

The Texas Commission on Environmental Quality (commission) adopts an amendment to §114.622 *with changes* to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 *TexReg* 5324).

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Senate Bill 12 (SB 12), 80th Legislature, 2007, amended Texas Health and Safety Code, Chapter 386, Texas Emissions Reduction Plan (TERP) Program. Most of the new provisions add to existing project categories and do not require amendment of the rules for implementation. The TERP Guidelines will be revised to include the additional grant criteria established by SB 12.

The adopted rulemaking amends §114.622 to implement the cost-effectiveness increase from \$13,000 per ton of nitrogen oxides reduced to \$15,000 per ton under Texas Health and Safety Code, §386.106(a), as required by SB 12. Senate Bill 12 also authorizes the commission to designate highways and roadways or portions of a highway or roadway on which travel by grant-funded vehicles may count towards the requirement that vehicles be operated at least 75 percent of the annual miles in the nonattainment areas and affected counties.

In addition to the amendment adopted to implement SB 12, the rule will be amended to remove the option for grant recipients to permanently remove from the State of Texas the old equipment or engines replaced under a grant project. With this amendment, grant recipients will be required to recycle or scrap the old

equipment or engine, with one exception. Based on comments received, the rule amendment is changed to authorize the executive director to allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

SECTION DISCUSSION

The adopted amendment would increase the cost-effectiveness of eligible projects and allow the commission to designate vehicle travel on highways and roadways to count towards the percentage of use requirement. The adopted amendment will also omit the option to move replaced equipment from the State of Texas. For proposed projects that include the replacement or repower of equipment, the old equipment or engine must be recycled or scrapped, with one exception. The executive director may allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

§114.622. Incentive Program Requirements.

The adopted amendment to §114.622(b) allows the commission to designate highways and roadways or portions of a highway or roadway on which travel by grant-funded vehicles may count towards the requirement that vehicles be operated at least 75 percent of the annual miles in the nonattainment areas and affected counties. Section 114.622(b) currently establishes a usage commitment of 75 percent for vehicle miles traveled to occur in a nonattainment area or affected county.

The adopted amendment to §114.622(c) requires grant recipients to recycle or permanently scrap old equipment and engines. Section 114.622(c) currently includes an option for grant recipients to

permanently remove from the state equipment or engines replaced under the program, in lieu of recycling or scrapping. Beginning with grants issued in fiscal year 2007, the commission has not allowed grant recipients to use the removal option and has required that the old equipment or engine to be recycled or scrapped. After evaluating the implementation of the replacement and repower grants for several years, staff found that it was difficult to ensure that old equipment and engines were actually removed from the state and, if removed, would not be returned to the state in the future. Staff determined that the best way to ensure that the reductions in emissions of nitrogen oxides are achieved is to not allow this option and to require that the old equipment and engines be recycled or scrapped, with one exception. Based on comments received, §114.622(c) is being adopted with a change from proposal to authorize the executive director to allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

The adopted amendment to §114.622(d) increases the cost-effectiveness for projects from the current \$13,000 per ton of nitrogen oxides emissions reduced to \$15,000 per ton of nitrogen oxides emissions reduced.

FINAL REGULATORY IMPACT ANALYSIS 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 §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 amendment to Chapter 114 modifies the existing rules in accordance with SB 12, 80th Legislature, which amended Texas Health and Safety Code, Chapter 386. The adopted amendment is part of a voluntary incentive program with the goal of reducing diesel emissions and as such, the adopted rule 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 regulatory impact analysis is not required because the adopted rule does 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, and the technical requirements are consistent with applicable federal standards. 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.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the adopted rule is subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with SB 12, 80th Legislature. The amendment implements a voluntary program and only affects motor vehicles and equipment which are not considered to be private real property. Therefore, promulgation and enforcement of this adopted rule is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, the rule does 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 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 adds criteria to a voluntary incentive grant program and does not govern air pollution emissions.

