

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** January 12, 2022

**DATE OF REQUEST:** December 22, 2021

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Gwen Ricco, Rule/Agenda Coordinator, (512) 239-2678

**CAPTION: Docket No. 2021-1099-RUL.** Consideration for publication of, and hearing on, proposed amendment to Section 114.622 of 30 TAC Chapter 114, Control of Air Pollution from Motor Vehicles, and corresponding revisions to the State Implementation Plan.

The proposed rulemaking would implement House Bill 4472 from the 87th Texas Legislature, 2021, Regular Session, and align with the existing statute relating to the Diesel Emissions Reduction Incentive Program (DERIP) providing that the commission set the minimum percentage of annual hours of operation required for Texas Emission Reduction Plan-funded marine vessels or engines at 55% under the DERIP. Additionally, the proposed rule would establish that, over the life of the project, the marine vessels or engines must be operated in the intercoastal waterways or bays adjacent to a nonattainment area or affected county of this state by the percentage established by the commission. (Nate Hickman, Sierra Redding; Rule Project No. 2021-032-114-AI)

Tonya Baer  
**Director**

Mike Wilson  
**Division Deputy Director**

Gwen Ricco  
**Agenda Coordinator**

Copy to CCC Secretary? NO  YES

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** December 22, 2021

**Thru:** Laurie Gharis, Chief Clerk  
Toby Baker, Executive Director

**From:** Tonya Baer, Director  
Office of Air

**Docket No.:** 2021-1099-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 114, Control of Air Pollution from Motor Vehicles  
HB 4472: TERP Amendments  
Rule Project No. 2021-032-114-AI

**Background and reason(s) for the rulemaking:**

The purpose of the rulemaking is to amend 30 Texas Administrative Code (TAC) Chapter 114 in accordance with the amendments to Texas Health and Safety Code (THSC), Chapter 386 as a result of House Bill (HB) 4472, 87th Texas Legislature, 2021 and to align with the existing statute. HB 4472 provided the commission with the authority to set a minimum percentage of annual hours of operation required for TERP-funded marine vessels or engines at 55% under the Diesel Emissions Reduction Incentive Program (DERIP). Existing statute requires that, over the lifetime of a project, the marine vessels or engines must be operated in the intercoastal waterways or bays adjacent to a nonattainment area or affected county of this state by the percentage established by the commission.

**Scope of the rulemaking:**

The proposed rulemaking would amend DERIP provisions to align current regulations with statute.

**A.) Summary of what the rulemaking would do:**

The proposed rulemaking would amend 30 TAC §114.622, creating a new subsection (c), establishing that proposed projects involving marine vessels or engines must be operated in the intercoastal waterways or bays adjacent to a nonattainment area or affected county of this state for not less than 55% over the lifetime of the project to implement HB 4472. Also, the commission proposes to amend subsequent subsections to align with the new subsection (c).

**B.) Scope required by federal regulations or state statutes:**

The proposed rulemaking would implement HB 4472 and existing statute.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

None.

**Statutory authority:**

The amendments would be proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments would also be proposed under 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 TERP.

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**Effect on the:**

**A.) Regulated community:**

The programs affected by this rulemaking are voluntary programs. The proposed rulemaking is not anticipated to have any implications on the regulated community.

**B.) Public:**

The programs affected by this rulemaking are voluntary programs. The proposed rulemaking is not anticipated to have any implications on the public.

**C.) Agency programs:**

Agency publications and websites relating to these programs will need to be updated.

**Stakeholder meetings:**

The commission did not hold any stakeholder meetings related to this rulemaking; however, a public hearing will be offered in Austin during the rulemaking comment period.

**Potential controversial concerns and legislative interest:**

None.

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

The rulemaking will require revisions to internal policies and procedures for DERIP to align with amended rules. Existing guidelines available to the public will also be updated.

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

HB 4472 requires the commission to amend DERIP provisions. This rulemaking complies with that requirement, and there are no alternatives to rulemaking. If the rulemaking does not move forward, commission rules will not align with statute.

