

The Texas Commission on Environmental Quality (TCEQ, commission, or agency) proposes amendments to §§114.650 - 114.654.

If adopted, the amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan.

Background and Summary of the Factual Basis for the Proposed Rules

Senate Bill 1759, 81st Legislature, 2009, amended the Texas Health and Safety Code (THSC), by adding Chapter 391, Texas Clean Fleet Program (program). This program is designed to encourage eligible fleets to replace diesel vehicles with alternative fuel or hybrid vehicles. House Bill (HB) 3399, 82nd Legislature, 2011, amended THSC, Chapter 391, to revise current eligibility criteria and add additional criteria. The changes made under HB 3399 are as summarized in the following paragraphs.

THSC, §391.002(b), was revised to reduce the number of qualifying vehicles that an entity must place in service in the state in order to be eligible to participate in the program from 25 to 20 vehicles. This provision is then qualified under THSC, §391.002(c), to allow for commission funding of fewer than 20 vehicles under a grant, as long as an entity's application originally included 20 vehicles for replacement under the program. This provision allows an application to be approvable in the event that the commission does not approve one or more vehicles for funding during the application

process.

THSC, §391.004(a), was revised to reduce from 100 to 75 the number of vehicles that any entity must operate in its fleet in the state in order to be eligible to apply for and receive a grant under the program.

Under a new THSC, §391.004(d), the commission is directed to minimize, to the maximum extent possible, the amount of paperwork required for an application. In addition, an applicant may be required to submit a photograph or other documentation of a vehicle identification number, registration information, inspection information, tire condition, or engine block identification only if it is requested after the commission has decided to award a grant to the applicant.

THSC, §391.005(b)(2)(A), was revised to allow a vehicle that has been leased or otherwise commercially financed and registered and operated by the applicant in Texas for at least the two years immediately preceding the submission of a grant application to be replaced under the program. The previous language only allowed vehicles that had been owned, registered, and operated in Texas by the applicant for the preceding two years to be replaced under the program.

A change was made to THSC, §391.005(c), to revise the requirement that a vehicle

funded under the program be operated in the state by grant recipient for at least five years from the date of reimbursement, to require that the vehicle be operated in the state under the earlier of the fifth anniversary of the reimbursement date or until the date the vehicle has been in operation for 400,000 miles after the date of reimbursement.

THSC, §391.005(f), was revised to require the commission to provide a means for an applicant to propose an alternative method of complying with the vehicle or engine destruction requirements of this subsection. The existing requirements include rendering the vehicle permanently inoperable by crushing the vehicle or making a hole in the engine block and permanently destroying the frame of the vehicle.

Finally, a new THSC, §391.005(i), was added to require the executive director of the TCEQ to waive the requirements of THSC, §301.004(b)(2)(A), upon a finding of good cause, which may include a waiver for short lapses in registration or operation attributable to economic conditions, seasonal work, or other circumstances. This subsection includes requirements that an applicant have owned, leased, or otherwise commercially financed, registered, and operated the vehicle to be replaced in Texas for at least two years immediately preceding the submission of a grant application.

These proposed rules incorporate the changes to THSC, Chapter 391, under HB 3399.

Section by Section Discussion

§114.650, Definitions

Proposed revisions to §114.650(2) would amend the definition of an "Eligible Entity" to reduce the number of vehicles in an entity's fleet that must be registered in Texas from 100 to 75 vehicles and the number of vehicles in an entity's fleet that must be eligible for replacement from 25 to 20 vehicles as required under THSC, §391.004.

§114.651, Applicability

Section 114.651(a) would be amended to reduce the number of vehicles that must be included in an application from 25 to 20 vehicles, as required by THSC, §391.002(a).

In addition, proposed subsection (b) would allow an entity to participate in the program if that entity submits a grant application for 20 or more qualifying vehicles, even if the commission denies approval for one or more of the vehicles during the application process, as required by THSC, §391.002(b).

§114.652, Qualifying Vehicles

Section 114.652(b) would be amended to incorporate changes to the requirement for how long a grant-funded qualifying vehicle must be owned, registered, and operated in Texas by a grant recipient. The ownership and use requirement would be changed from

a period at least five years from the date of reimbursement of the grant-funded expenses, to until the earlier of the fifth anniversary of the date of reimbursement of the grant-funded expenses or until the date the vehicle has been in operation for 400,000 miles after the date of reimbursement. The amendment is required by THSC, §391.005.

§114.653, Grant Eligibility

The proposed rule would amend §114.653(b) to incorporate changes to the grant eligibility requirements to allow a vehicle that has been leased or commercially financed by the applicant to be replaced under the program, as required by THSC, §391.005.

The proposed rule would also amend §114.653 to add subsection (e) directing the executive director to waive the requirement that a vehicle have been owned, leased, or commercially financed and registered and operated in Texas by the applicant on a finding of good cause, as required by THSC, §391.005.

§114.654, Usage and Disposition

Section 114.654(b) would be amended to include specific criteria for how a vehicle replaced under the program must be rendered permanently inoperable and to direct the executive director to provide a means for an applicant to propose an alternative method for rendering a vehicle inoperable, as required by THSC, §391.005.

