

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §114.680 and §114.682.

Sections 114.680 and 114.682 are adopted *without changes* to the proposed text as published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2127) and 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 Proposed Rules**

The rulemaking amends existing rules implementing the Drayage Truck Incentive Program (DTIP) established under Texas Health and Safety Code (THSC), Chapter 386, Subchapter D-1.

Under THSC, §386.183(f), the commission may modify the DTIP to improve its effectiveness or further the goals of the Texas Emissions Reduction Plan (TERP). The amendments to the DTIP rules are intended to improve the effectiveness of the DTIP to reduce emissions at and near seaports and rail yards in the state's nonattainment areas. The amendments include non-road cargo handling equipment as eligible for replacement under the program and remove the requirement that the drayage truck being purchased must have a day cab only. In addition, language is added to the definition of a seaport to include publically or privately owned property within a ship channel security district

established under Texas Water Code (TWC), Chapter 68. The Houston Ship Channel Security District (HSCSD) is the only district established in Texas under this provision.

### **Section by Section Discussion**

#### *§114.680, Definitions*

Section 114.680(1) is amended to remove the definition term, "Day cab," under the DTIP and replace it with the term, "Cargo handling equipment." The removal of "Day cab" is made because, with the change to §114.682 to remove the requirement that a new drayage truck purchased under the DTIP have a day cab only, the definition is no longer needed. The term "Cargo handling equipment" is added in conjunction with the addition of cargo handling equipment to §114.682 as eligible for replacement and purchase under the DTIP. The definition of cargo handling equipment includes any heavy-duty, non-road, self-propelled vehicle or equipment used at a seaport or rail yard to lift or move cargo, such as containerized, bulk, or break-bulk goods. The equipment includes, but is not limited to, rubber-tired gantry cranes, yard trucks, top handlers, side handlers, reach stackers, forklifts, loaders, and aerial lifts.

Section 114.680(6) is amended to add language to the definition of "Seaport" to include publically or privately owned property within a ship channel security district established under TWC, Chapter 68.

In the Port of Houston area, there are multiple businesses and facilities with substantial drayage truck activity located in proximity to, but not at, the cargo transfer locations.

The HSCSD includes property where many businesses and facilities associated with port activities in some manner are located and provides an appropriate defined boundary that can be used to delineate an expanded area considered a seaport under the DTIP. The addition to the definition of "Seaport" in §114.680(6) makes drayage trucks operating on or transgressing through the properties included in the HSCSD eligible for replacement under the DTIP.

*§114.682, Eligible Vehicle Models*

Section 114.682(a)(1) is amended to remove the requirement that a heavy-duty on-road vehicle eligible for purchase under the DTIP have a day cab only. Based on visits to many of the rail and port facilities and discussion with port administrators and drayage truck owners, the commission has determined that the goals of the DTIP will be better addressed by allowing on-road heavy-duty vehicles with sleeper cabs to be eligible for purchase under the program. The commission has determined that a number of the drayage truck owners are individual truck owners who contract to provide drayage services and that use vehicles with sleeper berths. The day cab requirement is removed in order to improve the ability of the DTIP to achieve its goals and the goals of the TERP.

Section 114.682(a)(3) and (b)(3) are amended to add "other cargo handling equipment" to the list of drayage truck models eligible for replacement and purchase under the DTIP. Along with the addition of a definition for cargo handling equipment in §114.680, this change expands the program to include replacement and purchase of heavy-duty non-road, self-propelled vehicles or equipment used at a seaport or rail yard to lift or move

cargo, such as containerized, bulk, or break-bulk goods. As noted under the definition, this equipment includes, but is not limited to, rubber-tired gantry cranes, yard trucks, top handlers, side handlers, reach stackers, forklifts, loaders, and aerial lifts. The commission has determined that expanding the program to include other cargo handling equipment at seaports and rail yards helps achieve the goals of the DTIP and the TERP by further reducing the concentrated emissions associated with the movement of cargo at those facilities.

#### **Final Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking in light of the regulatory impact analysis (RIA) 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 rules add or revise eligibility requirements for a voluntary grant program. Because the proposed 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. In addition, the amendments do not place additional financial burdens on the regulated community.

In addition, a RIA is not required because the rules do not meet any of the four applicability criteria for requiring a RIA 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 invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the RIA.

### **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 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 rules are 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 rulemaking 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, 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 coastal management program during the public comment period. No comments were received on the CMP.

### **Public Comment**

The commission held public hearings on April 12, 2016, in Austin and on April 14, 2016, in Houston. The comment period closed on April 18, 2016. The commission received comments from North Central Texas Council of Governments (NCTCOG), Port of Houston Authority (POHA), Regional Transportation Council of the Dallas-Fort Worth Metropolitan Planning Organization (RTC), and Texas Farm Patch LLC (TFP). NCTCOG, RTC, and POHA commented in support of the rulemaking. NCTCOG recommended additional changes to the rules. NCTCOG, RTC, and TFP also provided recommendations that were outside of the scope of this rulemaking.