**Key points in the proposed rulemaking schedule:**

**Anticipated proposal date:** January 12, 2022

**Anticipated *Texas Register* publication date:** January 28, 2022

**Anticipated public hearing date:** February 18, 2022

**Anticipated public comment period:** January 28, 2022 - March 1, 2022

**Anticipated adoption date:** June 1, 2022

**Agency contacts:**

Nate Hickman, Rule Project Manager, Air Grants Division, (512) 239-4434

Sierra Redding, Staff Attorney, (512) 239-2496

Gwen Ricco, Texas Register Rule/Agenda Coordinator, (512) 239-2678

**Attachments:**

House Bill 4472

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Jim Rizk  
Morgan Johnson  
Brody Burks  
Office of General Counsel

Commissioners  
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December 22, 2021

Re: Docket No. 2021-1099-RUL

Nate Hickman  
Sierra Redding  
Gwen Ricco

AN ACT

relating to the Texas emissions reduction plan.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 386.051(b), Health and Safety Code, is amended to read as follows:

(b) Under the plan, the commission and the comptroller shall provide grants or other funding for:

(1) the diesel emissions reduction incentive program established under Subchapter C, including for infrastructure projects established under that subchapter;

(2) the motor vehicle purchase or lease incentive program established under Subchapter D;

(3) the air quality research support program established under Chapter 387;

(4) the clean school bus program established under Chapter 390;

(5) the new technology implementation grant program established under Chapter 391;

(6) the regional air monitoring program established under Section 386.252(a);

(7) a health effects study as provided by Section 386.252(a);

(8) air quality planning activities as provided by Section 386.252(d);

1           (9) a contract with the Energy Systems Laboratory at  
2 the Texas A&M Engineering Experiment Station for computation of  
3 creditable statewide emissions reductions as provided by Section  
4 386.252(a);

5           (10) the Texas clean fleet program established under  
6 Chapter 392;

7           (11) the Texas alternative fueling facilities program  
8 established under Chapter 393;

9           (12) the Texas natural gas vehicle grant program  
10 established under Chapter 394;

11           (13) other programs the commission may develop that  
12 lead to reduced emissions of nitrogen oxides, particulate matter,  
13 or volatile organic compounds in a nonattainment area or affected  
14 county;

15           (14) other programs the commission may develop that  
16 support congestion mitigation to reduce mobile source ozone  
17 precursor emissions;

18           (15) the seaport and rail yard areas emissions  
19 reduction program established under Subchapter D-1;

20           (16) conducting research and other activities  
21 associated with making any necessary demonstrations to the United  
22 States Environmental Protection Agency to account for the impact of  
23 foreign emissions or an exceptional event;

24           (17) studies of or pilot programs for incentives for  
25 port authorities located in nonattainment areas or affected  
26 counties as provided by Section 386.252(a); [~~and~~]

27           (18) the governmental alternative fuel fleet grant

1 program established under Chapter 395; and

2 (19) remittance of funds to the state highway fund for  
3 use by the Texas Department of Transportation for congestion  
4 mitigation and air quality improvement projects in nonattainment  
5 areas and affected counties.

6 SECTION 2. Section 386.057, Health and Safety Code, is  
7 amended by adding Subsection (e) to read as follows:

8 (e) Not later than October 1 of each year, the Texas  
9 Department of Transportation shall report to the commission the  
10 following information for all congestion mitigation and air quality  
11 improvement projects in nonattainment areas and affected counties  
12 that are planned to be funded, or received initial funding during  
13 the preceding 10 years, from money received by the department under  
14 this chapter:

15 (1) projects to mitigate congestion and improve air  
16 quality that are currently planned;

17 (2) projects to mitigate congestion and improve air  
18 quality that have been completed;

19 (3) estimated emissions reductions for all planned and  
20 completed congestion mitigation projects; and

21 (4) estimated cost per ton analysis of reduced  
22 emissions of nitrogen oxides, particulate matter, or volatile  
23 organic compounds for each congestion mitigation project planned or  
24 completed.

25 SECTION 3. Sections 386.104(c) and (c-1), Health and Safety  
26 Code, are amended to read as follows:

27 (c) Except as otherwise provided by this subsection, for a

1 proposed project as described by Section 386.102(b), [~~other than a~~  
2 ~~project involving a marine vessel or engine,~~] not less than 75  
3 percent of vehicle miles traveled or hours of operation projected  
4 for the five years immediately following the award of a grant must  
5 be projected to take place in a nonattainment area or affected  
6 county of this state. The commission may set the minimum percentage  
7 of vehicle miles traveled or hours of operation required to take  
8 place in a nonattainment area or affected county at a percentage and  
9 for a period that is different from the percentage and period  
10 specified by this subsection, provided that the commission may not  
11 set the minimum percentage at a level that is less than 55 percent.  
12 The commission may allow vehicle travel on highways and roadways,  
13 or portions of a highway or roadway, designated by the commission  
14 and located outside a nonattainment area or affected county to  
15 count towards the percentage of use requirement in this subsection.

