* (38 TexReg 8392) and, therefore, the amendments will not be republished.

The amendments will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan.

### **Background and Summary of the Factual Basis for the Adopted Rules**

The rulemaking amends existing rules implementing the Diesel Emissions Reduction Incentive (DERI) Program established under Texas Health and Safety Code (THSC), Chapter 386, Subchapter C. The DERI Program provides financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment.

The DERI Program is one of several incentive programs under the Texas Emissions Reduction Plan (TERP) as listed under THSC, §386.051. The TERP was established by the Texas Legislature to create monetary incentives for the implementation of projects to improve air quality in the state's nonattainment areas. Other eligible counties within the state that may face air quality challenges in the future are also eligible for incentives under the TERP. Projects eligible for funding under the TERP are intended to reduce nitrogen oxide (NO<sub>x</sub>) emissions and other pollutants of concern. NO<sub>x</sub> is usually a by-

product of high-temperature combustion that can react with volatile organic compounds in the presence of sunlight to form ground-level ozone.

Senate Bill (SB) 1727, 83rd Legislature, 2013 amended THSC, Chapter 386, Subchapter C, to revise existing criteria for receiving an incentive grant under this subchapter. The revision to THSC, §386.106, removed the maximum cost-effectiveness limit of \$15,000 per ton of NO<sub>x</sub> reduced in the nonattainment area or affected county for which the project is proposed.

This adoption incorporates the change to THSC, §386.106, under SB 1727.

In addition, on May 21, 2012, the EPA published a revision to 40 Code of Federal Regulations Part 81, effective July 20, 2012, adding the designation of nonattainment areas for the 2008 ozone National Ambient Air Quality Standard (NAAQS). Under the revised EPA rule, the Dallas-Fort Worth Area was designated nonattainment for the 2008 eight-hour ozone NAAQS, and the 1997 eight-hour ozone nonattainment area boundary was expanded to include Wise County.

This adoption adds Wise County to the list of applicable counties for the DERI Program.

### **Section by Section Discussion**

#### *§114.622, Incentive Program Requirements*

Section 114.622 is amended to incorporate a change to the program eligibility criteria required by THSC, §386.106(a).

Subsection (g) is amended to be consistent with amended THSC, §386.106(a), by removing the maximum cost-effectiveness limit of \$15,000 per ton of NO<sub>x</sub> emissions reduced. With the change to this subsection, the commission will be authorized to set cost-effectiveness limits as needed to ensure the best use of available funds.

#### *§114.629, Affected Counties and Implementation Schedule*

Section 114.629 is amended to update the list of applicable counties in the TERP incentive program to be consistent with the latest designation of nonattainment areas for the 2008 ozone NAAQS by the EPA. Subsection (a) is amended to add Wise County to the list of applicable counties based on the addition of Wise County to the Dallas-Fort Worth 2008 Eight-Hour Ozone Nonattainment Area.

### **Final Regulatory Impact Determination**

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking 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 SB 1727, 83rd Legislature, 2013, Regular Session, which amended THSC, Chapter 386. The rules add or revise eligibility requirements for a voluntary grant program. 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. In addition, the amendments do not 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 on the draft regulatory impact analysis determination. 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 rules are subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with SB 1727, 83rd Legislature, 2013, Regular Session. The rules make revisions to voluntary programs and only affect motor vehicles and equipment that are not considered to be private real property. The

promulgation and enforcement of the rules are neither a statutory nor a constitutional taking because the rules do 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 CMP during the public comment period. No comments were received regarding consistency with the CMP.

### **Public Comment**

The commission held a public hearing on December 12, 2013. The comment period closed December 18, 2013. The commission received comments from Beneficial Results,

the EPA, the Regional Transportation Council of the North Central Texas Council of Governments (NCTCOG), Public Citizen, and the Lone Star Chapter of the Sierra Club (Sierra Club).

Beneficial Results, EPA, NCTCOG, Public Citizen, and Sierra Club commented in support of the rulemaking. NCTCOG, Public Citizen, and Sierra Club also recommended additions to the rulemaking or additional rulemaking.

