The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§114.680 - 114.682.

Sections 114.680 and 114.682 are adopted *with changes* to the proposed text as published in the November 22, 2013, issue of the *Texas Register* (38 TexReg 8400). Section 114.681 is adopted *without changes* to the proposed text and will not be republished.

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

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

The adopted new rules implement the Drayage Truck Incentive Program (program) established under Texas Health and Safety Code (THSC), Chapter 386, Subchapter D-1. The program provides financial incentives to encourage owners to replace drayage trucks with pre-2007 model year engines with drayage trucks with 2010 or later model year engines.

This 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 ($NO_X$) emissions and other pollutants of concern. $NO_X$ is usually a by-product of high-temperature combustion that reacts with volatile organic compounds in the presence of sunlight to form harmful ground-level ozone.

Senate Bill (SB) 1727, 83nd Legislature, 2013, amended THSC, Chapter 386, to add new Subchapter D-1, establishing the program. THSC, §386.182, requires the commission by rule to establish criteria for the models of drayage trucks that are eligible for inclusion in the program.

## Section by Section Discussion

*§114.680, Definitions*

Adopted new §114.680 establishes definitions for terms used in the new Division 8 to Subchapter K of this chapter. In this section, a *drayage truck* is defined as a heavy-duty on-road or non-road vehicle used for drayage activities and that operates on or transgresses through a seaport or rail yard for the purpose of loading, unloading, or transporting cargo, including transporting empty containers and chassis. This definition is intended to include vehicles that operate primarily within the boundaries of a seaport or rail yard and those vehicles that transport a load to or from a seaport or rail yard.

*Drayage activities* are defined as the transport of cargo, such as containerized, bulk, or break-bulk goods.

In this section, a *rail yard* is defined as a rail facility where cargo is routinely transferred from drayage truck to train or vise-versa, including structures that are devoted to receiving, handling, holding, consolidating, and loading or unloading delivery of rail-borne cargo. A *seaport* is defined as a publically or privately owned property associated with the primary movement of cargo or materials from ocean-going vessels or barges to shore or vice-versa, including structures and property devoted to receiving, handling, holding, consolidating, and loading or delivery of waterborne shipments. The term "or barges" was added to the proposed text in response to comments from the Port of Houston Authority (POHA) to account for the movement of waterborne cargo by barge, in addition to ocean-going vessels. These definitions are intended to define the eligible facilities and properties as those primarily associated with the intermodal transfer of cargo from trains or marine vessels to transport by truck. Also, under THSC, Chapter 386, Subchapter D-1, only rail yards and seaports located in a nonattainment area are applicable to this program.

The terms *day cab* and *non-road yard truck* are also defined in this section. The definition of the term *day cab* was changed from the proposed text that read "a conventional truck cab that does not include a sleeper berth." The proposed text was

changed to read "a drayage truck cab that does not have a compartment behind the driver's seat intended to be used by the driver for sleeping." This change was made to clarify the type of truck referred to in the definition and to avoid any confusion about the term *sleeper berth*. These types of vehicles are generally used for local or regional routes since they do not include a sleeper berth to facilitate long distance and overnight travel. A *non-road yard truck* is defined as a mobile utility vehicle used to transport cargo containers with or without chassis. This type of vehicle is also known as a utility tractor rig, yard tractor, or terminal tractor. These types of vehicles are used for movement of cargo containers within the boundaries of a facility or property, generally either from the off-load point to a storage location or to move cargo from one storage location to another within the facility or property. Some models of yard trucks are also manufactured to be registered and meet requirements for on-road use on public roads and highways. An on-road yard truck is considered as a type of on-road heavy-duty vehicle.

Additional language is added from proposal to the definition of a seaport under §114.680(6). The term "or barges" is added to the definition to clarify that a seaport includes property associated with the primary movement of cargo or materials from either ocean-going vessels or barges to shore or vice-versa. The addition of barges to this definition is intended to account for the fact that a substantial amount of the cargo and

materials delivered to or picked up from marine ports in Texas are transported by barge along the Texas Intracoastal Waterway, in addition to transport by ocean-going vessels.