16 (c-1) For a proposed project involving a marine vessel or  
17 engine, the vessel or engine must be operated in the intercoastal  
18 waterways or bays adjacent to a nonattainment area or affected  
19 county of this state for a sufficient percentage [~~amount~~] of time  
20 over the lifetime of the project, as determined by the commission,  
21 to meet the cost-effectiveness requirements of Section 386.105.  
22 The percentage determined by the commission under this subsection  
23 may not be less than 55 percent.

24 SECTION 4. Section 386.250(c), Health and Safety Code, as  
25 effective September 1, 2021, is amended to read as follows:

26 (c) Not later than the 30th day after the last day of each  
27 state fiscal biennium, the commission shall transfer the



1 unencumbered balance of the fund remaining on the last day of the  
2 state fiscal biennium to the credit of the state highway fund for  
3 use by the Texas Department of Transportation for projects  
4 described by Section 386.051(b)(19) [~~Texas emissions reduction~~  
5 ~~plan account~~].

6 SECTION 5. Section 386.251(c), Health and Safety Code, as  
7 effective September 1, 2021, is amended to read as follows:

8 (c) The account consists of its accumulated balance [~~and the~~  
9 ~~amount of money transferred to the account under Section~~  
10 ~~386.250(c)~~].

11 SECTION 6. Section 386.252, Health and Safety Code, as  
12 effective September 1, 2021, is amended by amending Subsection (a)  
13 and adding Subsection (a-1) to read as follows:

14 (a) Money in the fund and account may be used only to  
15 implement and administer programs established under the  
16 plan. Subject to the reallocation of funds by the commission under  
17 Subsection (h) and after remittance to the state highway fund under  
18 Subsection (a-1), money from the fund and account to be used for the  
19 programs under Section 386.051(b) shall initially be allocated as  
20 follows:

21 (1) four percent may be used for the clean school bus  
22 program under Chapter 390;

23 (2) three percent may be used for the new technology  
24 implementation grant program under Chapter 391, from which at least  
25 \$1 million will be set aside for electricity storage projects  
26 related to renewable energy;

27 (3) five percent may be used for the Texas clean fleet

1 program under Chapter 392;

2 (4) not more than \$3 million may be used by the  
3 commission to fund a regional air monitoring program in commission  
4 Regions 3 and 4 to be implemented under the commission's oversight,  
5 including direction regarding the type, number, location, and  
6 operation of, and data validation practices for, monitors funded by  
7 the program through a regional nonprofit entity located in North  
8 Texas having representation from counties, municipalities, higher  
9 education institutions, and private sector interests across the  
10 area;

11 (5) 10 percent may be used for the Texas natural gas  
12 vehicle grant program under Chapter 394;

13 (6) not more than \$6 million may be used for the Texas  
14 alternative fueling facilities program under Chapter 393, of which  
15 a specified amount may be used for fueling stations to provide  
16 natural gas fuel, except that money may not be allocated for the  
17 Texas alternative fueling facilities program for the state fiscal  
18 year ending August 31, 2019;

19 (7) not more than \$750,000 may be used each year to  
20 support research related to air quality as provided by Chapter 387;

21 (8) not more than \$200,000 may be used for a health  
22 effects study;

23 (9) at least \$6 million but not more than \$16 million  
24 may be used by the commission for administrative costs, including  
25 all direct and indirect costs for administering the plan, costs for  
26 conducting outreach and education activities, and costs  
27 attributable to the review or approval of applications for

1 marketable emissions reduction credits;

2 (10) six percent may be used by the commission for the  
3 seaport and rail yard areas emissions reduction program established  
4 under Subchapter D-1;

5 (11) five percent may be used for the light-duty motor  
6 vehicle purchase or lease incentive program established under  
7 Subchapter D;

8 (12) not more than \$216,000 may be used by the  
9 commission to contract with the Energy Systems Laboratory at the  
10 Texas A&M Engineering Experiment Station annually for the  
11 development and annual computation of creditable statewide  
12 emissions reductions obtained through wind and other renewable  
13 energy resources for the state implementation plan;

14 (13) not more than \$500,000 may be used for studies of  
15 or pilot programs for incentives for port authorities located in  
16 nonattainment areas or affected counties to encourage cargo  
17 movement that reduces emissions of nitrogen oxides and particulate  
18 matter; and

19 (14) the balance is to be used by the commission for  
20 the diesel emissions reduction incentive program under Subchapter C  
21 as determined by the commission.