### **Response to Comments**

Beneficial Results, EPA, NCTCOG, Public Citizen and Sierra Club expressed support for the proposed rulemaking and the DERI Program.

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

NCTCOG commented in support of and recommended use of DERI Program funds under §114.622(a)(9) for research and development of advanced emission testing technologies and methodologies to support the inclusion of heavy-duty and diesel vehicles into the Inspection and Maintenance (I/M) program since those vehicles currently contribute 38% of the on-road NO<sub>x</sub> emissions in the Dallas-Fort Worth area.

**The proposed rulemaking did not include any proposed changes to §114.622(a)(9), and the requested change would be beyond the identified scope of this rulemaking. No changes to the proposed text were made in response to these comments.**

NCTCOG recommended changes to §114.622(e) pertaining to the destruction or removal of vehicles and equipment replaced under the program from the state. NCTCOG recommended removal of the option to sell the vehicle or engine out of state. NCTCOG commented that transporting a vehicle or equipment to another state does not ensure that the vehicle or equipment will not again travel through or be operated in Texas.

**The proposed rulemaking did not include changes to §114.622(e). The commission agrees with NCTCOG's concern about ensuring that vehicles and equipment replaced under the DERI program are not later returned to operation in Texas. The language in the rules is consistent with the statutory language under THSC, §386.104(i). As provided for under THSC, §386.053, the guidelines adopted by the commission of the DERI program, *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants (RG-388)*, contain more specific criteria for implementation of the statutory and regulatory requirements. The guidelines currently only allow the out-of-state sale or transfer of replaced**

**equipment for projects involving the replacement of a locomotive. The guidelines require permanent destruction of the vehicle or equipment for other types of projects. The commission will continue to assess the effectiveness of the DERI program criteria as it implements the program in the future and will make changes to the guidelines as needed. No changes to the proposed text were made in response to these comments.**

NCTCOG commented in support of the removal of the \$15,000 per ton cost-effectiveness limit under §114.622(g). NCTCOG commented that the removal of the limit on cost-effectiveness will allow local governments to compete better through the DERI program. NCTCOG also requested that the commission continue to take cost-effectiveness into consideration and aim to fund projects that will result in the largest emissions reductions in order to garner the greatest air quality results.

**The commission appreciates the support for the change to remove the cost-effectiveness limits. The commission shares NCTCOG's interest in ensuring that projects funded under the DERI program result in the greatest air quality benefits. The commission will consider appropriate cost-effectiveness limits and other program requirements on a grant-round basis to help best achieve the goals of the program. No changes to the proposed text were made in response to these comments.**

Sierra Club expressed support for the addition of Wise County to the list of applicable counties under §114.629.

**The commission appreciates the support for the addition of Wise County to the list. No changes to the proposed text were made in response to this comment.**

NCTCOG requested more clarification on the intent of §114.629(b), which states that equipment purchased before September 1, 2001, is not eligible for a grant under the program. NCTCOG asked whether this restriction applies to the model year of the vehicle or the date of ownership.

**The proposed rulemaking did not include changes to §114.629(b). This provision implements THSC, §386.111(e), which limits the funding to purchases and installation of equipment completed on or after September 1, 2001. This provision applies to the purchase date and not to the model year of the vehicle or equipment being purchased. No changes to the proposed text were made in response to this comment.**

Sierra Club commented in support for the extension of the Texas Clean School Bus Program until 2019.

**Although the extension of the Texas Clean School Bus Program rules is not part of this rulemaking, the commission appreciates the support.**

Beneficial Results, Public Citizen, and Sierra Club commented on the authority of the commission under THSC, §386.051(b-1), to implement additional programs under the TERP that may not be specifically outlined in statutory provisions. Beneficial Results and Public Citizen recommended guidelines or rule language to implement authority under THSC, §386.051(b-1), to support retrofit or replacement of trucks and off-road equipment used in fracking operations in oil and gas production fields adjacent to the areas eligible under the DERI program. Sierra Club also commented that the commission should implement a rulemaking or add language to this rulemaking to implement a program under THSC, §386.051(b-1), for reducing emissions from oil and gas development. Sierra Club further commented that it thinks the legislative intent was clear on the ability of the commission to determine eligibility for the additional grant program and that it was intended to be a voluntary program that does not open the oil and gas production facilities to additional regulations. Sierra Club provided proposed language that it indicated could be included in this or other rulemaking. The proposed language reads as follows:

"TCEQ may develop, administer and fund other programs as necessary to fulfill its duties and achieve the objectives under Section 386.052 and specifically to achieve reductions in ozone precursors or particulate matter. To the extent practicable, TCEQ will apply the criteria and requirements applicable to other programs – like the Diesel Emission Reduction Plan – to programs established under this subsection. Specifically, the commission is authorized to begin programs that: (1) reduce emissions of oxides of nitrogen or particulate matter from heavy-duty on-road vehicles and non-road equipment, including drayage vehicles, locomotives and marine vessels, at seaport facilities or servicing seaport facilities in nonattainment areas, or affected counties; and (2) reduce emissions from the operation of drilling, production, completions, and related heavy-duty on-road vehicles or non-road equipment in oil and gas production fields. The commission must determine that such a voluntary incentive program is needed in addition to regulatory efforts to reduce pollutants that otherwise could contribute to an area, or an adjacent area, from being in violation of national ambient air quality standards.

To be eligible for any incentives for on-road or non-road equipment under these programs, an applicant must be primarily located in a nonattainment area, affected county, or a county adjacent to an affected county or nonattainment area. The incentive may not be used to meet a regulatory requirement."

**These comments refer to authority of the commission under THSC, §386.051(b-1), to implement additional incentive programs separate from the other TERP incentive programs, including the DERI program.**

**Implementation of the additional statutory authority is outside of the scope of this rulemaking, which is specifically to amend the rules for the DERI program. No changes to the proposed text were made in response to these comments.**

Sierra Club commented to remind the commission that in spending money budgeted for the DERI Program, the commission should quickly shift money to other programs if there is inadequate demand from applicants for this program.

**These comments are outside of the scope of this rulemaking. The commission appreciates the comment and understands the need to adjust the funding priorities among the various TERP incentive programs to ensure that the funds are used effectively. No changes to the proposed text were made in response to these comments.**

NCTCOG commented to encourage full funding of the TERP programs through the appropriation of all revenue collected under the program. NCTCOG encouraged the

commission to request full funding of the TERP programs as budgets are prepared for the next biennium.

**The commission appreciates NCTCOG's support for funding the TERP programs; however, these comments are outside of the scope of this rulemaking. Decisions on appropriation levels are made by the Texas Legislature. Also, how the commission structures the biennial appropriations request is guided by direction from the Legislative Budget Board (LBB). The commission will continue to work with members of the legislature and the LBB regarding the appropriation funding levels for the TERP programs. No changes to the proposed text were made in response to these comments.**

**SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS**

**DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM**

**FOR ON-ROAD AND NON-ROAD VEHICLES**

**§114.622 and §114.629**

**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. The 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; 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 Plan. Finally, the amendments are part of the implementation of Senate Bill 1727, 83rd Legislature, 2013.

The amendments implement THSC, §386.104 and §386.106.

**§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<sub>x</sub>) 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 NOX 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, 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) 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) The commission may set 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<sub>x</sub> 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) 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) 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) A proposed retrofit, repower, replacement, or add-on equipment project must achieve a reduction in NO<sub>x</sub> 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) 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) 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.

**§114.629. Affected Counties and Implementation Schedule.**

(a) Applicable counties in the incentive program include: Bastrop, Bexar, Brazoria, Caldwell, Chambers, Collin, Comal, Dallas, Denton, El Paso, Ellis, Fort Bend, Galveston, Gregg, Guadalupe, Harris, Hardin, Harrison, Hays, Henderson, Hood, Hunt, Jefferson, Johnson, Kaufman, Liberty, Montgomery, Nueces, Orange, Parker, Rockwall, Rusk, San Patricio, Smith, Tarrant, Travis, Upshur, Victoria, Waller, Williamson, Wilson, Wise, and any other county located within an area of Texas designated as a nonattainment area for ground-level ozone under Federal Clean Air Act, §107(d), as amended.

(b) Equipment purchased before September 1, 2001 is not eligible for a grant under this program.