Under the specific criteria that would be added to subsection (b), a vehicle or engine replaced under the program would need to be rendered permanently inoperable by crushing the vehicle, by making a hole in the engine block and permanently destroying the frame of the vehicle, or by another method approved by the executive director that permanently removes the vehicle from operation in this state. The executive director would be required to provide a means for an applicant to propose an alternate method for complying with these destruction requirements.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The agency will implement the proposed rules using currently available resources. Other units of state or local government may experience cost benefits from the proposed rules if they qualify for grant funds to replace a diesel vehicle with a vehicle that qualifies for grant funding under the program in Account 5071 - Texas Emission Reduction Plan (TERP). Appropriations for the program are an estimated \$2.8 million in each year of the 2012 - 2013 biennium.

The proposed rules would amend Chapter 114 per the requirements of HB 3399, to amend the criteria for the program. The proposed rules will change the definition of an

eligible entity. The change in the definition will allow more entities statewide to apply for TERP funding by reducing the size of the fleet the entity must have from 100 vehicles or more to 75 vehicles or more and by reducing the number of vehicles eligible for replacement from at least 25 to at least 20. The proposed rules also revise the required period of use for a qualifying vehicle to be the earliest of the fifth anniversary of reimbursement or 400,000 miles instead of at least five years. The proposed rules will also allow leased or otherwise commercially financed vehicles to be eligible for replacement. The proposed rules also allow the executive director to waive the two-year ownership or lease and registration requirements for the vehicle being replaced upon a finding of good cause. The proposed rules also specify the method by which a motor vehicle or engine must be destroyed while providing a means by which an applicant can propose an alternate method of destruction.

State agencies or units of local government may experience cost benefits from the proposed rules if they qualify for grant funds to replace a light-duty or heavy-duty diesel vehicle with a vehicle that qualifies for grant funding under the program. The proposed rules are expected to increase the number of eligible grantees and replacement vehicles and motors. The program is a statewide voluntary incentive program, and staff is not able to determine how many state agencies or units of local government would become eligible to apply for a grant at this time. Under current rules, an award from the program ranges from \$15,000 to \$140,000 depending on the type of vehicle or motor

replaced.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be improved air quality in the state. The proposed rules are expected to expand the universe of potential grantees and vehicles eligible for replacement.

The program is a voluntary statewide grant incentive program. The proposed rules may not have a direct fiscal benefit for individuals, since it is unlikely that an individual would meet the requirement that an applicant own and operate at least 75 vehicles in Texas. However, any eligible individual or entity should experience the same cost savings as those experienced by a local government or large business. Most eligible grantees are expected to be governmental agencies or businesses that own vehicle fleets.

The proposed rules are expected to increase the number of businesses and the number of vehicles and motors that qualify for a grant under the program. Costs for vehicles could range from \$30,000 for a light-duty vehicle to \$180,000 or more for a large heavy-duty truck. Currently, eligible grant awards offsetting the replacement costs of these vehicles range from \$15,000 to \$140,000. Under the proposed rules, grantees are expected to experience similar cost savings. The grant program is a voluntary program,

and staff is not able to determine how many state agencies or units of local government would become eligible to apply for a grant at this time.

The proposed rules could increase revenue for sellers and lessors of qualifying replacement vehicles and motors since there should be more entities that qualify for grants and allow them to purchase eligible vehicles and motors at a lower cost.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. If a small business meets the eligibility requirements, it should experience the same type of cost savings or increased revenue as a large business.

Currently, eligible grant awards offsetting the replacement costs of eligible vehicles range from \$15,000 to \$140,000.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has 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 rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rule action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The amended Chapter 114 rules are proposed in accordance with HB 3399, which amended THSC, Chapter 391. The program offers financial incentives for the voluntary replacement of diesel engines. Because the proposed rules place no involuntary requirements on the regulated community, 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.

Also, none of the proposed amendments place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the proposed rules do not meet any of the four applicability criteria for requiring a regulatory analysis of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and is not 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 rulemaking 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. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

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 HB 3399. The rules amend the criteria for implementing a voluntary program and only affect motor vehicles which are not considered to be private real property. The promulgation and enforcement of the proposed rules is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, the rules do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed 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 amends a voluntary incentive grant program and does not govern air pollution emissions.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on November 29, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-051-114-EN. The comment period closes December 5, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Stephen Dayton, Implementation Grants Section, (512) 239-6824.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 5: TEXAS CLEAN FLEET PROGRAM

§§114.650 - 114.654

Statutory Authority

The amendments are proposed 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. These amendments are also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. Finally, these amendments are proposed under THSC, Chapter 391, and are part of the implementation of House Bill 3399.

The proposed amendments implement THSC, §§391.002, 391.004, and 391.005.

§114.650. 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 that are defined by the TCAA and §§3.2, 101.1, and 114.1 of this title (relating to Definitions), the following words and terms, when used in this division will have the following meanings, unless the context clearly indicates otherwise.

(1) Alternative fuel--A fuel, other than gasoline or diesel fuel. When used in this division, this definition is limited to the following: electricity, compressed natural gas, liquefied natural gas, hydrogen, propane, or a mixture of fuels containing at least 85% methanol by volume.