22 (a-1) The commission shall remit not less than 35 percent of  
23 the amount deposited to the credit of the fund to the state highway  
24 fund for use by the Texas Department of Transportation for projects  
25 described by Section 386.051(b)(19).

26 SECTION 7. Section 391.002(b), Health and Safety Code, is  
27 amended to read as follows:

1 (b) Projects that may be considered for a grant under the  
2 program include:

3 (1) advanced clean energy projects, as defined by  
4 Section 382.003;

5 (2) new technology projects that reduce emissions of  
6 regulated pollutants from stationary sources;

7 (3) new technology projects that reduce emissions from  
8 upstream and midstream oil and gas production, completions,  
9 gathering, storage, processing, and transmission activities  
10 through:

11 (A) the replacement, repower, or retrofit of  
12 stationary compressor engines;

13 (B) the installation of systems to reduce or  
14 eliminate the loss of gas, flaring of gas, or burning of gas using  
15 other combustion control devices; or

16 (C) the installation of systems that reduce  
17 flaring emissions and other site emissions [~~by capturing waste heat  
18 to generate electricity solely for on-site service~~]; and

19 (4) electricity storage projects related to renewable  
20 energy, including projects to store electricity produced from wind  
21 and solar generation that provide efficient means of making the  
22 stored energy available during periods of peak energy use.

23 SECTION 8. Section 391.205(a), Health and Safety Code, is  
24 amended to read as follows:

25 (a) Except as provided by Subsection (c), in awarding grants  
26 under this chapter the commission shall give preference to projects  
27 that:

1           (1) involve the transport, use, recovery for use, or  
2 prevention of the loss of natural resources originating or produced  
3 in this state;

4           (2) contain an energy efficiency component;

5           (3) include the use of solar, wind, or other renewable  
6 energy sources; ~~or~~

7           (4) recover waste heat from the combustion of natural  
8 resources and use the heat to generate electricity; or

9           (5) reduce flaring emissions and other site emissions.

10           SECTION 9. Section 391.301, Health and Safety Code, is  
11 amended to read as follows:

12           Sec. 391.301. RESTRICTION ON USE OF GRANT. A recipient of a  
13 grant under this chapter must use the grant to pay the incremental  
14 costs of the purchase, lease, or ~~and~~ installation of the project  
15 for which the grant is made, which may include reasonable and  
16 necessary expenses for the labor needed to install  
17 emissions-reducing equipment. The recipient may ~~not~~ use the  
18 grant for the costs of operating and maintaining the  
19 emissions-reducing equipment.

20           SECTION 10. Section 501.138, Transportation Code, is  
21 amended by amending Subsections (b-1), (b-2), and (b-3) and adding  
22 Subsection (b-4) to read as follows:

23           (b-1) Except as provided by Subsection (b-4), fees ~~Fees~~  
24 collected under Subsection (b) to be sent to the comptroller shall  
25 be deposited to the credit of the Texas ~~Mobility Fund, except that~~  
26 ~~\$5 of each fee imposed under Subsection (a)(1) and deposited on or~~  
27 ~~after September 1, 2008, and before September 1, 2015, shall be~~

1 ~~deposited to the credit of the Texas]~~ emissions reduction plan  
2 fund.