*§114.681, Applicability*

Adopted new §114.681 establishes that the provisions of §§114.680, 114.682, and 114.683 would apply to the new Drayage Truck Incentive Program established under THSC, Chapter 386, Subchapter D-1.

*§114.682, Eligible Vehicle Models*

THSC, §386.182, requires the commission to establish by rule the criteria for the models of drayage trucks that are eligible for inclusion in the program. Adopted new §114.682 establishes the necessary criteria. Under the criteria, models of drayage trucks eligible for purchase to replace an existing drayage truck include a heavy-duty on-road vehicle with a gross vehicle weight rating (GVWR) of over 26,000 pounds and having a day cab and non-road yard trucks. The minimum limit on the GVWR is intended to exclude from the program large vans and smaller delivery vehicles that, while they may transport cargo from trains or marine vessels, are not generally considered drayage vehicles. Also, larger vehicles generally emit higher levels of pollutants and replacement of larger vehicles used for drayage activities will achieve the most benefit and best address the goals of the program. The requirement that an on-road heavy-duty vehicle must have a day cab is intended to help ensure that vehicles purchased under the

program will be used for local and regional drayage activities in and near rail yards and seaports and not for long-haul transport out of the area.

Criteria is also included in this section for the models of existing drayage trucks eligible for replacement under the program, to include a heavy-duty on-road vehicle with a GVWR over 26,000 pounds and a non-road yard truck. The criteria for vehicles being replaced do not require that an existing on-road heavy-duty vehicle only have a day cab. Although a vehicle with a sleeper berth is intended to facilitate long-haul, overnight travel, many older long-haul vehicles have been used for shorter drayage activities as those vehicles become less reliable for long-distance travel. The criteria allows for replacement of these older long-haul vehicles that have a sleeper berth, if those vehicles are currently being used for drayage activities. The vehicle purchased to replace the older vehicle may not have a sleeper berth.

Changes to the proposed text in §114.682(d) make it clear that authority provided to the executive director to further limit vehicle models and engine model years eligible for purchase or replacement under the program allows the executive director to use more restrictive criteria on a grant-round basis and does not provide for expansion of the eligible vehicle models and model years. The phrase "may further define or limit vehicle models and engine model years" is changed to read "may place additional limits on vehicle models and engine model years." The phrase "for a particular grant round" is

added to make it clear that additional limits may be applied on a grant-round basis, as needed to improve the effectiveness and further the goals of the program.

**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 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 SB 1727, which amended THSC, Chapter 386. The rules add eligibility requirements for a voluntary incentive 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 rules 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 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 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. The rules establish criteria for a voluntary program 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 rulemaking and found the proposal 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 establishes criteria for 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**

A public hearing was held on December 12, 2013. The comment period closed on December 18, 2013. The commission received comments from Beneficial Results, the Environmental Defense Fund (EDF), the EPA, the Regional Transportation Council of the North Central Texas Council of Governments (NCTCOG), thePOHA, Public Citizen, and the Lone Star Chapter of the Sierra Club (Sierra Club).

Beneficial Results, EDF, EPA, NCTCOG, POHA, Public Citizen, and Sierra Club commented in support of the rulemaking. EPA also expressed some concern about one provision. Beneficial Results, EDF, NCTCOG, PHOA, and Public Citizen provided suggestions and recommendations for additions or changes to the proposed language.

**Response to Comments**

Beneficial Results, EDF, EPA, NCTCOG, POHA, Public Citizen, and Sierra Club expressed support for the proposed rulemaking and the program.

EDF commented that the Port of Houston and other Texas ports are major drivers of the Texas economy, as well as the national economy. EDF explained the downside to port activites is that the vehicles, machines, and vessels operating at the ports contribute to pollutants like particulate matter and $NO_X$ affecting the health of surrounding communities and the regional air quality. EDF commented that programs like this will help improve air quality at the Port of Houston and at inland ports in Texas and areas already challenged by air quality issues. EDF included an example that the Port of Houston's most recent emissions inventory from 2008 showed an average number of over 150,000 truck visits per year, based on observations of over 3,000 trucks operating at the port. EDF indicated that the average age of these trucks was between 10 and 11 years old, suggesting that the average truck operating at the port was emitting up to 20 times more $NO_X$ and 10 times more particulate matter than an equivalent truck manufactured today. EDF commented that the heavy-duty diesel fuel vehicle sector was responsible for over 35% of the annual tons of $NO_X$ for port-related emissions, representing over 2,000 tons per year of $NO_X$ and over 50 tons per year of particulate matter.

