

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §114.622 and §114.629.

If adopted, the amendments 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**

The purpose of this rulemaking is to amend existing rules implementing the Diesel Emissions Reduction Incentive (DERI) Program established under Texas Health and Safety Code (THSC), Chapter 386, Subchapter C. The DERI Program provides financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment.

Senate Bill (SB) 1727, 83rd Legislature, 2013, amended THSC, Chapter 386, Subchapter C, to revise existing criteria for receiving an incentive grant under this subchapter. The revision to THSC, §386.106, removed the maximum cost-effectiveness limit of \$15,000 per ton of nitrogen oxides (NO<sub>x</sub>) reduced in the nonattainment area or affected county for which the project is proposed.

The proposed rulemaking would incorporate the change to THSC, §386.106, under SB 1727.

In addition, on May 21, 2012, the EPA published a revision to 40 Code of Federal Regulations Part 81, effective July 20, 2012 amending the designation of nonattainment areas for the 2008 Ozone National Ambient Air Quality Standard. Under the revised EPA rule, Wise County was added to the designation of the Dallas-Fort Worth 2008 Eight-Hour Ozone Nonattainment Area.

The proposed rulemaking would add Wise County to the list of applicable counties for the DERI Program.

### **Section by Section Discussion**

#### *§114.622, Incentive Program Requirements*

The commission proposes to amend §114.622 to incorporate a change to the program eligibility criteria under THSC, §386.106(a).

Proposed subsection (g) would be consistent with amended THSC, §386.106(a), by removing the maximum cost-effectiveness limit of \$15,000 per ton of NO<sub>x</sub> emissions reduced. Under the proposed change to this subsection, the commission would be authorized to set cost-effectiveness limits as needed to ensure the best use of available funds.

*§114.629, Affected Counties and Implementation Schedule*

The commission proposes to amend §114.629 to update the list of applicable counties in the Texas Emissions Reduction Program (TERP) incentive program to be consistent with the latest designation of nonattainment areas for the 2008 Ozone National Ambient Air Quality Standard by the EPA. Subsection (a) would be amended to add Wise County to the list of applicable counties based on the addition of Wise County to the Dallas-Fort Worth 2008 Eight-Hour Ozone Nonattainment Area.

**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 rulemaking is 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 use funding appropriated out of the TERP - Account 5071 to implement the changes made to the DERI Program in the proposed rule. For the 2014 - 2015 biennium, appropriated funding for DERI Program grants is approximately \$34 million each year.

The proposed rulemaking would amend Chapter 114 to implement parts of SB 1727 and to update the list of applicable counties in the DERI Program as a result of changes to the EPA designation of nonattainment areas for the 2008 Ozone National Ambient Air Quality Standard. Specifically, the proposed rulemaking would remove the maximum

limits on the cost-effectiveness of a project and add Wise County to the list of applicable counties.

If the commission establishes a cost-effectiveness limit for the DERI Program that is higher than the original limit of \$15,000 per ton of NO<sub>x</sub> reduced, state agencies and local governments interested in applying for the program may benefit if their projects qualify for a larger incentive amount. Applying for a grant would be voluntary, and it is not known at this time how many state agencies or local governments would do so. Under current rules, the typical grant award ranges from \$50,000 to \$100,000. Under the proposed changes, the average grant award could increase depending on the limits established by the commission.

### **Public Benefits and Costs**

Nina Chamness also determined that for each of the first five years the proposed rulemaking is in effect, the anticipated public benefit will be an improvement in air quality in the 42 counties eligible to receive DERI Program grant funding since a greater number of vehicles and equipment will become eligible for replacement or upgrade using grant funds.

The proposed rulemaking may not have a significant fiscal impact on individuals unless they qualify for a DERI Program grant. Individuals that can utilize DERI Program

funding should experience the same cost benefits as a local government or large business.

