

The Texas Commission on Environmental Quality (commission) proposes amendments to §§114.620 - 114.622, and 114.629. The commission also proposes new §114.623, and corresponding revisions to the state implementation plan (SIP). The commission concurrently adopts, in a separate rulemaking (Rule Log No. 2003-053-114-AI), identical rules on an emergency basis. The emergency rules will be effective at the time of filing with the *Texas Register* and will continue in effect for up to 120 days. The permanent rules in this proposal, when adopted, would supercede the emergency rules. The amendments and new section are proposed to be submitted to the United States Environmental Protection Agency (EPA) as a revision to the 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 PROPOSED 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 proposed rulemaking would alter specific definitions and incentive program requirements within the rules. Guidelines and criteria for the program, including specific criteria and procedures, will be adopted by the commission. The proposed rulemaking would also broaden the list of persons eligible to

apply for a grant. Furthermore, the proposal would add three counties to the list of counties where eligible projects may be funded, as well as add 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 would establish 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 commission proposes to update the Texas SIP again in order to incorporate the provisions of House Bill 1365.

#### SECTION BY SECTION DISCUSSION

The proposed 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 proposed 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 proposed 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 will also be amended to include the new title of that section: Applicable Counties and Implementation Schedule.

The proposed 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. Proposed new subsection (i) states that criteria established in the guidelines, including revisions, apply to the program. This subsection would allow 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 proposed 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 include pre-approval or pre-authorization 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 proposed 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 will be 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.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Analyst with the Strategic Planning and Appropriations Section, has determined that for the first five-year period the proposed amendments are in effect, no significant fiscal implications are anticipated for the agency and no additional required costs for other units of state and local government are anticipated as a result of administration or enforcement of the proposed rules. Units of state and local government that do not participate in the voluntary TERP incentive program would not be affected by the proposed amendments.

The TERP incentive program was established by Senate Bill 5, and is voluntary. This program provides financial incentives for reducing emissions of on-road and non-road motor vehicles and equipment in affected counties and nonattainment areas. The program is funded through surcharges and

fees established by Senate Bill 5 and updated by House Bill 1365. The Legislative Budget Board estimates that the agency will receive, contingent on revenue collection, an additional \$91.1 million in Fiscal Year 2004 for incentive grants, rising to an additional \$122.7 million by Fiscal Year 2005. The agency was also funded for an additional nine full-time equivalent positions and associated administrative costs to support the TERP incentive program. Units of state and local government with projects that meet TERP eligibility requirements would be able to apply for TERP grant funding.

This rulemaking addresses changes made by House Bill 1365 to the existing TERP incentive program by updating references and deleting unnecessary rule language in Chapter 114. Specifically, the amendments would allow more applicants and projects to receive TERP funding, expand the listing of counties where eligible projects may be funded, and list proposed methods for a simplified grant process for small businesses. House Bill 1365 also established new fees and changed existing surcharges to fund the TERP incentive programs; however, those changes will not be addressed by this rulemaking.

The proposed amendments do not make major changes to the current TERP incentive program other than to increase the number of entities eligible to participate. The eligibility criteria for applying for a TERP grant would be expanded by broadening existing rule language to include non-diesel vehicles, pieces of equipment, or infrastructure. Henderson, Hood, and Hunt Counties would be added to the list of counties. Additionally, the proposed changes would authorize the commission to allow a person other than the owner or lessee of eligible equipment to apply for and receive a TERP grant.

#### PUBLIC BENEFIT AND COSTS

Mr. Davis has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments would be potentially increased reductions in nitrogen oxides emissions. The proposed amendments would expand the types of applicants and projects available for TERP funding, as well as add three counties to the counties list.

The proposed amendments are intended to implement provisions of House Bill 1365 by expanding the types of applicants and projects available for TERP funding, expanding the listing of counties, and listing proposed methods for a simplified grant process for small businesses. Individuals and businesses would only be affected if they voluntarily applied for funding assistance under the TERP incentive program.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will not be adverse fiscal implications for small and micro-businesses due to implementation of the proposed amendments, which are intended to implement provisions of House Bill 1365 by expanding the types of applicants and projects available for TERP funding, expanding the listing of counties where eligible projects may be funded, and listing proposed methods for a simplified grant process for small businesses. Small and micro-businesses would only be affected if they voluntarily applied for funding assistance under the TERP incentive program.

#### LOCAL EMPLOYMENT IMPACT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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 proposed amendments to Chapter 114 will 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 proposed 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 proposed 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 proposal does not exceed a standard set by federal law, and the proposed technical requirements are consistent with applicable federal standards. In addition, this proposal does not exceed an express requirement of state law and is not proposed 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 proposal does not exceed a requirement of a delegation agreement or contract to implement a state and federal program. The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the proposed 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 proposed rules would be neither a

statutory nor a constitutional taking because they do not affect private real property. Therefore, these rules will not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal 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 (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the 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 will be 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, to protect and enhance air quality in the coastal natural resources area (31 TAC §501.14(q)). This rulemaking action complies with 40 Code of Federal Regulations Part 51. This action is part of the control strategy for ozone nonattainment areas in accordance with SIP requirements in 40 Code of Federal Regulations Part 51. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

#### ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on December 1, 2003 at 10:00 a.m. in Building F, Room 2210, at the commission's central office, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-048-114-AI. Copies of the proposed rules can be obtained from the commission's Web site at <http://www.tnrcc.state.tx.us/oprd/rules/propadop.html>. Comments must be received by 5:00 p.m. on December 1, 2003. For further information, please contact Debra Barber, Office of Environmental Policy, Analysis, and Assessment, (512) 239-0412.

**SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS**

**DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR ON-ROAD  
AND NON-ROAD VEHICLES**

**§§114.620 - 114.623, 114.626, 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.

The proposed amendments and new section implement Texas Health and Safety Code, Chapter 386, as amended by House Bill 1365.

**§114.620. Definitions.**

Unless specifically defined in the Texas Clean Air Act (TCAA) [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) (No change.)

(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) [(2)] **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) [(3)] **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) [(4)] 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) [(5)] 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 this 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) [(6)] On-road diesel** - An on-road diesel-powered motor vehicle that has a gross vehicle weight rating of 8,500 [10,000] pounds or more.

**(8) [(7)] 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) [(8)] 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. [:]

[(A) a new engine that emits at least 30% less than the nitrogen oxides (NO<sub>x</sub>) emissions standard required by federal regulation for the current model year for that engine;]

[(B) an engine manufactured later than 1987 that emits at least 30% less than the NO<sub>x</sub> emissions standard emitted by a new engine certified to the baseline NO<sub>x</sub> emissions standard for that engine;]

[(C) an engine manufactured before 1988 that emits not more than 50% of the NO<sub>x</sub> emissions standard emitted by a new engine certified to the baseline NO<sub>x</sub> emissions standard for that engine; or]

[(D) electric motors, drives, or fuel cells.]

**(10) [(9) 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 [an affected county as defined by] §114.629 of this title (relating to Applicable [Affected] 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) - (6) (No change.)

(7) implementation of infrastructure projects; [and]

(8) replacement of on-road and non-road diesels with newer on-road and non-road diesels; and

(9) [(8)] other projects that have the potential to reduce anticipated NO<sub>x</sub> emissions from diesel engines.

(b) (No change.)

(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 [affected] counties listed in [as defined by] §114.629 of this title (relating to Applicable [Affected] 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<sub>x</sub> emissions.

(e) - (f) (No change.)

(g) 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 [of at least 30%] compared with the baseline emissions adopted by the commission for the relevant engine year and application.

(h) (No change.)

(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 [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, [and] 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) (No change.)