Beneficial Results and Public Citizen commented that focusing on particulate matter reductions around the Port of Houston is going to be critical to the success of the program and that targeting the old and dirty trucks is going to provide huge benefits, both to the air quality in the area and also to provide economic stimulus in the

community. Beneficial Results and Public Citizen commented that it is a challenge to work with the truck drivers operating at the ports because of economic conditions and that the drivers don't always have the best credit.

**The commission appreciates the support expressed for this program and generally agrees with the comments that programs like this can be important tools to address air quality issues near seaports and rail yards. No changes to the proposed text were made in response to these comments.**

NCTCOG recommended expanding the definition of ports in §114.680(6) to include both seaports and inland ports. NCTCOG commented that this change would ensure that all major freight hubs in the Dallas-Fort Worth region, including airports that transport freight, would be eligible for funding irrespective of whether it is specifically accessible by rail. NCTCOG commented that Dallas is home to the International Inland Port of Dallas, which is a public-private partnership serving as a third phase of regional intermodal development. NCTCOG further commented that the inland port is a key driver in making Dallas the nation's premier logistics and distribution center and a catalyst for Southern Sector investment, job growth, and development of sustainable communities, with a goal of increasing the local tax base and employment.

**The commission agrees that reducing emissions from vehicles operating at a wide range of facilities will help improve air quality in the Dallas-Fort Worth area. However, the rule language implements the specific provisions of THSC, §386.183(a)(2)(B), requiring that drayage trucks funded under the program must be operated in and within a maximum distance of a seaport or rail yard in a nonattainment area of this state. Also, the other TERP incentive programs, including the Diesel Emissions Reduction Incentive Program established under THSC, Chapter 386, Subchapter C, are available to provide funding for replacement of heavy-duty on-road vehicles and non-road equipment in the nonattainment areas and other affected areas, including vehicles and equipment operating at inland ports. No changes to the proposed text were made in response to these comments.**

POHA commented that the definition of a seaport under §114.680(6) be modified to account for the movement of waterborne cargo by barge. POHA recommended the addition of the term "or barges" after the term "ocean-going vessels" in the definition language.

**The commission agrees with this recommendation, based on the understanding that a substantial amount of cargo and materials are transported by barge along the Texas Intracoastal Waterway, in addition to**

**transport by ocean-going vessels. The language has been changed from the proposed text to read "... ocean-going vessels or barges . . .."**

EDF commented in support of the criteria included in §114.681, regarding eligible vehicle models. EDF commented that heavy-duty trucks operating in ports can be some of the dirtiest vehicles on the road and that limiting eligibility to on-road drayage trucks, generally Class 8B vehicles, and on terminal yard hustlers and terminal tractors makes sense, especially given that some of the terminal tractors may be using off-road engines that can be much dirtier than the same on-road engines. EDF also commented that excluding trucks with sleeper berths allows the program to focus on trucks operating primarily at the port and not on long-haul or regional vehicles that may only visit the port rarely.

**The commission appreciates the support expressed for the proposed criteria regarding eligible vehicle models. No changes to the proposed text were made in response to these comments.**

EPA expressed some concern with the proposed language under §114.682(d), which states "the executive director may further define or limit vehicle models or engine model years eligible for purchase and replacement under the program in order the improve the effectiveness and further the goals of the program." EPA commented that it is not aware

of any attainment or reasonable progress plans that will be impacted by this provision because it will impact the program going forward. EPA commented that if, in future attainment or reasonable progress plans, the commission wishes to take credit for this program, the commission may need to further define how the executive director's discretion will be implemented to be able to project the reductions from the program that will be achieved.