PUBLIC COMMENT

The public hearings for this rulemaking were held on: September 11, 2007, 11 a.m., Texas Commission on Environmental Quality, 12100 Park 35 Circle, Austin; September 11, 2007, 3:30 p.m., North Central Texas Council of Governments, 616 Six Flags Drive, Arlington; and September 11, 2007, 3:30 p.m., Houston-Galveston Area Council, 3555 Timmons Lane, Houston.

Emisstar LLC (Emisstar), City of Dallas (Dallas), United States Environmental Protection Agency Region 6 (EPA), Fort Worth Chamber of Commerce (FWC), North Central Texas Council of Governments (NCTCOG), and Port of Houston Authority (PHA) submitted oral and/or written comments in support of all or part of the rulemaking. BNSF, Emisstar, Genessee & Wyoming Inc. – Motive Power (G&W), Railpower Hybrid Technologies Corp. (Railpower), and Union Pacific Railway Company (UP) submitted oral and/or written comments expressing concerns and/or suggesting changes to part of the proposal. Dallas, FWC, Greater Dallas Chamber (GDC), NCTCOG, Neste Oil, PHA, UP and one individual submitted oral and/or written comments not directly related to the TERP rulemaking.

RESPONSE TO COMMENTS

Change to §114.622(b) regarding travel on designated highways and roadways.

NCTCOG, Emisstar, and EPA expressed support for the change. NCTCOG also urged the commission to use all flexibility allowed in applying this clause to determining the project cost-effectiveness.

The commission appreciates the support for the changes to the rule. Regarding the additional recommendation made by NCTCOG, Texas Health and Safety Code, §386.105(d), states that only the reductions in NO_x emissions that are achieved in the nonattainment areas and affected counties may be used to determine the cost-effectiveness of a project. Therefore, the commission would not be able to consider the reductions in NO_x emissions occurring on the designated highways and roadways outside of the nonattainment areas and affected counties when calculating the cost-effectiveness of a project.

UP commented that this change would support commission designation of certain railways to count toward the percentage of use requirement in locomotive replacement projects.

The commission does not agree with UP's interpretation of the rule change. The change only applies to vehicles traveling on designated highways and roadways, not rail lines.

Change to §114.622(c) to remove the option for equipment and engines replaced or repowered under the TERP program to be permanently removed from the State of Texas in lieu of being recycled or scrapped.

NCTCOG, Dallas, EPA, FWC, and PHA expressed support for the change to the rule.

The commission appreciates the support for the changes to the rule.

Emisstar, G&W, BNSF, Railpower, and UP did not support the change to the rule.

Emisstar stated that it has information that potential TERP participants have been unwilling to participate in TERP for the past few grant rounds because the commission began not accepting the transfer or sale of the old equipment and engines to out-of-state users. As an example, Emisstar stated that several stevedoring companies at Texas ports have elected to not participate in TERP because of this requirement. Emisstar referred to data indicating that in 2006, eleven stevedoring companies participated in TERP, but a year later when the commission began not accepting the transfer option, only six stevedoring companies participated in the program.

Emisstar further stated that the concerns about ensuring that the transfer occurs and that the equipment and engines are not returned to the state are addressed by the stipulation in the TERP contract that the equipment must remain out of the state. Emisstar suggested that the commission allow two options: 1) allow TERP participants the option of choosing whether to take a salvage value of \$1,000 and scrap the engine or equipment; or 2) allow the transfer or sale of the engine or equipment out of state, with a requirement that the TERP participant is contractually liable for ensuring that the engine or equipment never returns to Texas.

G&W stated that it operates 47 individual railroads, performs rail switching services in 12 U.S. port facilities and provides rail switching services to dozens of industrial customers in 26 states, including Texas. G&W stated that it is unfortunate that it can not and will not participate in a program where it is forced to scrap an otherwise viable locomotive asset that could be redeployed to another region, state or rail operation. G&W further stated that this change will likely remove all incentive for railroad locomotive operators to participate in the TERP and that the program will not receive any more locomotive submittals if this change becomes effective.

