

The Texas Commission on Environmental Quality (commission) adopts amendments to §§114.620 - 114.622, and 114.629. The commission also adopts new §114.623. Sections 114.620 - 114.623 and 114.629 are adopted *without changes* to the proposed text as published in the November 7, 2003 of the *Texas Register* (28 TexReg 9711), and the sections will not be republished.

The permanent rules in this adoption supercede the emergency rules adopted by the commission on October 22, 2003. The amendments and new section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP). These rules partially implement House Bill 1365 (relating to the Texas Emissions Reduction Plan), 78th Legislature, 2003.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 77th Legislature, 2001, enacted Senate Bill 5 establishing the Texas Emissions Reduction Plan (TERP), which provides financial incentives for reducing emissions of on-road and non-road motor vehicles and equipment. The program is funded through surcharges and fees established in the bill. House Bill 1365 amended the surcharges and fees, the eligibility criteria, and other provisions of the TERP program.

The adopted rulemaking alters specific definitions and incentive program requirements within the rules. Guidelines and criteria for the program, including specific criteria and procedures, were adopted by the commission on October 24, 2003. This adopted rulemaking broadens the list of persons eligible to apply for a grant. Furthermore, the adoption adds three counties to the list of counties where eligible

projects may be funded, as well as adding all counties in nonattainment areas to the list of counties. A nonattainment area is a geographic area that fails to meet the National Ambient Air Quality Standards, and is officially designated (e.g., moderate, serious, severe, or extreme) by the EPA under procedures set forth by the Federal Clean Air Act. Finally, the new section establishes methods for providing fast and simple access to grants for a small business.

Senate Bill 5, §18, required the commission to submit a SIP revision to the EPA deleting the requirements of two rules in Chapter 114 from the SIP no later than October 1, 2001. The Texas SIP revision, which incorporated the provisions of Senate Bill 5, was the August 22, 2001 Attainment Demonstration for the Dallas/Fort Worth Nonattainment Area (Rule Log Number 2001-025-SIP-AI). The Texas SIP will now be updated again in order to incorporate the provisions of House Bill 1365.

SECTION BY SECTION DISCUSSION

The adopted amendments to §114.620, Definitions, add the term “Guidelines” to the section. The amendments also change the definition of “On-road diesel” from a vehicle that has a gross vehicle weight rating of 10,000 pounds or more to one whose gross vehicle weight rating is 8,500 pounds or more. The adopted amendments also broaden the definition of “Repower” by deleting much of the existing language. Finally, the amendments add the term “Small business” to the list of definitions. Together, these changes will act to expand the number of persons eligible to receive funding under TERP.

The adopted amendments to §114.621, Applicability, expand the list of persons eligible to apply for a grant by referencing the counties in §114.629 and allow a person other than the owner or lessee to apply for and receive a grant. The reference to §114.629 is amended to include the new title of that section: Applicable Counties and Implementation Schedule.

The adopted amendments to §114.622, Incentive Program Requirements, include changes to eligible projects. Eligible projects are no longer limited to non-road diesels, but now include the purchase and lease of on-road diesels as well. Additionally, eligible projects now include the replacement of on-road and non-road diesels with newer on-road and non-road diesels. Further, the amendments to subsection (d) add language that excludes infrastructure projects and infrastructure purchases that are part of a broader retrofit, repower, replacement, or add-on equipment project from the \$13,000 per ton cost-effectiveness requirement. Subsection (g) is amended to state that a project must achieve a reduction in nitrogen oxides emissions to a level established in the guidelines for that type of project instead of “at least 30%” and adds “replacement” to the list of affected projects. Adopted new subsection (i) states that criteria established in the guidelines, including revisions, apply to the program. This subsection allows for changes to be made to certain program components through the guideline adoption procedure instead of requiring rulemaking, even if the program component is set in a rule provision.

The adopted new §114.623, Small Business Incentives, establishes methods for providing fast and simple access to grants for a small business, as required under House Bill 1365. These methods include preapproval or preauthorization of certain types of grant purchases and expenses; a simplified expense reimbursement process; and promotional activities and instructional materials targeted at small

businesses including a provision that the commission may develop, through guidelines, additional details for providing fast and simple access to grants for small businesses.