(2) Eligible entity--Any person or entity with a fleet of 75 [100] or more vehicles that:

(A) are registered in Texas; and

(B) include at least 20 [25] vehicles that are eligible for replacement.

(3) Golf cart--A motor vehicle designed by the manufacturer primarily for transporting persons on a golf course.

(4) Heavy-duty vehicle--A motor vehicle with a gross vehicle weight rating greater than 8,500 pounds and containing an engine certified to the United States Environmental Protection Agency's heavy-duty engine standards.

(5) Hybrid vehicle--A motor vehicle with at least two different energy converters and two different energy storage systems on board the vehicle for the purpose of propelling the vehicle.

(6) Light-duty motor vehicle--A motor vehicle with a gross vehicle weight rating of less than 10,000 pounds and certified to the United States Environmental Protection Agency's light-duty vehicle emission standards.

(7) 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.

(8) Neighborhood electric vehicle--A motor vehicle that:

(A) is originally manufactured to meet, and does meet, the equipment requirements and safety standards established for "low-speed vehicles" in Federal Motor Vehicle Safety Standard No. 500 (49 Code of Federal Regulations §571.500);

(B) is a slow-moving vehicle, as defined by Texas Transportation Code, §547.001 that is able to attain a speed of more than 20 miles per hour but not more than 25 miles per hour in one mile on a paved, level surface;

(C) is a four-wheeled motor vehicle;

(D) is powered by electricity or alternative power sources;

(E) has a gross vehicle weight rating of less than 3,000 pounds; and

(F) is not a golf cart.

(9) Program--The Texas Clean Fleet Program established under this division.

§114.651. Applicability.

(a) Any eligible entity that will replace 20 [25] or more on-road diesel vehicles within a twelve-month period with qualifying vehicles may apply for a grant under the Texas Clean Fleet Program to offset the cost of replacing those vehicles with alternative fuel or hybrid vehicles.

(b) Notwithstanding subsection (a) of this section, an entity that submits a grant application for 20 or more qualifying vehicles is eligible to participate in the program even if the commission denies approval for one or more of the vehicles during the application process.

(c) [(b)] The commission may allow a regional planning commission, council of governments, or similar regional planning agency created under Local Government Code, Chapter 391, or a private nonprofit organization to apply for and receive a grant to improve the ability of the program to achieve its goals.

§114.652. Qualifying Vehicles.

(a) A qualifying vehicle is one that:

(1) is certified to current federal emissions standards;

(2) replaces a diesel-powered on-road vehicle of the same weight classification and use; and

(3) is a hybrid vehicle or fueled by an alternative fuel.

(b) As a condition of receiving a grant the qualifying vehicle must be continuously owned, registered, and operated in Texas by the grant recipient until the earlier of the fifth anniversary of [for at least five years from] the date of reimbursement of the grant-funded expenses or until the date the vehicle has been in operation for 400,000 miles after the date of reimbursement.

(c) A vehicle is not a qualifying vehicle if it:

(1) is a neighborhood electric vehicle;

(2) has been used as a qualifying vehicle to qualify for a grant under this division for a previous reporting period or by another entity; or

(3) has qualified for a similar grant or tax credit in another jurisdiction.

§114.653. Grant Eligibility.

(a) To be eligible for a grant under the program a project must result in a reduction in emissions of nitrogen oxides of at least 25%, based on:

(1) the baseline emission level set by the executive director; and

(2) the certified emission rate of the new vehicle or engine.

(b) The vehicle being replaced must:

(1) be an on-road vehicle that has been owned, leased, or otherwise commercially financed, and registered[,] and operated by the applicant in Texas for at least the two years immediately preceding the submission of a grant application;

(2) satisfy any minimum average annual mileage or fuel usage requirements established by the executive director;

(3) satisfy any minimum percentage of annual usage requirements established by the executive director; and

(4) be in operating condition with at least two years of remaining useful life, as determined in accordance with criteria established by the executive director.

(c) At the discretion of the executive director, projects that result in a 25% reduction in other pollutants may be considered eligible for funding under this program.

(d) The executive director may establish additional criteria for purposes of prioritizing projects for selection. Such criteria may include, but are not limited to:

(1) nonattainment status of the primary location in which the eligible vehicles are used; or

(2) cost per ton benefits of the overall emissions being reduced.

(e) The executive director shall waive the requirements of subsection (b)(1) of this section on a finding of good cause, which may include a waiver for short lapses in registration or operation attributable to economic conditions, seasonal work, or other circumstances.

§114.654. Usage and Disposition.

(a) Not less than 75% of the annual use of the qualifying vehicle, either mileage or fuel use as determined by the executive director, must occur in Texas.

(b) A vehicle or engine replaced under this program must be rendered permanently inoperable by crushing the vehicle, by making a hole in the engine block and permanently destroying the frame of the vehicle, or by another method approved by the executive director that permanently removes the vehicle from operation in this state [in accordance with criteria established by the executive director]. The executive director shall provide a means for an applicant to propose an alternative method for complying with the requirements of this subsection.