### **Response to Comments**

#### *Comment*

NCTCOG and POHA commented in support of the rule changes. NCTCOG agreed that the revisions are key to reducing emissions from all vehicles employed in drayage activities and best accomplishing the goals of the program. POHA expressed appreciation that the commission recognizes emissions in the port sector and that there is a program like this, because there are plenty of diesel engines in the port area.

#### *Response*

**The commission appreciates the support expressed for the rulemaking. No changes to the proposed text were made as a result of these comments.**

#### *Comment*

POHA commented in support of the change to §114.680(1) to remove the definition of "Day cab" and the change to §114.682(a)(1) to remove the requirement that a heavy-duty on-road vehicle eligible for purchase under the DTIP have a day cab only. POHA explained that it supports the change because the majority of drayage truck owners are independent owner-operators and that the truck owners want to be as flexible as possible in what they want to do with their trucks. POHA further commented that removing the day cab requirement will give the truck owners some comfort in knowing that after they meet their grant requirements they could use those trucks for long-haul purposes and any other purpose where a sleeper cab would help them. POHA stated that, at the same time, the change will help ensure that the DTIP results in more emissions reductions.

*Response*

**The commission appreciates the POHA's support for the changes. The commission agrees that the removal of the day cab requirement will encourage more independent owner-operators to participate in the DTIP. The commission also hopes that after completion of the grant commitment period participants will continue to use the grant-funded vehicles in the areas where the use of the lower-emitting vehicles can help keep the air clean. No changes to the proposed text were made as a result of these comments.**

*Comment*

POHA also commented in support of adding a new definition of "Cargo handling equipment" to §114.680(1) and to adding "other cargo handling equipment" to the list of

drayage trucks eligible for purchase under §114.682(a)(3) and to the list of drayage trucks eligible for replacement under §114.682(b)(3). POHA commented that adding cargo handling equipment to the DTIP will give POHA and its tenants and any other port-related facilities an additional opportunity to reduce emissions.

*Response*

**The commission appreciates the support expressed for the addition of the term cargo handling equipment and agrees that this change will provide port facilities an additional opportunity to reduce emissions. No changes were made to the proposed text in response to the comments.**

*Comment*

NCTCOG recommended that §114.680(4) containing the definition of "Non-road yard truck" be deleted. NCTCOG recommended that non-road yard trucks be specifically integrated into the new definition of "Cargo handling equipment" added to §114.680(1). NCTCOG commented that integrating non-road yard trucks into the definition of cargo handling equipment would define all non-road equipment together and could be more simply referenced. NCTCOG also recommended that §114.682(a)(2), listing a non-road yard truck as eligible for purchase under the DTIP, and §114.682(a)(3), listing other cargo handling equipment as eligible for purchase under the DTIP, be combined because non-road yard trucks are a type of cargo handling equipment and therefore do not need to be listed as a distinct vehicle type.

*Response*

**The commission agrees that non-road yard trucks are a type of cargo handling equipment. However, the commission does not agree with the proposed changes. The commission anticipates continuing to consider non-road yard trucks separate from other cargo handling equipment when establishing standardized usage rates and grant amounts, and in allowing for possible replacement of an on-road vehicle with a non-road yard truck. Retaining the separate definition of a non-road yard truck in §114.680(4) and separate listing of non-road yard trucks as eligible for purchase in §114.682(a)(2) will help the commission with implementation of the program. No changes to the proposed text were made as a result of this comment.**

*Comment*

NCTCOG recommended additional expansion of the definition of "Seaport" under §114.680(6), or addition of another definition, to accommodate eligibility of inland ports and airports to ensure that all major freight hubs would be eligible for funding. NCTCOG commented that the drayage trucks and cargo handling equipment targeted by the DTIP are critical to operations at all of these types of facilities and ensuring eligibility for all locations would best ensure that funded projects address emissions from the highest-polluting, highest-activity vehicles and equipment, regardless of whether they operate at facilities specifically accessible by air, rail, or ocean. NCTCOG provided a suggested definition of "Logistic center/intermodal facility" be added to the rules. *"Logistic center/intermodal facility - Any publically or privately owned property associated with the primary movement of cargo or materials to or from a multi-model facility, including*

*structures and property devoted to receiving, handling, consolidating, and loading or delivery through the use of drayage truck operations."*

