

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** March 21, 2014

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2013-1192-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 114, Control of Air Pollution From Motor Vehicles
SB 1727: Emissions Reduction Incentive Grants Program
Rule Project No. 2013-036-114-AI

Background and reason(s) for the rulemaking:

Senate Bill (SB) 1727, 83rd Legislature, 2013, Regular Session, by Senators Deuell and Garcia, amends Texas Health and Safety Code (THSC), Chapter 386, Subchapter C. This subchapter establishes the Diesel Emissions Reduction Incentive (DERI) Program to be funded from the Texas Emissions Reduction Plan (TERP) Fund and administered by the Texas Commission on Environmental Quality (commission). The changes enacted under SB 1727 require amendment of existing rules to revise existing provisions.

In addition, on May 21, 2012, the United States Environmental Protection Agency (EPA) published a revision to Title 40 Code of Federal Regulations (CFR) Part 81 (40 CFR Part 81), effective July 20, 2012, adding a designation for nonattainment areas for the 2008 Ozone National Ambient Air Quality Standard. Under the revised EPA rule, the Dallas-Fort Worth Area was designated nonattainment for the 2008 eight-hour ozone standard, and the 1997 eight-hour ozone nonattainment area was expanded to include Wise County.

According to current commission rules, Wise County automatically became an eligible county under the DERI Program once it was included in the nonattainment area designation. The rule amendment adds Wise County to the list of counties applicable to the DERI Program to make the list consistent with the nonattainment area designation.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do: SB 1727 amended THSC, §386.106(a), to remove the maximum cost-effectiveness limit of \$15,000 per ton of nitrogen oxide (NO_x) emissions reduced. The rule revision removes the cost-effectiveness limits from the rules. The commission may set cost-effectiveness limits as needed to meet the needs of the DERI Program.

Also, the rule revision adds Wise County to the list of applicable counties in the DERI Program to make the list consistent with the EPA's recent addition of Wise County to the counties currently designated nonattainment for ozone in the Dallas-Fort Worth Area.

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B.) Scope required by federal regulations or state statutes: This rulemaking is required by changes to: THSC, Chapter 386, under SB 1727; and changes to 40 CFR Part 81 by the EPA to amend the designation of nonattainment areas for the 2008 Ozone National Ambient Air Quality Standard.

C.) Additional staff recommendations that are not required by federal rule or state statute: Staff is not recommending additional changes to the rules.

Statutory authority:

- Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties;
- 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 the state;
- TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission;
- THSC, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act;
- THSC, §382.011, which authorizes the commission to establish the level of air 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 DERI Program.

Effect on the:

A.) Regulated community: This rulemaking will not affect regulated entities.

B.) Public: The change to remove the cost-effectiveness limits may result in an increase to the eligible grant applicants and amounts depending on the limits that may be set by the commission.

C.) Agency programs: The TERP guidance document, *Guidelines for Emissions Reduction Incentive Grants* (guidelines), will need to be amended. The revised guidelines will need to be adopted by the commission after the rule changes are adopted. Program processes, criteria, and forms will need to be updated.

Stakeholder meetings:

Stakeholder meetings were not held for this rulemaking.

Public Comment:

The proposal was published in the November 22, 2013, issue of the *Texas Register* (38 TexReg 8392). A public hearing was held on December 12, 2013. The comment period

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closed 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, Public Citizen, and Sierra Club also recommended additions to the rulemaking or additional rulemaking. Significant comments and recommendations are discussed further.

NCTCOG commented in support of and recommended use of DERI program funds under §114.622(d) for research and development of advanced emission testing technologies and methodologies to support the inclusion of heavy-duty and diesel vehicles into the Inspection and Maintenance program. No changes were made to the proposed text as a result of this comment.

NCTCOG recommended changes to §114.622(e) pertaining to the destruction or removal from the state of vehicles and equipment replaced under the DERI Program. NCTCOG recommended removal of the option to sell the vehicle or engine out of state. No changes were made to the proposed text as a result of this comment.

NCTCOG commented in support of the removal of the \$15,000 per ton cost-effectiveness limit under §114.622(g) and requested that the commission continue to take cost-effectiveness into consideration and aim to fund projects that will result in the largest emissions reductions in order to garner the greatest air quality benefits. No changes were made to the proposed text as a result of this comment.

Sierra Club expressed support for the addition of Wise County to the list of applicable counties under §114.629. No changes were made to the proposed text as a result of this comment.

NCTCOG requested clarification on the intent of §114.629(b), which states that equipment purchased before September 1, 2001, is not eligible for a grant under the program. NCTCOG asked whether this restriction applies to the model year of the vehicle or the date of ownership. In the response to comments section of the rule preamble, it was explained that the provision applies to the purchase date. No changes were made to the proposed text as a result of this comment.

Beneficial Results, Public Citizen, and Sierra Club commented on the authority of the commission under THSC, §386.051(b-1), to implement additional programs under the TERP that may not be specifically outlined in the statutory provisions. Public Citizen recommended guidelines or rule language to implement this authority and to support the retrofit or replacement of trucks and off-road equipment used in fracking operations in oil and gas production fields adjacent to the areas eligible under the regular DERI Program.

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Sierra Club also commented that the commission should implement a rulemaking or add language to this rulemaking to implement a program for reducing emissions from oil and gas development. Sierra Club further commented that it thinks the legislative intent was clear on the ability of the commission to determine eligibility for the additional grant program and that it was intended to be a voluntary program that does not open the oil and gas production facilities to additional regulations. Sierra Club provided proposed language that it indicated could be included in this or other rulemaking. No changes were made to the proposed text as a result of this comment.

Sierra Club commented to remind the commission that in spending monies budgeted for the program, the commission should quickly shift money to other programs if there is not demand from applicants. No changes were made to the proposed text as a result of this comment.

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. No changes were made to the proposed text as a result of this comment.

Significant changes from proposal:

No changes are made from the proposal.

Potential controversial concerns and legislative interest:

This rulemaking does not go further than what is required to comply with statutory changes and to reflect changes to federal rules. Therefore, staff does not anticipate any concerns with the rulemaking. Staff expects legislators involved in SB 1727 to be interested in how the commission implements the changes to the DERI Program criteria.

Does this rulemaking affect any current policies or require development of new policies?

The TERP guidelines will need to be amended to incorporate the changes to the rules.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If the rulemaking is not completed, implementation of the programs under the existing rules would be inconsistent with the statutory provisions. Possible alternatives are not adopting the rules or adopting the rules at a later date and delaying implementation of the program.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: November 22, 2013

Anticipated *Texas Register* adoption publication date: April 25, 2014

Anticipated effective date: May 1, 2014

Six-month *Texas Register* filing deadline: May 22, 2014

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Attachments

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cc: Chief Clerk, 2 copies
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