

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§114.650, 114.653, and 114.656 *without changes* to the proposed text as published in the November 22, 2013, issue of the *Texas Register* (38 TexReg 8396), and therefore, the amendments will not be republished.

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 Adopted Rules

This rulemaking amends existing rules for implementing the Texas Clean Fleet Program (program) established under Texas Health and Safety Code (THSC), Chapter 392.

The program is one of several incentive programs under the Texas Emissions Reduction Plan (TERP) as listed under THSC, §386.051. The TERP was established by the Texas Legislature to create monetary incentives for the implementation of projects to improve air quality in the state's nonattainment areas. Other eligible counties within the state that may face air quality challenges in the future are also eligible for incentives under the TERP. Projects eligible for funding under the TERP are intended to reduce nitrogen oxide (NO_x) emissions and other pollutants of concern. NO_x is usually a by-product of high-temperature combustion that can react with volatile organic compounds in the presence of sunlight to form ground-level ozone.

This program is designed to encourage owners of eligible vehicle fleets to replace diesel vehicles with alternative fuel or hybrid vehicles. Senate Bill (SB) 1727, 83rd Legislature, 2013, amended THSC, Chapter 392, to revise current standards for determining eligible grant amounts. Senate Bill 1727 also amended THSC, Chapter 386, to include additional eligibility criteria for projects related to transportation of raw agricultural products under the program. The changes made under SB 1727 are as summarized in the following paragraphs.

THSC, §386.0515, was added by SB 1727. This section defines "agricultural product transportation" and directs the commission to provide by rule or policy specific eligibility requirements under the Texas Clean Fleet Program for projects related to agricultural product transportation. Under this section, the determining factor for eligibility for participation in the program for a project related to agricultural product transportation is the overall accumulative net reduction in NO_x emissions in a nonattainment area, an affected county, or the clean transportation triangle established under THSC, Chapter 394.

THSC, §392.007(a), was revised to remove the different standards for the percentage of incremental costs that may be covered by a grant based on the model year of the heavy-duty diesel engine or light-duty diesel vehicle being replaced. The revision to this

subsection specifies that the amount the commission is to award under a grant for each vehicle being replaced is up to 80%, as determined by the commission, of the total cost for replacement of a heavy-duty or light-duty diesel engine.

These rules incorporate the changes to THSC, Chapter 386 and Chapter 392, under SB 1727.

Section by Section Discussion

§114.650, Definitions

Section 114.650 is amended to add a new paragraph (1) to include a definition for "Agricultural product transportation," as established under THSC, §386.0515, and renumber the subsequent paragraphs accordingly. The new paragraph defines agricultural product transportation as the transportation of a raw agricultural product from the place of production using a heavy-duty on-road vehicle to: a nonattainment area; an affected county, as defined under THSC, §386.001; a destination inside the clean transportation triangle established under THSC, §394.010; or a county adjacent to an affected county or that contains an area in a nonattainment area or the clean transportation triangle.

§114.653, Grant Eligibility

Section 114.653(a) is amended to replace the phrase "a reduction in emissions of nitrogen oxides" with "nitrogen oxide emission reductions." This change is made for editorial purposes.

The revisions to §114.653 also add subsection (f) to direct that in establishing more specific requirements or additional criteria, as authorized under this section, for projects related to agricultural product transportation, the executive director shall use as a determining factor for eligibility the overall accumulative net reduction in NO_x emissions in a nonattainment area, an affected county, or the clean transportation triangle.

§114.656, Eligible Grant Amounts

Revisions to §114.656(a) and (b) delete provisions in paragraphs (1) - (4) of subsection (a) and paragraphs (1) - (3) of subsection (b) that established different percentages of the incremental cost of replacement of a vehicle that may be covered by the grant award, based on the model year of the heavy-duty diesel engine or light-duty diesel vehicle. The amendment to subsection (a) establishes a new maximum grant amount for replacement of a heavy-duty vehicle of up to 80%, as determined by the executive director, of the total cost for replacement. The amendment to subsection (b) establishes a new maximum grant amount for replacement of a light-duty on-road vehicle of up to 80%, as determined by the executive director, of the total cost for replacement.