**The commission agrees that the proposal language may have been unclear regarding the extent to which the executive director would have independent authority to revise the vehicle eligibility criteria. This language is not intended to authorize the executive director to expand the program to a broader range of vehicles that do not otherwise fit within the statutory and regulatory criteria and, as a result, negatively impact the amount of emission reductions that may be achieved by the program. Instead, this language is included to ensure that the executive director can make adjustments to the program to target those types of vehicles and engines that will result in the greatest level of emission reductions. Also, any action by the executive director to further limit the types of vehicles and engines that may be considered under the program will not change the methodology and criteria that will be used to calculate emission reductions based on the replacement of an older vehicle with a newer vehicle that emits less $NO_X$**

**and other pollutants of concern. This provision has been changed from the proposed text to better define how the executive director's discretion would be implemented. The phrase "may further define or limit vehicle models and engine model years," is changed to read "may place additional limits on vehicle models and engine model years." The phrase "for a particular grant round" is added to make it clear that additional limits may be applied on a grant-round basis, as needed to improve the effectiveness and further the goals of the program.**

Sierra Club commented that the requirements of THSC, §386.183(a)(2)(C), requiring destruction of an engine and scrapping of a truck replaced under the program are not included in the proposed rules. Sierra Club recommended that the vehicle and engine destruction requirements be included in the rules themselves to make the requirements abundantly clear to applicants.

**The rules are adopted in accordance with THSC, §386.182(b), which requires the commission to establish by rule the criteria for models of drayage trucks that are eligible for inclusion in the program. The broader criteria and requirements necessary for implementation of the program will be included in guidelines adopted in accordance with THSC, §386.182(a), which states that the commission shall adopt guidelines**

**necessary to implement the program. The guidelines will include the specific requirements for destruction of the vehicles and engines replaced under the program. In addition, the grant contracts will ensure compliance with the destruction requirements and the commission will require reporting and documentation of the vehicle and engine destruction. No changes to the proposed text were made in response to this comment.**

Sierra Club commented to remind the commission that in spending money budgeted for this program, the commission should quickly shift money to other programs if there is not demand from applicants.

**These comments are outside of the scope of this rulemaking. The commission understands the need to quickly 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 for the TERP programs as budgets are prepared for the next biennium.

**The commission appreciates NCTCOG's support for funding the TERP programs. 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 in regards to the appropriation funding levels for the TERP programs. No changes to the proposed text were made in response to these comments.**

EDF commented that diesel particulate matter is especially dangerous for human health and that programs such as TERP should address the reduction of these substances in grant applications to a greater extent than is current practice. EDF commented that including particulate matter reductions in the cost-effectiveness calculations, as well as providing a summary of the health concerns associated with particulate matter in background information that educates the public about the TERP goals, would help the commission to better serve the air quality goals of the TERP (e.g., assure that air is safe to breath and develop multi-pollutant approaches for residents of Texas).

**These comments are outside of the scope of this rulemaking. The commission agrees that the goals of the TERP incentive programs,**

**including this program, may include consideration of other pollutants, such as particulate matter, in addition to reductions in $NO_X$ emissions. The focus of the TERP incentive programs has been the reduction of $NO_X$ emissions because it is a precursor to the formation of ground-level ozone, which is the primary issue in Texas for compliance with federal National Ambient Air Quality Standards. However, the commission is considering ways to better account for reductions in other pollutants, such as particulate matter, when assessing the effectiveness of the TERP incentive programs. No changes to the proposed text were made in response to these comments.**

EDF commented to encourage commission staff to review efforts of other regions with their clean vehicle programs and take into consideration opportunities to align the TERP programs with similar programs to make it easier for original equipment manufacturers, dealers, and customers to implement clean vehicles in their fleets. EDF commented that because many of the heavy-duty vehicles are fleet vehicles, fleet managers would more easily be able to deploy clean vehicles and technologies if opportunities were promoted in a nationwide program, such as the concept proposed by CALSTART.