*Response*

**The commission agrees that reducing emissions from vehicles and equipment operating at a wide range of freight hubs will help improve air quality in the nonattainment areas and other affected counties. However, the rule language implements the specific provisions of THSC, §386.183(a)(2)(B), requiring that drayage trucks funded under the program must be operated in and within a maximum distance of a seaport or rail yard in a nonattainment area of this state. Also, the other TERP incentive programs, including the Diesel Emissions Reduction Incentive (DERI) Program established under THSC, Chapter 386, Subchapter C, are available to provide funding for replacement of heavy-duty on-road vehicles and non-road equipment in the nonattainment areas and other affected areas, including vehicles and equipment operating at inland ports and airports. No changes to the proposed text were made in response to these comments.**

*Comment*

NCTCOG recommended streamlining §114.682 by deleting §114.682(c) requiring that replacement drayage trucks have an engine model year 2010 or later and that the drayage truck being replaced have an engine of model year 2006 or earlier. NCTCOG further recommended that those requirements then be added to §114.682(a)(1) and (b)(1), respectively.

*Response*

**The commission does not agree with the changes proposed by NCTCOG. Section 114.682(c) pertains to the model year of the drayage truck engine, while §114.682(a) and (b) pertain to the model year of the drayage truck. The eligibility requirements for the model year of the drayage truck engine are listed separate from the requirements for the model year of the drayage truck in order to make sure that the different requirements are clearly understood. Combining the provisions could make the provisions less clear. No changes to the proposed text were made as a result of this comment.**

*Comment*

NCTCOG commented that for consistency of requirements between on-road vehicles and non-road equipment, the commission should add emissions tier certification requirements to §114.682(a)(2), which lists non-road yard trucks as eligible for purchase under the program. NCTCOG commented that this change would create consistency with the DTIP guidelines, *Texas Emissions Reduction Plan: Guidelines for the Drayage Truck Incentive Program (RG-524)*, which specify that eligible non-road yard trucks must be certified under an EPA certificate of conformity to meet the final Tier 4 non-road engine emission standards.

*Response*

**The commission does not agree with the change recommended by NCTCOG. Under §114.682(c), the drayage truck purchased must have an engine of model year 2010 or later. This provision in the rules implements a statutory requirement established in THSC, §386.182(b). The implementation deadline for meeting the final federal Tier 4 emission standards for a heavy-duty non-road engine in certain horsepower categories was extended through 2014. Therefore, a non-road yard truck with a non-road engine of model year 2010 or later still might not meet the latest federal emission standards or otherwise be certified to a nitrogen oxides emission rate that is substantially lower than the engine on a non-road yard truck being replaced. In recognition of this issue, the commission determined it was appropriate to include supplemental criteria in the DTIP guidelines to also require that the engine on a non-road yard truck purchased under the program meet the final federal Tier 4 emission standards, to help ensure that the project would result in a significant reduction in emissions and that the engine would meet the latest federal emission standards. It is not necessary to add the language proposed by NCTCOG to the rules in order for the supplemental criteria already included in the guidelines to apply. No changes to the proposed text were made as a result of this comment.**

*Comment*

POHA commented in support of the addition of other cargo handling equipment as eligible for purchase under §114.682(a)(3) and eligible for replacement under §114.682(b)(3). POHA commented that the changes will give the POHA, its tenants, and any other port-related facilities the opportunity to reduce emissions.

*Response*

**The commission appreciates the support expressed for the addition of other cargo handling equipment as eligible under the DTIP. No changes to the proposed text were made as a result of this comment.**

*Comment*

NCTCOG recommended that eligible technologies for new drayage trucks or cargo handling equipment should include, but not be limited to, alternative fuel vehicles, battery-electric trucks, fuel-cell trucks, and battery-electric trucks utilizing fuel cells or internal combustion engines acting as range extenders.

*Response*

**The commission agrees that providing for a full range of fuel options can help encourage potential applicants to apply to the DTIP. The DTIP is fuel-neutral and any fuel type or power source is already eligible if the drayage truck and engine otherwise meet the eligibility criteria. No changes to the proposed text were made as a result of this comment.**

*Comment*

NCTCOG recommended that the commission consider a revision that would give preference to projects involving use of zero or near-zero emission vehicles. NCTCOG commented that the EPA has recently initiated such preferential consideration in the

Clean Diesel Funding Assistance Program Announcement, in which the cleanest technologies qualify for slightly higher funding levels. NCTCOG expressed its opinion that such a change would support commercialization of near-zero emission technologies, encourage program applicants to consider the cleanest available technology options, and contribute to additional incremental emission reductions.

*Response*

**The commission agrees that increased use of zero or near-zero emission vehicles could further contribute to achieving emission reductions. However, in implementing the DTIP and other TERP incentive programs, the commission has remained fuel-neutral unless the legislature has specifically directed that certain fuels and types of engines be targeted. Under this approach, the commission has encouraged applicants to select the type of technology that the applicant determines will work best for its particular needs, as long as the project meets the eligibility criteria. No changes to the proposed text were made as a result of this comment.**

*Comment*

NCTCOG and RTC commented in support of the TERP and encouraged the commission to request full funding of the program as budgets are prepared for the next biennium.

