

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §§114.640, 114.642, 114.644, 114.646, and 114.648; and the simultaneous adoption of new §§114.640, 114.642, 114.644, 114.646, and 114.648 *without changes* to the proposed text as published in the December 27, 2013, issue of the *Texas Register* (38 Tex Reg 9439). The new sections will not be republished.

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

### **Background and Summary of the Factual Basis for the Adopted Rules**

House Bill (HB) 1796, 81st Legislature, 2009, authored by Representative Warren Chisum, amended the Clean School Bus Program (referred to as the Texas Clean School Bus Program, or TCSB), Texas Health and Safety Code (THSC), Chapter 390, to extend the expiration date for the TCSB Program from August 31, 2013 to August 31, 2019. The adopted rulemaking would allow for the continuance of the existing TCSB Program through August 31, 2019, or later if the program is extended or reauthorized by the Texas Legislature and provide for administrative cleanup.

The TCSB was originally established by the Texas Legislature in 2005 to fund efforts by school districts and other local or regional planning entities or nonprofit organizations to improve the health of children by reducing emissions of diesel exhaust from school

buses. Reduction of emissions from diesel-powered school buses will also benefit the public in ozone nonattainment areas and throughout the state by reducing emissions of nitrogen oxides (NO<sub>x</sub>), which are important contributors to ozone formation. Under the adopted sections, school districts, charter schools, regional planning organizations, councils of government, or similar regional planning agencies created under the Local Government Code, Chapter 391, or private nonprofit organizations would be eligible to apply for grants for the use of emission reducing catalysts, particulate filters, qualifying fuels, and other emission reducing add-on equipment or technology that the commission finds will reduce emissions.

### **Section by Section Discussion**

The commission adopts the repeal of existing §§114.640, 114.642, 114.644, 114.646, and 114.648 as these requirements expired on August 31, 2013, and adopts new §§114.640, 114.642, 114.644, 114.646, and 114.648 to implement the TCSB.

#### *§114.640, Definitions*

Adopted new §114.640 provides definitions for the TCSB Program. Definitions specific to the TCSB include definitions of diesel exhaust, incremental cost, qualifying fuel, repower, and retrofit.

#### *§114.642, Applicability*

Adopted new §114.642 establishes program eligibility for school districts and charter schools, as well as for regional planning commissions, councils of government or similar regional planning agencies created under Local Government Code, Chapter 391, or private nonprofit organizations.

*§114.644, Clean School Bus Program Requirements*

Adopted new §114.644 establishes basic program requirements. The adopted section addresses the types of emission reduction projects that would be eligible to receive funding, as well as grant funding particulars such as prioritization and other specifics associated with grant eligibility.

*§114.646, Monitoring, Recordkeeping, and Reporting Requirements*

Adopted new §114.646 establishes that grant recipients must adhere to monitoring, recordkeeping, and reporting requirements of their grant, which will occur no less frequently than annually.

*§114.648, Expiration*

Adopted new §114.648 establishes that the TCSB Program will expire on August 31, 2019, unless the program is extended or reauthorized by the Texas Legislature.

**Final Regulatory Impact Determination**

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking 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, 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. Additionally, the adopted rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). 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.

The adoption to Chapter 114 would replace expired sections of the TAC with new sections to provide for the continued implementation of the TCSB Program as required by the Texas Legislature. The TCSB Program is intended to reduce diesel exhaust

emissions from school buses by funding eligible projects, and is a voluntary incentive program. The Texas Legislature authorized the issuance of grants under the TCSB Program to protect the environment and reduce risks to human health from environmental exposure, but the adopted rulemaking is not expected to 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, since the repeal and replacement with new sections are to provide for continued implementation of the TCSB Program, which is a voluntary program designed to assist school districts in reducing school bus emissions.

The adopted rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the national ambient air quality standards (NAAQS) in each air quality control region of the state. Since the TCSB Program was designed to provide emission reductions from school buses and funded by the Texas Legislature, the commission previously submitted the TCSB Program rules to the EPA as a revision to the Texas SIP, which EPA approved. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may

be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85). The provisions of the Federal Clean Air Act (FCAA) recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is

not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted the adopted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule adopted for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are

extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a) because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially un-amended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ*). *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied*); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the

legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of these rules is to remove expired sections from the TAC and adopt new sections to provide for the continued implementation of the TCSB Program as required by the Texas Legislature. As discussed elsewhere in this preamble, the repeal to remove expired sections from the TAC and adopted new sections amount to a mere administrative clean-up to ensure that there is no confusion on the part of the public regarding the continuation of the TCSB Program, as intended by the Texas Legislature. Additionally, even if the adopted rulemaking was a major environmental rule, the adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this adopted rulemaking. Therefore, this adopted rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b) because the adopted rulemaking does not meet the definition of a "major environmental rule," nor does it meet any of the four applicability criteria for a major environmental rule.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period and received no comments.