BNSF stated that it understands that it has been difficult for TCEQ staff to ensure that old equipment and engines are removed from the state and would not be returned to the state. However, BNSF stated that the locomotives likely to be replaced under the program are not appropriate for use as cores to manufacture the new Gen Set locomotives that would be purchased to replace the old locomotive. BNSF indicated that the locomotives that would be replaced in Texas are often more reliable than the locomotives used in other BNSF system locations and that the value of those locomotives is often greater than the book value because of the limited market. BNSF stated that the rule change would greatly

increase the cost of future locomotive replacements in Texas and will likely result in fewer grant applications from BNSF. BNSF referenced TERP grant data through January 2007 that indicated that locomotives have made up only 2 percent of the number of TERP projects but have resulted in 40 percent of the TERP NO_x emissions reductions.

BNSF suggested an alternative approach to the scrapping only requirement where the commission could require that the grant recipient install global positioning systems on the locomotives being replaced. The TCEQ staff could then observe the location of the old locomotives on a real time basis.

UP stated that the change to the rule will seriously hinder the ability of UP and other railroad companies operating in Texas to undertake new locomotive projects, result in the loss of already limited projects capable of capturing further available NO_x emissions reductions, and create a general disincentive for participation in the program.

UP also stated that switch engine replacement projects are well-suited for permanent removal from Texas and that verification is not difficult. UP explained that it has maintained ownership and control of the old locomotives and that it has ample opportunity to relocate old locomotives that have remaining useful life. UP stated that roughly half of the locomotives replaced under the program have been scrapped and their engines destroyed, with the rest of the locomotives being reassigned to other UP locations outside of Texas. UP references its locomotive management system as a reliable means of ensuring that the locomotives are not returned to the state and pointed to the success of the replacement projects that have been completed.

UP explained that as a result of the program's success, most of the oldest switch locomotives in UP's Texas fleet have been replaced and that locomotives available for future replacements have a longer remaining activity life and are of more value than the locomotive replaced in the past.

Railpower also stated its objection to this change to the rules. Railpower's comments reflected the same point of view as the statements made by the railroad companies, including concern that railroad companies would find it hard to participate in the TERP program in the future. Railpower also stated that the California Air Districts have acknowledged that the railroad companies have and will fulfill the requirements to control the locomotives replaced under the California Carl Moyer Program and will continue to allow the option of removing the locomotive from the state.

The commission understands the concern expressed regarding the effect this change will have on the participation in the TERP program by owners of non-road equipment and locomotives. As noted by Emisstar, the commission began not accepting the option to transfer or sell the old equipment and engines outside the state beginning with the fiscal year (FY) 2007 grant rounds. This change to the rule will make permanent the interim decision by the commission to not accept that option, with one exception. The rule amendment is changed to authorize the executive director to allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

This change to the rule is based on a number of factors, including a detailed internal review of the program by the commission's audit staff and an evaluation of the risks associated with the grant award decisions. In addition, guidelines published in 2006 by the EPA, entitled *Diesel Retrofits:*

Quantifying and Using Their Benefits in SIPs and Conformity – Guidance for State and Local Air and Transportation Agencies (EPA420-B-06-005, June 2006), state that in order to use emissions reductions from any replacements in a SIP or in a conformity determination the vehicle, engine, or equipment being replaced should be scrapped or the replaced engine returned to the original manufacturer for remanufacturing to a cleaner standard. Under the provision proposed in the rule change, the commission would consider the remanufacture process as a form of scrapping the old engine.

The commission has very little control over the replaced equipment once it leaves the state. The commission is also limited in its ability to ensure that the old equipment or engines are actually removed from the state. This change is proposed to address the risks associated with the replacement grants as well as the direction in the EPA guidance to ensure that the old equipment and engines are permanently removed from the emissions inventory and that the emissions reductions are creditable to the SIP.

However, the commission agrees that railroad companies, in particular, may be able to adequately ensure that a locomotive that is removed from Texas is not returned to the state. Based on the comments received, the rule amendment is changed to authorize the executive director to allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

Change to §114.622(d) increasing the maximum cost-effectiveness from \$13,000 to \$15,000 per ton of NO_x emissions reduced.

NCTCOG, Emisstar, Dallas, and EPA expressed support for the increase in the maximum cost-effectiveness limit.

The commission appreciates the support for the changes to the rule.