The revisions to §114.656(c) update the provisions to be consistent with the changes to subsections (a) and (b). Under existing language, the executive director is authorized to revise the standards for determining the grant amounts, as listed in subsections (a) and (b), to reflect changes to federal emission standards and decisions on pollutants of concern. Under the changes to subsections (a) and (b), the maximum limits on grant amounts are no longer specifically linked to the different model years of heavy-duty engines or light-duty vehicles being replaced, which correspond to the different federal emission standards for NO_x based on engine or vehicle model years. Instead, a single maximum limit on the grant amount for all projects, regardless of model year of the engine or vehicle, is set at up to 80% of the total cost of the replacement. The changes to subsection (c) authorize the executive director to set more specific standards for determining grant amounts, within the new maximum limit of 80% of the total cost, consistent with the priorities for project selection, including consideration of the federal emissions standards for different model years of engines and vehicles, decisions on pollutants of concern, and other factors that will help implement the project priorities that may be established by the executive director under THSC, §386.056.

Final Regulatory Impact 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 adopted in accordance with SB 1727, which amended THSC, Chapter 386 and Chapter 392. The program offers financial incentives for the voluntary replacement of diesel engines. Because the rules place no involuntary requirements on the regulated community, the 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 amendments place additional financial burdens on the regulated community.

In addition, a 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. 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 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 or federal program.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed an analysis of whether the 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. The rules amend the criteria for implementing a voluntary program and only affect motor vehicles that

are not considered to be private real property. The promulgation and enforcement of the rules is neither a statutory nor a constitutional taking because the 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 rulemaking and found the adoption 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.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on December 12, 2013. The comment period closed on December 18, 2013. The commission received comments from Beneficial Results, the EPA, the Regional Transportation Council of the North Central Texas Council of Governments (NCTCOG), Public Citizen, and the Lone Star Chapter of the Sierra Club (Sierra Club).

Beneficial Results, EPA, NCTCOG, Public Citizen, and Sierra Club commented in support of the rulemaking. NCTCOG and Sierra Club both recommended changes and additions to the rulemaking.

Response to Comments

EPA, NCTCOG, Public Citizen, and Sierra Club expressed support for the proposed rulemaking and the Texas Clean Fleet Program.

The commission appreciates the support expressed for this program. No changes to the proposed text were made in response to these comments.

Sierra Club commented in support of the addition of agricultural product transportation projects as being eligible for this program, including the language under §114.653(f)

making it clear that the commission will prioritize funding based on reductions in NO_x emissions.

The commission appreciates the support expressed for the program changes. No changes to the proposed text were made in response to these comments.

NCTCOG recommended that the definition of "Alternative fuel" under §114.650(2) be changed to match the Federal Energy Policy Act (EPA) of 1992, codified under 42 United States Code, §13211. The EPA definition states that "the term Alternative Fuel means methanol, denatured ethanol, and other alcohols; mixtures containing 85 percent or more (or such other percentage, but not less than 70 percent, as determined by the Secretary, by rule, to provide for requirements relating to cold start, safety, or vehicle functions) by volume of methanol, denatured ethanol, and other alcohols with gasoline or other fuels; natural gas, including liquid fuels domestically produced from natural gas; liquefied petroleum gas; hydrogen; coal-derived liquid fuels; fuels (other than alcohol) derived from biological materials; electricity (including electricity from solar energy); and any other fuel the Secretary determines, by rule, is substantially not petroleum and would yield substantial energy security benefits and substantial environmental benefits."

The commission appreciates NCTCOG's recommendation. However, the definition of alternative fuel in the rules is consistent with the definition in THSC, §392.001(a). It was clearly the intent of the legislature to restrict the definition to a more limited number of fuel types than may be listed in the federal definitions. No changes were made to the proposed text as a result of this comment.

NCTCOG commented that the definition of a "Neighborhood electric vehicle" under §114.650(9) contradicts the definition under Texas Transportation Code, §551.301, which states that a neighborhood electric vehicle means a vehicle that can attain a maximum speed of 35 miles per hour (mph) on a paved level surface and otherwise complies with Federal Motor Vehicle Safety Standard 500 under 49 Code of Federal Regulations (CFR) §571.500. NCTCOG recommended aligning the definition for this program with the definition in the Texas Transportation Code.

The commission appreciates the recommendation by NCTCOG. The definition in the rule is consistent with the definition of a neighborhood electric vehicle established for this program by the legislature under THSC, §392.001(8). The rule and statutory language apply both the equipment requirements and safety standards established under 49 CFR §571.500 and the definition of a "slow-moving vehicle" established under Texas

Transportation Code, §547.001. Under all of these provisions, a neighborhood electric vehicle is limited to a speed of no more than 25 mph rather than the 35 mph under the definition in the Texas Transportation Code. The commission has determined that the definition language in the rules implements the legislative direction for this program. No changes were made to the proposed text as a result of this comment.

NCTCOG commented on the proposed change to §114.653(a). The phrase "a reduction in emissions of nitrogen oxides" is changed to read "nitrogen oxide emission reductions." NCTCOG recommended keeping the term "nitrogen oxides" plural to encompass both nitrogen monoxide and nitrogen dioxide.