*Response*

**The commission appreciates the comments in support of 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 Legislature Budget Board (LBB). The commission will continue to work with members of the legislature and the LBB regarding the appropriation funding levels for the TERP programs. No changes to the proposed text were made in response to these comments.**

*Comment*

TFP requested that the commission include Atascosa County as an eligible county for the program. TFP commented that it is a grower, packer, shipper operation that sells fresh Texas produce to HEB, Walmart, Kroger, Target, and some other smaller retailers. TFP explained that it is currently upgrading irrigation pumps and well motors from diesel to electric and old tractors to newer, more energy efficient ones. TFP commented that this program may help in its quest to achieve the upgrades and make Texas a better place to live and work.

*Response*

**The commission appreciates TFP's efforts to upgrade its equipment; however, this recommendation is outside of the scope of this rulemaking. The counties eligible for operation of grant-funded vehicles and equipment are included in the DTIP guidelines and are not listed in the rules. In addition, the equipment identified by TFP does not meet the definition of a drayage truck and is not eligible under the DTIP. TFP might be confusing the DTIP with the TERP DERI Program established under THSC, Chapter**

**386, Subchapter C, which includes funding for replacement or upgrade of irrigation pumps and tractors. The counties eligible for operation of grant-funded vehicles under the DERI Program include nonattainment areas and affected counties listed in THSC, §386.051(2). Atascosa County is not included in that list of eligible counties. Under THSC, §386.051(2)(Z), the commission may designate additional affected counties by rule. However, any consideration of adding counties to the list would be separate from this rulemaking. No changes to the proposed text were made as a result of this comment.**

**SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS**

**DIVISION 8: DRAYAGE TRUCK INCENTIVE PROGRAM**

**§114.680 and §114.682**

**Statutory Authority**

The 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 the 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 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; 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 Emissions Reduction Plan.

The amendments implement the Drayage Truck Incentive Program established under THSC, Chapter 386, Subchapter D-1.

**§114.680. Definitions.**

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used in this division 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) Cargo handling equipment--Any heavy-duty non-road, self-propelled vehicle or equipment used at a seaport or rail yard to lift or move cargo, such as containerized, bulk, or break-bulk goods. Equipment includes, but is not limited to, rubber-tired gantry cranes, yard trucks, top handlers, side handlers, reach stackers, forklifts, loaders, and aerial lifts. [Day cab--A drayage truck cab that does not have a compartment behind the driver's seat intended to be used by the driver for sleeping].

(2) Drayage activities--The transport of cargo, such as containerized, bulk, or break-bulk goods.

(3) Drayage truck--A heavy-duty on-road or non-road vehicle used for drayage activities and that operates on or transgresses through a seaport or rail yard for the purpose of loading, unloading, or transporting cargo, including transporting empty containers and chassis.

(4) Non-road yard truck--A non-road mobile utility vehicle used to transport cargo containers with or without chassis; also known as a utility tractor rig, yard tractor, or terminal tractor.

(5) Rail yard--A rail facility where cargo is routinely transferred from drayage truck to train or vice-versa, including structures that are devoted to receiving, handling, holding, consolidating, and loading or delivery of rail-borne cargo.

(6) Seaport--Publically or privately owned property associated with the primary movement of cargo or materials from ocean-going vessels or barges to shore or vice-versa, including structures and property devoted to receiving, handling, holding, consolidating, and loading or delivery of waterborne shipments. A seaport also includes publically or privately owned property within a ship channel security district established under Texas Water Code, Chapter 68.

**§114.682. Eligible Vehicle Models.**

(a) Models of drayage trucks eligible for purchase to replace an existing drayage truck under the program include:

(1) a heavy-duty on-road vehicle with a gross vehicle weight rating (GVWR) over 26,000 pounds [and having a day cab only]; [and]

(2) a non-road yard truck; and.]

(3) other cargo handling equipment.

(b) Models of existing drayage trucks eligible for replacement under the program include:

(1) a heavy-duty on-road vehicle with a GVWR over 26,000 pounds; [and]

(2) a non-road yard truck; and.]

(3) other cargo handling equipment.

(c) To be eligible for purchase under the program a drayage truck must have an engine of model year 2010 or later as specified by the agency in the grant solicitation materials and the drayage truck being replaced must have an engine of model year 2006 or earlier.

(d) The executive director may place additional limits on vehicle models and engine model years eligible for purchase and replacement under the program for a particular grant round in order to improve the effectiveness and further the goals of the program.