G&W expressed concern that the increase in the maximum cost-effectiveness in the rules would mean very little in the end. G&W expressed doubts that rail projects would be allowed to use the maximum \$15,000 cost-effectiveness limit, since past legislation required that the commission always maintain locomotive and marine projects at a lower cost-effectiveness than other projects.

The commission agrees that past legislation requires that locomotive and marine vessel projects have a lower cost-effectiveness limit. Texas Health and Safety Code, §386.102(e)(1), requires the commission to establish cost-effectiveness limits for grants awarded under the program to an owner or operator of a locomotive or marine vessel that are lower than the cost-effectiveness limits applied to other emissions reduction projects. However, the commission does not agree that the rule change will mean little to rail projects. Because the limit on all projects is being raised, the commission will be able to set a higher limit on locomotive and marine projects as well. Decisions on the cost-effectiveness limits to use for each project category, subject to the maximum limit set by this rule change, will be made separate from this rulemaking and prior to the opening of each grant application period.

FWC and GDC also recommended that the commission set the limits for all project types at the maximum allowed of \$15,000. GDC stated that increasing the previous limits of \$5,000 for on-road and \$10,000 for non-road sources would encourage greater participation in TERP by individuals in the North Texas area.

The commission appreciates the support of the TERP program by FWC and GDC and agrees that raising the cost-effectiveness limits for on-road and non-road projects would encourage greater participation in the TERP program. As explained in the response to the previous comment, a decision on the cost-effectiveness limits to set for each type of project, subject to the maximum limit set by this rule change, will be made by the commission separate from this rulemaking and prior to opening each grant application period. The comments by FWC and GDC will be considered when that decision is being made.

Other comments not directly related to this rulemaking.

NCTCOG and Dallas expressed support for the establishment of a diesel testing center as authorized under SB 12, 80th Texas Legislature.

The establishment of a diesel testing center is outside the scope of this rulemaking. The commission agrees that the establishment of a diesel testing center as authorized under SB 12 will provide a valuable resource for the state to evaluate retrofit systems and advanced technologies to determine their effectiveness in reducing emissions of NO_x and other pollutants.

NCTCOG requested the commission's support and provision of allocation of grant funds to the area necessary to meet the Dallas-Fort Worth nonattainment area's air quality goals.

This comment is outside of the scope of this rulemaking. The commission agrees that the TERP program is an important tool in helping the Dallas-Fort Worth nonattainment area to meet its air quality goals. The commission will consider the needs of the area when determining how the funds will be allocated and used.

NCTCOG suggested that the commission consider expanding the requirements that the emissions reductions that can be attributed to retrofit technology be verified by the EPA and the California Air Resources Board to include technology verified under testing programs outside of the country. NCTCOG stated that other states have determined the need for and permitted technologies verified through similar processes in Europe and Asia to be included in their air quality programs.

This comment is outside of the scope of this rulemaking. The commission will seek additional information regarding the requirements of other states for accepting retrofit technologies for emissions reduction credit.

Neste Oil provided information regarding its technology to produce renewable diesel fuel from either vegetable oil or animal fats by adding hydrogen to the bio-feedstock to make renewable paraffinic hydrocarbons, also known as alkanes. Neste Oil stated that adding alkanes to diesel fuel tends to reduce NO_x. Neste Oil also stated that definitions are being written that could exclude this new technology and prevent the commission from harvesting the low-hanging NO_x reduction fruit. Neste Oil asked for any

assistance that the commission can provide to maintain a level playing field so that this and other evolving technology can help the commission to achieve the goals of energy security, reducing greenhouse gases, and lowering NO_x emissions.

This comment is outside of the scope of this rulemaking. The statement regarding definitions being written that might exclude the new technology appear to be in reference to the rules pertaining to Texas Low Emission Diesel (TxLED) requirements specified in Chapter 114, Subchapter H, Division 2. Those rules include standards for cetane and aromatic levels in diesel fuel sold in the eastern part of the state. The commission's TxLED program staff may be contacted for more information regarding how the TxLED requirements may possibly affect the sale and use of the fuel products that may become available from Neste Oil if approved by the EPA for use in the United States.