### **Takings Impact Assessment**

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The specific intent of these rules is to remove expired sections from the TAC and propose new sections to provide for the continued implementation of the TCSB Program as required by the Texas Legislature. As discussed elsewhere in this preamble, the repeal to remove expired sections from the TAC and adopt new sections amount to a mere administrative clean-up to ensure that there is no confusion on the part of the public regarding the continuation of the TCSB Program, as intended by the Texas Legislature. The adopted rules would substantially advance this stated purpose by repealing the original sections in Chapter 114, Division 4 and replacing those sections with new sections prescribing the requirements of the TCSB Program.

Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by state law. THSC, Chapter 390, Clean School Bus Program, requires the commission to establish and administer a clean school bus program designed to reduce the exposure of school children to diesel exhaust

in and around diesel-fueled school buses. Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4).

Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a "taking" under Texas Government Code, Chapter 2007. Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These adopted rules create a voluntary program for school districts in the state to apply for and receive grants for the offset of incremental cost of projects that reduce diesel exhaust emissions.

In addition, because the subject adopted regulations do not provide more stringent requirements they do not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these rules will not constitute a taking under the Texas Government Code, Chapter 2007. For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

### **Consistency with the Coastal Management Program**

The commission reviewed the adopted 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 revises voluntary incentive grant programs and does not govern air pollution emissions.

The commission invited public comment regarding the consistency with the CMP during the public comment period and received no comments.

### **Effect on Sites Subject to the Federal Operating Permits Program**

Chapter 114 does not contain applicable requirements under 30 TAC Chapter 122, Federal Operating Permits; therefore, owners or operators subject to the Federal Operating Permit Program will not be required to revise their operating permits, consistent with the revision process in Chapter 122, to include the revised Chapter 114 requirements for each emission unit at their sites affected by the revisions to Chapter 114.

### **Public Comment**

The commission held a public hearing on January 21, 2014. The comment period closed on January 27, 2014. The commission received written comments from the Regional Transportation Council of the North Central Texas Council of Governments (NCTCOG). The NCTCOG supported the rulemaking and provided recommendations for expanding the scope of the TCSB.

### **Response to Comments**

The NCTCOG recommended that the TCSB be expanded to allow for replacements and include a NO<sub>x</sub> reduction component. As part of their overall comment to allow for school bus replacements, NCTCOG suggested the following changes: 1) a change to the definition of qualifying fuel to include any renewable or alternative fuel registered or verified by the EPA other than standard gasoline or diesel; 2) adding a definition of replacement to clarify that project eligibility includes school bus replacement activities; 3) expanding the definition of retrofit to include both NO<sub>x</sub> and particulate matter retrofits approved by either the EPA or the California Air Resources Board; and 4) expanding the list of eligible projects to specifically include NO<sub>x</sub> retrofits, engine repowers, and school bus replacements. The NCTCOG also commented that §114.644(e) be revised to disallow the removal of old equipment from the State of Texas, including retrofits and engines, as well as chassis, upon the inclusion of school bus replacements in the TCSB.

**The commission acknowledges the comment provided by the NCTCOG. The commission has made no changes in response to this comment. The TCSB was established to reduce particulate matter in and around the school bus. The inclusion of NO<sub>x</sub> emissions reductions, as recommended by the NCTCOG, would fall outside the scope of the TCSB. Other programs under the Texas Emissions Reduction Plan (TERP) umbrella, such as the Texas Clean Fleet Program and the Texas Natural Gas Vehicle Grant Program, offer grants for school bus replacements.**

The NCTCOG also commented that a portion of funds be earmarked for administrative costs to cover the expense of compliance and enforcement of the program.

**The commission has made no changes in response to this comment. The adopted rules reflect THSC, §390.005, which states "the recipient may not use the grant to pay for administrative expenses."**

The NCTCOG commented that it supports the TCSB and encourages the full funding of TERP through the appropriation of all revenue collected under the program. NCTCOG further encouraged the commission to request full funding of TERP as budgets are prepared for the next biennium.

**The commission appreciates NCTCOG's support for funding the TERP programs, however, the comment is outside 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 LBB. The commission will continue to work with members of the legislature and the LBB to help them determine the appropriation funding levels for the TERP programs. No changes to the proposed text were made in response to this comment.**

**SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS**  
**DIVISION 4: TEXAS CLEAN SCHOOL BUS PROGRAM**  
**§§114.640, 114.642, 114.644, 114.646, 114.648**

**Statutory Authority**

The repeals 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. The rulemaking is also adopted under Texas Health and Safety Code (THSC), §382.002, policy and purpose of the Texas Clean Air Act (TCAA), THSC, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; and 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. Finally, the rulemaking is adopted under THSC, Chapter 386, which established the Texas Emissions Reduction Program and THSC, Chapter 390, which established the Texas Clean School Bus Program, and as part of the implementation of House Bill 1796, 81st Legislature, 2009.