**These comments are outside of the scope of this rulemaking. The commission agrees that reviewing other programs when developing and**

**implementing the TERP incentive programs could be helpful. Commission staff review similar incentive programs in other states and regions on a continual basis and have considered those other programs when developing, implementing, and updating the TERP incentive programs. EDF also referenced consideration of a concept proposed by CALSTART for a national network of clean vehicle incentives in the form of voucher rebates. CALSTART is a non-profit organization based in California with a membership of 150 companies representing clean vehicles, fuels, and technologies. Based on CALSTART literature, the organization provides services and consulting help to spur advanced transportation technologies, fuels, and systems and the companies that make them. CALSTART prepared a March 2013 white paper entitled, *Clean Tech Vouchers: An Effective Tool for All Regions*. The main theme of the white paper is the idea of a state and regional incentive network to provide point-of-sale purchase incentives (vouchers) for the purchase of clean technology vehicles. The paper references as an example a voucher program in California for the purchase of hybrid and zero-emission trucks and buses, the Hybrid and Zero-Emission Truck and Bus Voucher Incentive Project. The paper also discusses use of federal Congestion Mitigation and Air Quality program funding as one source of incentive funds. The commission appreciates EDF's reference to this proposal. Because the incentive programs**

**implemented by states and regional entities have differing goals, criteria, and requirements, as well as different funding time frames, it would be very difficult to bring programs together in some sort of combined incentive initiative. However, staff will continue to review this information and information regarding other incentive programs and will continue to evaluate ways to make this and other TERP incentive programs as accessible and effective as possible. No changes to the proposed text were made in response to these comments.**

## SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

## DIVISION 8: DRAYAGE TRUCK INCENTIVE PROGRAM

## §§114.680 - 114.682

### Statutory Authority

The new sections 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 rules 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 Emissions Reduction Plan. Finally, the rules are adopted as part of the implementation of Senate Bill 1727.

The adopted rules implement THSC, §386.182.

**§114.680. Definitions.**

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used in this division 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) Day cab--A drayage truck cab that does not have a compartment behind the driver's seat intended to be used by the driver for sleeping .

(2) Drayage activities--The transport of cargo, such as containerized, bulk, or break-bulk goods.

(3) Drayage truck--A heavy-duty on-road or non-road vehicle used for drayage activities and that operates on or transgresses through a seaport or rail yard for the purpose of loading, unloading, or transporting cargo, including transporting empty containers and chassis.

(4) Non-road yard truck--A non-road mobile utility vehicle used to transport cargo containers with or without chassis; also known as a utility tractor rig, yard tractor, or terminal tractor.

(5) Rail yard--A rail facility where cargo is routinely transferred from drayage truck to train or vice-versa, including structures that are devoted to receiving, handling, holding, consolidating, and loading or delivery of rail-borne cargo.

(6) Seaport--Publically or privately owned property associated with the primary movement of cargo or materials from ocean-going vessels or barges to shore or vice-versa, including structures and property devoted to receiving, handling, holding, consolidating, and loading or delivery of waterborne shipments.

**§114.681. Applicability.**

The provisions of §114.680 and §114.682 of this title (relating to Definitions and Eligible Vehicle Models) apply to the Drayage Truck Incentive Program established and implemented under Texas Health and Safety Code, Chapter 386, Subchapter D-1.

**§114.682. Eligible Vehicle Models.**

(a) Models of drayage trucks eligible for purchase to replace an existing drayage truck under the program include:

(1) a heavy-duty on-road vehicle with a gross vehicle weight rating (GVWR) over 26,000 pounds and having a day cab only; and

(2) a non-road yard truck.

(b) Models of existing drayage trucks eligible for replacement under the program include:

(1) a heavy-duty on-road vehicle with a GVWR over 26,000 pounds; and

(2) a non-road yard truck.

(c) To be eligible for purchase under the program a drayage truck must have an engine of model year 2010 or later as specified by the agency in the grant solicitation materials and the drayage truck being replaced must have an engine of model year 2006 or earlier.

(d) The executive director may place additional limits on vehicle models and engine model years eligible for purchase and replacement under the program for a particular grant round in order to improve the effectiveness and further the goals of the program.