

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** April 10, 2015

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2014-0953-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 114, Control of Air Pollution from Motor Vehicles
LIRAP Rule Revision
Rule Project No. 2014-027-114-AI

Background and reason(s) for the rulemaking:

In March 2002, the Texas Commission on Environmental Quality (TCEQ) adopted rules to implement the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP), which was authorized in Texas Health and Safety Code (THSC), §382.209. The rules established a fee to be paid by vehicle owners in participating counties to fund the LIRAP. The LIRAP fee is paid by vehicle owners as a portion of the fees assessed under the Vehicle Inspection and Maintenance (I/M) Program. Only counties that participate in the I/M program are eligible to participate in the LIRAP. Those counties include: Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties in the Houston-Galveston-Brazoria (HGB) area; Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties in the Dallas-Fort Worth (DFW) area; Travis and Williamson Counties in the Austin-Round Rock (ARR) area; and El Paso County.

When the rules were first adopted, a procedure was established to allow counties to opt into the LIRAP, and all eligible counties but El Paso County opted in. No procedure was established to allow a participating county to opt out of the LIRAP and have the LIRAP-funding fee removed. On April 28, 2014, the TCEQ received Court Order No. 2014-221-04-21 from the Collin County Commissioners Court requesting withdrawal of the county from participation in the LIRAP, which requires amending the rules to include an opt-out procedure. This rulemaking establishes a formal procedure to allow Collin County or any participating county to opt out of the LIRAP and have LIRAP fee collection be discontinued and the contract between the county and the TCEQ executive director ended. Removing the LIRAP fee in opt-out counties requires coordination with the Texas Department of Public Safety (DPS) and the Texas Department of Motor Vehicles (DMV).

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The adopted revisions amend Chapter 114, Subchapter A to incorporate a non-substantive change to §114.2 and the following substantive changes to §114.7.

- Section 114.7 is amended to add four new definitions and revise two existing definitions. The amendment clarifies the fee element of the LIRAP, defines the date upon which an opt-out county is no longer subject to the LIRAP fee, defines the date

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upon which a county is completely withdrawn from participation in the LIRAP, and differentiates between eligible counties that participate in the LIRAP and those that do not. This rulemaking revises the numbering for §114.7 to incorporate the added definitions.

The adopted revisions also amend Chapter 114, Subchapter C to incorporate the following changes.

- Division 1, §114.53 is revised to address the difference in vehicle emissions I/M fees between a nonattainment county that participates in the LIRAP, a non-attainment county that is in the process of opting out of the LIRAP, and a non-participating, nonattainment county.
- Division 2, §114.60 is revised to clarify that LIRAP requirements apply only to participating counties.
- Division 2, §114.62 is revised to clarify that the LIRAP is funded by fees collected only in participating counties.
- Division 2, §114.64 is revised to incorporate a process by which a participating county may opt out of the LIRAP that includes a written request by the affected county commissioners court requesting removal of the LIRAP fee and ending of the grant contracts between the county and the TCEQ executive director. The LIRAP opt-out effective date for a county will be either the LIRAP fee termination effective date – the date upon which the county is no longer subject to the LIRAP fee – or the last day of the legislative biennium in which the LIRAP fee termination effective date occurs. Removal of the LIRAP fee will take at least 90 days but maybe more to take effect, which is the earliest a participating county may be completely withdrawn from the program.
- Division 2, §114.70 is revised to specify that the recordkeeping requirements and audit provisions will continue to apply to affected entities in a county that opts out of the LIRAP for three years after the LIRAP opt-out effective date.
- Division 3, §114.87 is revised to address the difference in vehicle emissions I/M fees between an early action compact county that participates in the LIRAP, an early action compact county that is in the process of opting out of the LIRAP, and a non-participating early action compact county.

In addition to the adopted changes to allow counties to opt out of the LIRAP, the rule revisions also include various non-substantive revisions to conform with *Texas Register* style and formatting requirements.

B.) Scope required by federal regulations or state statutes:

None.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

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Statutory authority:

This rulemaking is adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC, TWC §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC, and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. This rulemaking is also adopted under THSC, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and 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. Finally, this rulemaking is adopted under THSC, §382.003, amending definitions for the low-income vehicle repair assistance, retrofit, and accelerated vehicle retirement program authorized under THSC, §382.209.