The adopted amendments to §114.629, Affected Counties and Implementation Schedule, add three new counties: Henderson, Hood, and Hunt; and any other county within a nonattainment area. A nonattainment area is a geographic area that fails to meet the National Ambient Air Quality Standards, and is officially designated (e.g., moderate, serious, severe, or extreme) by the EPA under procedures set forth by the Federal Clean Air Act. In addition, the title of this section is changed to Applicable Counties and Implementation Schedule for purposes of clarity to distinguish it from affected counties as defined in Texas Health and Safety Code, §386.001.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this proposal is not subject to §2001.0025 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 adopted amendments to Chapter 114 modify the existing rules in accordance with House Bill 1365 by expanding the types of applicants and projects available for TERP funding, expanding the list of

counties eligible for the program, and listing methods for a simplified grant process for small businesses. These rule amendments are part of a voluntary incentive program with the goal of reducing diesel emissions and as such, the adopted 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, a draft 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. Section 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, and the adopted technical requirements are consistent with applicable federal standards. In addition, this proposal 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.

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 House Bill 1365. These amendments implement a voluntary program and only affect motor vehicles and equipment which are not considered to be private real property. Therefore, promulgation and enforcement of these adopted rules are neither a statutory nor a constitutional taking because they do not affect private real property. Therefore, these 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), relating to rules subject to the Coastal Management Program, and therefore required that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the amendments are consistent with CMP goals and policies because this rulemaking action implements enhancements to the diesel emission reduction incentive program. No new sources of air contaminants are authorized and nitrogen oxides air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal natural resources area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51. This action is part of the control strategy for

ozone nonattainment areas in accordance with SIP requirements in 40 CFR Part 51. The commission received no comments on the consistency of the proposed rules with the CMP.

PUBLIC COMMENT

A public hearing on this proposal was held December 1, 2003, and the public comment period closed on December 1, 2003. No oral comments were received at the public hearing. The commission received written comments during the comment period from the Houston Regional Group of the Sierra Club (Houston Sierra Club) and the EPA. Houston Sierra Club opposed the proposed rules. EPA supported the proposed rules.

RESPONSE TO COMMENTS

Houston Sierra Club did not support the use of guidelines for the creation and implementation of the TERP regulations because guidelines are voluntary, arbitrary, capricious, waiveable, and are not enforceable.

The commission responds that under Texas Health and Safety Code, §386.053, the commission is required to develop and adopt guidelines and criteria consistent with the requirements of the grants program. The guidelines are not guidance documents, but are binding criteria that are adopted under a prescribed statutory procedure. The statute provides that changes made to the guidelines shall be available for 45 days for public review and comment. In addition, a public meeting will be held to consider public comments. Input is also solicited from a TERP advisory board. Grant recipients must enter into a legally binding contract which requires adherence to

the grant criteria. While participation in the program is voluntary, once a grant is awarded and accepted, the grant recipient is required to comply with the program guidelines. Penalties for noncompliance are established in the contract, including provisions for return of the grant funds. No changes were made to the rules in response to this comment.

Houston Sierra Club expressed concern that the TERP is a voluntary program which cannot be enforced by the EPA and will not generate the nitrogen oxide and volatile organic compound emission reductions required for the Houston SIP. The Houston Sierra Club indicated that Houston is a severe ozone nonattainment area, and requires the mandatory implementation of control strategies and measures.

The TERP meets the requirements of a Financial Mechanism Economic Incentive Program (EIP) under the EPA's EIP guidance. The TERP program criteria are structured to ensure that the emission reductions generated by the program are surplus, enforceable, quantifiable, and permanent. Program results will be closely tracked, and adjustments will be made to the program as needed to ensure that the emission reduction targets are being met. No changes were made to the rules in response to this comment.

EPA expressed support for the rule changes, including the addition of Henderson, Hood, and Hunt Counties to the list of applicable counties in the incentive program, and the expansion of the list of persons who may apply for and receive a grant. EPA encouraged the commission to remain flexible under Regulatory Guidance 388 and to consider funding projects which come very close to meeting the percent reduction set forth in the guidance.