The commission appreciates the comments by NCTCOG. The intent of this change is grammatical and to make the usage of the terms consistent with other commission rules and programs. The change is not intended to narrow the focus to only one component of NO_x. Under this change the term is used as an adjective to the subject noun "emission reductions." In this context, the singular form is appropriate and the phrase retains the same overall meaning as the phrase being changed. No changes were made to the proposed text as a result of this comment.

NCTCOG also commented that reductions in particulate matter and other pollutants can be secondary goals for this program but should not take precedence over NO_x reductions.

The commission appreciates the comment by NCTCOG. The approach recommended by NCTCOG is consistent with how the commission has implemented the program. No changes were made to the proposed text as a result of this comment.

Sierra Club recommended that language be added to §114.656(c) to include criteria of achieving real emissions reduction in other pollutants, in addition to reductions in NO_x emissions. Sierra Club provided suggested language to be added at the end of this subsection to read "including the benefits of reducing more than one pollutant of concern."

The commission appreciates the recommendations provided by the Sierra Club and agrees that this program will help reduce other pollutants in addition to NO_x. The proposed text already includes the phrase "decisions on pollutants of concern," allowing the executive director to consider other pollutants of concern when setting priorities for project selection under a particular grant round. This language is sufficient to address other

pollutants, in addition to NO_x emissions, in the grant selection process if decisions are made by the commission that those other pollutants are of concern and should be considered as part of the priorities for the program. Therefore, no changes to the proposed text were made in response to these comments.

Sierra Club commented to remind the commission that in spending money budgeted for the program, the commission should quickly shift money to other programs if there is not demand from applicants.

These comments are outside the scope of this rulemaking. The commission appreciates the comment and understands the need to adjust the funding allocations among the various TERP incentive programs to ensure that funds are used effectively. No changes to the proposed text were made in response to these comments.

NCTCOG commented to encourage full funding of the TERP programs through the appropriation of all revenue collected under the program. NCTCOG encouraged the commission to request full funding of the TERP programs as budgets are prepared for the next biennium.

The commission appreciates NCTCOG's support for funding the TERP programs; however, these comments are outside of the scope of this rulemaking. Decisions on appropriation levels are made by the Texas Legislature. Also, how the commission structures the biennial appropriations request is guided by direction from the Legislative Budget Board (LBB). The commission will continue to work with members of the legislature and the LBB regarding appropriation funding levels for the TERP programs. No changes to the proposed text were made as a result of this comment.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 5: TEXAS CLEAN FLEET PROGRAM

§§114.650, 114.653, 114.656

Statutory Authority

These amendments are adopted 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 adopted 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 adopted under THSC, Chapter 392, and are part of the implementation of Senate Bill 1727.

§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) Agricultural product transportation--The transportation of a raw agricultural product from the place of production using a heavy-duty on-road vehicle to:

(A) a nonattainment area;

(B) an affected county as defined under Texas Health and Safety Code (THSC), §386.001;

(C) a destination inside the clean transportation triangle established under THSC, §394.010; or

(D) a county adjacent to a county described by subparagraph (B) of this paragraph or that contains an area described by subparagraph (A) or (C) of this paragraph.

(2) 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.

(3) Eligible entity--Any person or entity with a fleet of 75 or more vehicles that:

(A) are registered in Texas; and

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

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

(5) 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.

(6) 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.

(7) 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.

(8) 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.

(9) 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.

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

§114.653. Grant Eligibility.

(a) To be eligible for a grant under the program a project must result in nitrogen oxide emission reductions 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. 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.

(f) In establishing more specific requirements or additional criteria, as authorized under this section, for projects related to agricultural product transportation, the executive director shall use as a determining factor for eligibility for participation in the program established under this division the overall accumulative net reduction in

nitrogen oxide emissions in a nonattainment area, an affected county, or the clean transportation triangle.

§114.656. Eligible Grant Amounts.

(a) The eligible grant amount for each heavy-duty on-road vehicle being replaced is up to 80%, as determined by the executive director, of the total cost for replacement.

(b) The eligible grant amount for each light-duty on-road vehicle being replaced is up to 80%, as determined by the executive director, of the total cost for replacement.

(c) The executive director may establish more specific standards for determining grant amounts within the maximum percentage of total costs established under this section consistent with the priorities for project selection, including consideration of the federal emission standards for different model years of heavy-duty engines and light-duty vehicles, decisions on pollutants of concern, and other factors that will help implement the project priorities.

(d) To be eligible for replacement, vehicles and engines imported into the United States from another country must have met all applicable emissions certification requirements for importation.