Effect on the:

A.) Regulated community:

This rulemaking is not expected to have a direct impact on the regulated community. The LIRAP is a voluntary program in which eligible counties may choose to participate or from which they may choose to withdraw.

B.) Public:

While this rulemaking will not directly impact the public, there are possible implications if a participating county opts out of the LIRAP. Vehicle owners in non-participating counties are not subject to the LIRAP fee, which is \$6.00 in the participating HGB and DFW counties and \$2.00 in participating ARR counties. However, non-participating counties and the vehicle owners registered in those counties are not eligible for the Drive a Clean Machine (DACM) and Local Initiative Project (LIP) grant programs. With no DACM grant funds available to qualifying vehicle owners for repair or replacement of vehicles that fail emissions inspections, it is possible that program-related business at participating recognized emissions repair facilities and auto dealers in a non-participating county may be affected.

C.) Agency programs:

This rulemaking will not directly impact agency programs. If a county opts out of the LIRAP, then the TCEQ will be required to coordinate with the DMV and the DPS to remove the LIRAP fee in that county. The TCEQ will also contact the Legislative Budget Board when the LIRAP fee is no longer being collected and when the county has completely opted out of the program.

Stakeholder meetings:

No stakeholder meetings were held for this rulemaking. TCEQ staff coordinated with the DMV and DPS on developing a method for adding and removing the LIRAP fee in eligible counties.

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Public comment:

The comment period was from December 5, 2014 through January 9, 2015. The commission offered a public hearing on January 6, 2015, but it was not opened because no one registered to provide oral testimony. The commission received comments from the North Central Texas Council of Governments (NCTCOG) and the Transportation and Natural Resources Department of Travis County (Travis County). In general, both commenters supported this rulemaking; however, NCTCOG recommended changes related to the distribution of funds and recordkeeping and auditing requirements. Significant public comments are summarized below.

- NCTCOG commented that returning unspent LIRAP funds to the commission upon an opt-out county's LIRAP opt-out effective date would be complicated for participating DFW-area counties because they have agreed through an inter-county elective agreement to share LIRAP funds allocated for the DACM program. NCTCOG acts as the regional administrator for that program in the DFW area. NCTCOG recommended that the TCEQ amend its proposal to allow the redistribution of an opt-out county's unspent allocations to other participating counties within the region. *In response to this comment, the commission has amended proposed §114.64(g)(3) to specify that unspent allocations will be returned to the commission unless there is an official inter-county elective agreement that the opt-out county shares allocated LIRAP funds with other participating counties in the same region. If an inter-county elective agreement exists, then the portion of LIRAP allocations that is shared and unspent as of the LIRAP opt-out effective date will be redistributed among the remaining participating counties that are part of the agreement.*
- NCTCOG commented that LIRAP fees are currently being collected in participating counties at a higher rate than what is appropriated by the legislature and that there is a large surplus of unappropriated funds. NCTCOG recommended that the TCEQ develop a process to allow opt-out counties to spend all collected funds, appropriated and otherwise. *The commission made no change to the rulemaking in response to this comment. The opt-out process established in this rulemaking offers an opt-out county the choice of extending participation in the program beyond the date upon which the LIRAP fee is no longer collected, the LIRAP fee termination date. This allows the county to spend LIRAP grant funds that have been appropriated by the legislature and allocated by the commission. Any future appropriations are unknown and are dependent upon the legislature, which appropriates funding for the LIRAP to the commission during each biennial session from Clean Air Account 151. Clean Air Account 151 is used to safeguard the air resources of the state, and LIRAP fees from vehicle owners in each participating county are deposited into the account as part of a county's participation in the program. LIRAP appropriations from Clean Air Account 151 are not identified by revenue source and county, and as such, it would not be possible to identify future LIRAP appropriations as corresponding to a county that has opted out of the program without additional statutory or appropriations direction.*