3 (b-2) The comptroller shall establish a record of the amount  
4 of the fees deposited to the credit of the Texas emissions reduction  
5 plan fund [~~Mobility Fund~~] under Subsection (b-1). On or before the  
6 fifth workday of each month, the Texas Department of Transportation  
7 shall remit to the comptroller for deposit to the credit of the  
8 Texas Mobility Fund [~~emissions reduction plan fund~~] an amount of  
9 money equal to the amount of the fees deposited by the comptroller  
10 to the credit of the Texas emissions reduction plan fund [~~Mobility~~  
11 ~~Fund~~] under Subsection (b-1) in the preceding month. The Texas  
12 Department of Transportation shall use for remittance to the  
13 comptroller as required by this subsection money in the state  
14 highway fund that is not required to be used for a purpose specified  
15 by Section 7-a, Article VIII, Texas Constitution, and may not use  
16 for that remittance money received by this state under the  
17 congestion mitigation and air quality improvement program  
18 established under 23 U.S.C. Section 149.

19 (b-3) This subsection and Subsections (b-1) and  
20 [~~Subsection~~] (b-2) expire on the last day of the state fiscal  
21 biennium during which the Texas Commission on Environmental Quality  
22 publishes in the Texas Register the notice required by Section  
23 [382.037](#), Health and Safety Code.

24 (b-4) Fees collected under Subsection (b) to be sent to the  
25 comptroller shall be deposited to the credit of the Texas Mobility  
26 Fund if the fees are collected on or after the last day of the state  
27 fiscal biennium during which the Texas Commission on Environmental

1 Quality publishes in the Texas Register the notice required by  
2 Section 382.037, Health and Safety Code.

3           SECTION 11. The changes in law made by this Act apply only  
4 to a Texas emissions reduction plan grant awarded on or after the  
5 effective date of this Act. A grant awarded before the effective  
6 date of this Act is governed by the law in effect on the date the  
7 award was made, and the former law is continued in effect for that  
8 purpose.

9           SECTION 12. The change in law made by this Act to Section  
10 501.138, Transportation Code, applies only to a fee collected on or  
11 after the effective date of this Act. A fee collected before the  
12 effective date of this Act is governed by the law in effect when the  
13 fee was collected, and the former law is continued in effect for  
14 that purpose.

15           SECTION 13. This Act takes effect September 1, 2021.

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President of the Senate

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Speaker of the House

I certify that H.B. No. 4472 was passed by the House on May 14, 2021, by the following vote: Yeas 117, Nays 27, 3 present, not voting; and that the House concurred in Senate amendments to H.B. No. 4472 on May 28, 2021, by the following vote: Yeas 103, Nays 32, 1 present, not voting.

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Chief Clerk of the House

I certify that H.B. No. 4472 was passed by the Senate, with amendments, on May 25, 2021, by the following vote: Yeas 31, Nays 0.

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Secretary of the Senate

APPROVED: \_\_\_\_\_

Date

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Governor



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

If adopted, the amendments to §114.622 will be submitted to the United States Environmental Protection Agency as revisions to the State Implementation Plan.

### **Background and Summary of the Factual Basis for the Proposed Rule**

The Texas Emissions Reduction Plan (TERP) was established under Texas Health and Safety Code (THSC), Chapter 386, by Senate Bill 5, during the 77th Texas Legislature, 2001. The TERP was created to provide financial incentives for reducing emissions of on-road heavy-duty motor vehicles and non-road equipment, with the Diesel Emissions Reduction Incentive Program (DERIP) established under THSC, Chapter 386, Subchapter C as the primary incentive program.

House Bill (HB) 4472, 87th Texas Legislature, 2021, amended THSC, Chapter 386, Subchapter C to provide that the commission may not set the minimum percentage of annual hours of operation required for TERP-funded marine vessels or engines as less than 55%.

The proposed rulemaking would revise §114.622 to implement HB 4472 and align with existing statute.

### **Section Discussion**

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

The commission proposes to amend §114.622, creating a new subsection (c), establishing that proposed projects involving marine vessels or engines must be operated in the intercoastal waterways or bays adjacent to a nonattainment area or affected county of this state for not less

than 55% over the lifetime of the project to implement HB 4472. Also, the commission proposes to amend subsequent subsections to align with the new subsection (c).

#### **Fiscal Note: Costs to State and Local Government**

Jené Bearnse, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state as a result of administration or enforcement of the proposed rule.

#### **Public Benefits and Costs**

Ms. Bearnse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be improved air quality in eligible program areas and compliance with state law.

The proposed rulemaking may result in fiscal implications for businesses or individuals. Eligible businesses or individuals that apply for and receive a grant may experience a cost savings by having a percentage of costs to replace or upgrade vehicles or equipment covered by the grant. Grant recipients may also experience a cost savings from lower fuel and maintenance costs associated with operating a newer or upgraded vehicle or equipment.