The repeals implement THSC, §§382.002, 382.011, and 382.017 and THSC, Chapter 386 and Chapter 390, and House Bill 1796, 81st Legislature, 2009.

**§114.640. Definitions.**

**§114.642. Applicability.**

**§114.644. Clean School Bus Program Requirements.**

**§114.646. Monitoring, Recordkeeping, and Reporting Requirements.**

**§114.648. Implementation Schedule.**

**SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS**  
**DIVISION 4: TEXAS CLEAN SCHOOL BUS PROGRAM**  
**§§114.640, 114.642, 114.644, 114.646, 114.648**

**Statutory Authority**

The new sections 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. The rulemaking is also adopted under Texas Health and Safety Code (THSC), §382.002, policy and purpose of the Texas Clean Air Act (TCAA), THSC, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; and 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. Finally, the rulemaking is adopted under THSC, Chapter 386, which established the Texas Emissions Reduction Program and THSC, Chapter 390, which established the Texas Clean School Bus Program, and as part of the implementation of House Bill 1796, 81st Legislature, 2009.

The adopted new sections implement THSC, §§382.002, 382.011, and 382.017 and THSC, Chapter 386 and Chapter 390, and House Bill 1796, 81st Legislature, 2009.

**§114.640. 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 shall have the following meanings, unless the context clearly indicates otherwise.

(1) Diesel exhaust--One or more of the air pollutants emitted from an engine by the combustion of diesel fuel, including particulate matter, nitrogen oxides, volatile organic compounds, air toxics, and carbon monoxide.

(2) Incremental cost--The cost of an applicant's project less a baseline cost that would otherwise be incurred by an applicant in the normal course of business. Incremental costs may include added lease or fuel costs as well as additional capital costs.

(3) Qualifying fuel--Includes any liquid or gaseous fuel or additive registered or verified by the United States Environmental Protection Agency, other than standard gasoline or diesel, that is ultimately dispensed into a school bus that provides reductions of emissions of particulate matter.

(4) Repower--To replace an old engine powering an on-road or non-road diesel with a new engine; a used engine; a remanufactured engine; or electric motors, drives, or fuel cells.

(5) Retrofit--To equip an engine and fuel system with new emissions-reducing parts or technology verified by the United States Environmental Protection Agency after manufacture of the original engine and fuel system.

**§114.642. Applicability.**

(a) Any school district or charter school in this state that operates one or more diesel-fueled school buses or a transportation system provided by a countywide school district may apply for and receive a grant under the program.

(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.

**§114.644. Clean School Bus Program Requirements.**

(a) Eligible projects include:

- (1) diesel oxidation catalysts for school buses built before 1994;
- (2) diesel particulate filters for school buses built from 1994 to 1998;
- (3) the purchase and use of emission-reducing add-on equipment for school buses, including devices that reduce crankcase emissions;
- (4) the use of qualifying fuel; and
- (5) other technologies that the commission finds will bring about significant emissions reductions.

(b) The commission may limit funding under a particular funding round to certain areas of the state, types of applicants, and/or types of projects. The commission

may place a priority on funding for projects conducted in areas that do not attain certain national ambient air quality standards.

(c) Prior to each funding period, the commission may establish priorities and other criteria for reductions in diesel exhaust emissions to be achieved by projects funded during that period, including designation of additional pollutants to be addressed. A proposed project must achieve a reduction in emissions of diesel exhaust compared with the baseline emissions according to the percentage reduction level and other priorities established by the commission. The commission may also establish maximum levels for the funding awarded in relation to the emission reductions projected to be achieved by a project, in order to maximize the use of available funds.

(d) A school bus proposed for retrofit must be used on a regular, daily route to and from a school and have at least five years of useful life remaining unless the applicant agrees to remove the retrofit device at the end of the life of the bus and reinstall the device on another bus.

(e) For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled, scrapped, or otherwise permanently removed from the State of Texas.

(f) An application for a grant under this program is only eligible if it is made on the form provided by the commission and contains the information required by the commission.

(g) A recipient of a grant under this division shall use the grant to pay incremental costs of the project for which the grant is made, which may include the reasonable and necessary expenses incurred for the labor needed to install emissions-reducing equipment. The recipient may not use the grant to pay the recipient's administrative expenses.

(h) 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.

(i) 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 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 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.

(j) 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.

**§114.646. Monitoring, Recordkeeping, and Reporting Requirements.**

Grant recipients must meet the monitoring, recordkeeping, and reporting requirements of their grant. Reporting requirements must occur no less frequently than annually.

**§114.648. Expiration.**

This division expires August 31, 2019, unless the program is extended or reauthorized by the Texas Legislature.