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- NCTCOG recommended that the TCEQ alert all counties of any modifications to the LIRAP resulting from legislative action. *The LIRAP has been modified by legislative action four times since the 77th Texas Legislature enacted HB 2134 in 2001. The commission has and will continue to notify counties of changes to the LIRAP that result from legislative action.*
- NCTCOG supported amendments to §114.70(c) and (d) that will maintain program-related recordkeeping and auditing requirements related to an opt-out county after that county's opt-out effective date. NCTCOG recommended that the TCEQ add automobile dealerships to the list of entities that must comply with these requirements. *The commission made no change to the rulemaking in response to this comment. The proposed rulemaking did not address imposing recordkeeping and auditing requirements on any new entities, and adding automobile dealerships would impose new requirements that were not made available for public review and comment. At this time, the commission does not consider it necessary to include automobile dealerships in the list of entities with LIRAP-related recordkeeping and auditing requirements, which already includes participating dismantlers and program administrators. A participating automobile dealership facilitates the purchase of replacement vehicles by eligible applicants – for which it is reimbursed by the program administrator – and transfers those applicants' retired vehicles to participating dismantlers.*

Significant changes from proposal:

Section 114.64(g) was revised from proposal based on a comment from NCTCOG concerning the return of unspent LIRAP allocations after a county's LIRAP opt-out effective date. The proposed language indicated that any LIRAP funds remaining after a county has completely opted out of the program will be returned to the commission. NCTCOG commented that participating counties in the DFW area have agreed through an inter-county elective agreement to share DACM funds. Because the funds are combined and shared, it would be difficult for an opt-out county to return unspent allocations to the commission. To address this issue, the commission revised §114.64(g)(3) to specify that the unspent balance of allocated LIRAP funds for an opt-out county will be returned to the commission not more than 90 days after the county's chosen opt-out effective date unless the county opting out is part of an official inter-county elective agreement with other participating counties in the same region to share allocated LIRAP funds. If the county opting out has entered into an official inter-county elective agreement with other participating counties in the same region to share allocated LIRAP funds, then the portion of LIRAP allocations that is shared and unspent as of the LIRAP opt-out effective date will be redistributed among the remaining participating counties that are part of that agreement. Redistribution of funds will occur not more than 90 days after the opt-out county's chosen opt-out effective date.

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Potential controversial concerns and legislative interest:

The adopted rule revisions include a waiting period for LIRAP fee removal. This rulemaking does not set a specific time period for removal of the LIRAP fee because it is dependent on when registration forms that do not include the LIRAP fee are available from the DMV. The DMV prints and distributes its vehicle registration notices more than 90 days prior to a vehicle's registration expiration, so renewal notices that exclude the LIRAP fee for an opt-out county will be printed for registrations due more than 90 days after a county submits its request to opt out of the LIRAP. During the fee-removal time frame, vehicle owners will still pay the LIRAP fee, and the county will still be considered a participating county.

When a county participates in the LIRAP, vehicle owners remit the LIRAP fee, which funds the program. The LIRAP fees for each participating county are deposited in the state's Clean Air Fund 151, and a portion of that fund is appropriated to the commission for allocation to participating counties as annual grants for DACM and LIP. Vehicle owners in ARR counties pay \$2.00 in annual LIRAP fees, and vehicle owners in DFW and HGB-area counties pay \$6.00 in annual LIRAP fees. Once a county is effectively opted out of the LIRAP, the LIRAP fee for that county will no longer be collected and deposited in the state treasury's Clean Air Fund.

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

This rulemaking is not expected to directly affect any current policies or require the development of new policies.

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

The LIRAP is a voluntary program, and participating counties may opt out at their discretion. This rulemaking establishes a formal procedure to allow any participating LIRAP county to opt out of the program, which includes no longer paying the LIRAP fee. This rulemaking offers any county opting out of the LIRAP a choice between becoming a non-participating county upon the LIRAP fee termination effective date or continuing to participate in the grant program using allocated funds until the end of the biennium in which the LIRAP fee was terminated. If this rulemaking does not go forward, then affected counties would be required to pay the LIRAP fee even if they no longer wanted to participate in the program. One alternative to this rulemaking would be to conduct a separate rulemaking for every county that decided to withdraw from the LIRAP.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** December 5, 2014

Anticipated *Texas Register* adoption publication date: May 15, 2015

Anticipated effective date: May 21, 2015

Six-month *Texas Register* filing deadline: June 5, 2015

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Agency contacts:

Jamie Zech, Rule Project Manager, (512) 239-3935, Air Quality Division

Sierra Redding, Staff Attorney, (512) 239-2496

Kris Hogan, Texas Register Coordinator, (512) 239-6812

Attachments:

None

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Pattie Burnett
Stephen Tatum
Office of General Counsel
Jamie Zech
Kris Hogan