The commission appreciates the EPA's support for the TERP program. The commission intends to closely monitor the status and results of the program, and will consider adjustments to the program criteria as needed to ensure that the needed emission reductions are achieved. Changes to the guidelines will be made according to the procedure described by state statute. No changes were made to the rules in response to this comment.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM

FOR ON-ROAD AND NON-ROAD VEHICLES

§§114.620 - 114.623, 114.629

STATUTORY AUTHORITY

The amendments and new section are proposed under Texas Water Code, §5.102, which provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments and new section are also proposed under Texas Health and Safety Code, Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; §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; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and Chapter 386, which establishes the TERP. Finally, the amendments and new section are proposed as part of the implementation of House Bill 1365.

§114.620. 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 which 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 shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Cost-effectiveness** - The total dollar amount expended divided by the total number of tons of nitrogen oxides emissions reduction attributable to that expenditure.

(2) **Guidelines** - *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388) adopted by the commission under Texas Health and Safety Code, §386.053, as amended.

(3) **Incremental cost** - The cost of an applicant's project less a baseline cost that would otherwise be incurred by an applicant in the normal course of business and may include added lease or fuel costs as well as additional capital costs.

(4) **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.

(5) **Non-road diesel** - A vehicle or piece of equipment, excluding a motor vehicle or on-road diesel, that is powered by a non-road engine, including: non-road non-recreational equipment and vehicles; construction equipment; locomotives; marine vessels; and other high-emitting diesel engine categories.

(6) **Non-road engine** - An internal combustion engine that is in or on a piece of equipment that is self-propelled or that propels itself and performs another function, excluding a vehicle that is used solely for competition, or a piece of equipment that is intended to be propelled while performing its function, or a piece of equipment designed to be and capable of being carried or moved from one location to another.

(7) **On-road diesel** - An on-road diesel-powered motor vehicle that has a gross vehicle weight rating of 8,500 pounds or more.

(8) **Qualifying fuel** - Any liquid or gaseous fuel or additives registered or verified by the EPA that is ultimately dispensed into a motor vehicle or on-road or non-road diesel that provides reductions of nitrogen oxides emissions beyond reductions required by state or federal law.

(9) **Repower** - To replace an old engine powering an on-road or non-road diesel with a new engine; a used engine; a remanufactured engine; or electric motors, drives, or fuel cells.

(10) **Retrofit** - To equip an engine and fuel system with new emissions-reducing parts or technology verified by the EPA after manufacture of the original engine and fuel system.

(11) **Small business** - A business owned by a person who:

(A) owns and operates not more than two vehicles, one of which is:

(i) an on-road diesel with a pre-1994 engine model; or

(ii) a non-road diesel with an engine with uncontrolled emissions; and

(B) has owned the on-road or non-road diesel for more than one year.

§114.621. Applicability.

Any person that owns or leases, or intends to own or lease, one or more on-road or non-road diesels that operate, or will operate, within counties listed in §114.629 of this title (relating to Applicable Counties and Implementation Schedule) may apply for a grant under the diesel emissions reduction incentive program. Subject to the criteria included in the commission's *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388), a person other than the owner or lessee may also apply for and receive a grant.

§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_x) 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 NO_x 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, 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.

(c) For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled, scrapped, or otherwise removed from all counties listed in §114.629 of this title (relating to Applicable Counties and Implementation Schedule).

(d) To be eligible for a grant, the cost-effectiveness of a proposed project as listed in subsection (a) of this section, except for infrastructure projects and infrastructure purchases that are part of a broader retrofit, repower, replacement, or add-on equipment project, must not exceed \$13,000 per ton of NO_x emissions.

(e) 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.

(f) 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.

(g) A proposed retrofit, repower, replacement, or add-on equipment project must achieve a reduction in NO_x 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.

(h) 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.

(i) 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.

§114.623. Small Business Incentives.

(a) This section establishes a process to provide fast and simple access to grants for small businesses, in accordance with Texas Health and Safety Code, §386.116, as amended.

(b) The grant process for a small business may include:

(1) a simplified grant application and other forms;

(2) pre-approval or pre-authorization of certain types of grant purchases and expenses;

(3) a simplified expense reimbursement process, which may include procedures for the grant recipient to assign grant payments directly to the vendor; and

(4) promotional activities and instructional materials targeted at small businesses to encourage them to participate in the program and to inform them of how to access the grants.

(c) The commission's *Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388) shall include details to implement methods identified in subsection (b) of this section.

(d) Other methods for providing fast and simple access to grants for small businesses may be developed through guidelines.

§114.629. Applicable 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, 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.