UP recommended that the commission develop "job assignment" criteria for awarding grants that can be directly assigned to specific jobs or tasks conducted by an applicant, rather than limiting grants to specific units or pieces of equipment. UP explained that when a locomotive is removed from service at a location for fueling, maintenance, or inspection, a similarly-sized locomotive must be assigned to the job. That replacement locomotive will have the same or similar characteristics. UP stated that the grant program's potential is not fully realized in situations where some of the locomotives on a job are ineligible for the grant program but have emission characteristics that are identical to eligible locomotives assigned to the same job.

This comment is outside of the scope of this rulemaking and appears to be aimed at the requirement that vehicles and equipment replaced under the program must have been owned and operated in Texas for the two years preceding the application submission. UP's recommendation would require a major change to the methodology for verifying that a reduction in NO_x emissions will occur as a result of the replacement project.

UP recommended that the commission simplify its process for awarding grants by contracting with grant recipients on a comprehensive "lump-sum" basis for a specified amount rather than by providing reimbursement on an expense-by-expense basis. UP stated that the reimbursement process is complicated and adds unnecessarily to the administrative costs incurred by both the TCEQ and the grant recipients.

This comment is outside of the scope of this rulemaking. Implementation of a lump-sum approach would require statutory changes.

One individual discussed a technology he was developing called the TriTrack electrified guideway. He stated that the commission has specifically listed diesel engines as the only thing that will be considered under the TERP program. He further stated that if the TERP program is only allowed to be applied to diesel engines it is seriously flawed, as diesel engines need to be obsolete soon rather than have the state buying more of them to continue to run for decades. He proposed that TERP money be used for engineering and development of the replacement for diesel engines, not buying more. He explained that if TERP money were diverted to a more intelligent approach that has a multiplication effect like research and development then the TERP can achieve its underlying goal of cleaner air at a price the taxpayers can afford that does not play favorites with those who are the very offenders.

This comment is outside of the scope of this rulemaking. The commission does not agree with the statements that the TERP program only considers diesel engines. Under Texas Health and Safety Code, §386.053(d), the commission is authorized to expand the program, through the criteria established in the TERP Guidelines, to include vehicles and equipment that use fuels other than diesel. Based on that authority, the project criteria established in the *Texas Emissions Reduction Plan Guidelines for Emissions Reduction Incentive Grants (RG388 – May 2004)* allows funding for vehicles, equipment, and engines that use fuels other than diesel, including electric engines. To date, the TERP program has funded projects that include alternative fuel vehicles and equipment, electric equipment and engines, and electrification and alternative fuel infrastructure. The commission encourages projects that meet the grant criteria and can be shown to result in significant reductions in NO_x emissions, regardless of the type of fuel used.

Regarding the comments on the need for TERP money to be diverted to research and development, funding from the TERP revenue sources is available through the New Technology Research and Development (NTRD) Program established under Texas Health and Safety Code, Chapter 387. This program provides funding for research, development, testing and certification of new technologies that will result in reductions in emissions of NO_x and other air pollutants. The TCEQ's NTRD program staff may be contacted for more information about this program.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

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

§114.622

STATUTORY AUTHORITY

The amendment is adopted 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 amendment is also adopted 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; §382.002, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §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 amendment is adopted as part of the implementation of SB 12, 80th Legislature, 2007.

The adopted amendment implements Texas Clean Air Act, §§382.002, 382.011, 382.012, and 382.017, Texas Health and Safety Code, Chapter 386, and SB 12, 80th Legislature, 2007.

§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. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside a nonattainment area or affected county to count towards the percentage of use requirement.

(c) For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled or scrapped provided, however, that the executive director may allow permanent removal from the State of Texas in specific grants where the applicant has provided sufficient assurances that the old locomotive will not be returned to the State of Texas.

(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 a cost-effectiveness of \$15,000 per ton of NO_x emissions reduced. The commission may set lower cost-effectiveness limits as needed to ensure the best use of available funds. The commission may also base project selection

decisions on additional measures to evaluate the effectiveness of projects in reducing NO_x emissions in relation to the funds to be awarded.

(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.