If the commission establishes a cost-effectiveness limit for the DERI Program that is higher than the original limit of \$15,000 per ton of NO<sub>x</sub> reduced, businesses interested in applying for the program may benefit if their projects qualify for a larger incentive amount. Applying for a grant would be voluntary, and it is not known at this time how many businesses would do so. Under current rules, the typical grant award ranges from \$50,000 to \$100,000. Under the proposed changes, the average grant award could increase depending on the limits established by the commission.

Staff is not able to determine how many additional businesses may become eligible to apply for a grant as a result of these changes.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rulemaking may make it easier for a small or micro-business to qualify for a grant under the DERI Program. Small or micro-businesses are expected to experience the same benefits as a large business. Staff is not able to determine how many additional small and micro-businesses may become eligible to apply for a DERI Program grant as a result of these changes.

### **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 rulemaking is required by state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rulemaking is 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 rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is 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 rulemaking 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 SB 1727, 83rd Legislature, 2013, which amended THSC, Chapter 386. The proposed rules add or revise eligibility requirements for a voluntary grant program. 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. In addition, the amendments do not 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 SB 1727, 83rd Legislature, 2013. The rules make revisions to voluntary programs and only affect motor vehicles and equipment that are not considered to be private real property. The promulgation and enforcement of the proposed rules are neither a statutory nor a constitutional taking because the proposed rules do 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 revises voluntary incentive grant programs 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 December 12, 2013 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 Bruce McAnally, 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 2013-036-114-AI. The comment period closes December 18, 2013. 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](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Steve Dayton, Implementation Grants Section, at (512) 239-6824.

**SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS**

**DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM**

**FOR ON-ROAD AND NON-ROAD VEHICLES**

**§114.622 and §114.629**

**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. The 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; THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, Chapter 386, which establishes the Texas Emission Reduction Plan. Finally, the amendments are proposed as part of the implementation of Senate Bill 1727, 83rd Legislature, 2013.

The proposed amendments implement THSC, §386.104 and §386.106.

**§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<sub>x</sub>) 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 NOX 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, a project involving non-road equipment used for natural gas recovery purposes, a project involving replacement of a motor vehicle, or a project involving the purchase or lease of a motor vehicle, 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 motor vehicle replacement, purchase, or lease project, the period used to determine the emissions reductions and cost-effectiveness of each replacement, purchase, or lease activity included in the project must extend for five

years or more, or 400,000 miles, whichever occurs earlier. Not less than 75% of the vehicle miles traveled projected for the period used to determine the emissions reductions 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 of a nonattainment county or affected county to count towards the percentage of use requirement.

(d) 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.

(e) For a proposed project to replace a motor vehicle, the vehicle and engine must be decommissioned by crushing the vehicle and engine, 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 and engine from operation in this state. For a proposed project to repower a motor vehicle, the engine being replaced must be decommissioned in a manner consistent with the requirements for decommissioning an engine as part of a vehicle replacement project.

The executive director shall allow an applicant for a motor vehicle replacement or repower project to propose an alternative method for complying with the requirements of this subsection.

(f) For a project to replace a motor vehicle, the vehicle being replaced may have been owned, leased, or otherwise commercially financed by the applicant. The applicant must have a legal right to replace and recycle or scrap the vehicle and engine before a grant is awarded for that project.

(g) [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<sub>x</sub> 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<sub>x</sub> emissions in relation to the funds to be awarded.

(h) The executive director shall waive eligibility requirements established under subsections (b) - (f) of this section on a finding of good cause, which may include a waiver of any ownership and use requirements established for replacement of a motor

vehicle for short lapses in registration or operation attributable to economic conditions, seasonal work, or other circumstances. In determining good cause and deciding whether to grant a waiver, the executive director shall ensure that the emissions reductions that will be attributed to the project will still be valid and, where applicable, meet the conditions for assignment for credit to the state implementation plan.

(i) 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.

(j) 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.

(k) 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 compared with the baseline emissions adopted by the commission for the relevant engine year and application.

(l) 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.

(m) 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.

**§114.629. 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, Wilson, Wise, 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.