#### **Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

### **Rural Communities Impact Assessment**

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

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

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rules are in effect.

### **Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

### **Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking amends an existing regulation and may increase the number of individuals subject to its applicability. During the first five years, the proposed rule should

not impact positively or negatively the state's economy.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the 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" is 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.

The amendments to §114.622 are proposed in accordance with HB 4472, which amended THSC, Chapter 386, Subchapter C. The proposed rule revises eligibility criteria for a voluntary grant program. Because the proposed rule places no involuntary requirements on the regulated community, the proposed rule would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. In addition, none of these amendments place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the proposed rulemaking does not meet any of the 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 authority of the commission. This rulemaking does not exceed a standard set by federal law. Additionally, this rulemaking does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but is authorized by specific sections of the THSC that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invites public comment regarding the Draft Regulatory Impact Analysis during the public comment period. Written comments on the Draft Regulatory Impact Analysis may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007, does not apply.

Under Texas Government Code, §2007.002(5), taking means: (A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as

provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

Promulgation and enforcement of the proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with the amendments to THSC, Chapter 386 as a result of HB 4472. The proposed rule would revise a voluntary program and only affect motor vehicles that are not considered to be private real property. The proposed rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the proposed rule would not constitute a taking under Texas Government Code, Chapter 2007.

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

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that the goals

and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with the CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on February 18, 2022, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Ms. Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to [fax4808@tceq.texas.gov](mailto:fax4808@tceq.texas.gov). Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2021-032-114-AI. The comment period closes on February 28, 2022. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at [https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Nate Hickman, Air Grants Division, (512) 239-4434.



**SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS**

**DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR ON-ROAD AND  
NON-ROAD VEHICLES**

**§114.622**

**Statutory Authority**

The amendments are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also proposed under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, Chapter 386, which establishes the Texas Emissions Reduction Plan.

The amendments are proposed as part of the implementation of THSC, Chapter 386, Subchapter C, as amended by House Bill 4472, 87th Texas Legislature, 2021.

**§114.622. Incentive Program Requirements.**

(a) Eligible projects include:

- (1) purchase or lease of on-road and non-road diesels;
  - (2) emissions-reducing retrofit projects for on-road or non-road diesels;
  - (3) emissions-reducing repower projects for on-road or non-road diesels;
  - (4) purchase and use of emissions-reducing add-on equipment for on-road or non-road diesels;
  - (5) development and demonstration of practical, low-emissions retrofit technologies, repower options, and advanced technologies for on-road or non-road diesels with lower nitrogen oxides (NO<sub>x</sub>) emissions;
  - (6) use of qualifying fuel;
  - (7) implementation of infrastructure projects;
  - (8) replacement of on-road and non-road diesels with newer on-road and non-road diesels; and
  - (9) other projects that have the potential to reduce anticipated NO<sub>x</sub> emissions from diesel engines.
- (b) For a proposed project as listed in subsection (a) of this section, other than a project involving a marine vessel or engine, a project involving non-road equipment used for natural

gas recovery purposes, a project involving replacement of a motor vehicle, or a project involving the purchase or lease of a motor vehicle, not less than 55% of vehicle miles traveled or hours of operation projected for the five years immediately following the award of a grant must be projected to take place in a nonattainment area or affected county of this state. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside a nonattainment area or affected county to count towards the percentage of use requirement.

(c) For a proposed project involving a marine vessel or engine, the vessel or engine must be operated in the intercoastal waterways or bays adjacent to a nonattainment area or affected county of this state for not less than 55% of time over the lifetime of the project.

(d) [(c)] For a proposed motor vehicle replacement, purchase, or lease project, the period used to determine the emissions reductions and cost-effectiveness of each replacement, purchase, or lease activity included in the project must extend for five years or more, or 400,000 miles, whichever occurs earlier. Not less than 55% of the vehicle miles traveled projected for the period used to determine the emissions reductions must be projected to take place in a nonattainment area or affected county of this state. The commission may also allow vehicle travel on highways and roadways, or portions of a highway or roadway, designated by the commission and located outside of a nonattainment county or affected county to count towards the percentage of use requirement.

(e) [(d)] For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled or scrapped provided, however, that the executive director may allow permanent removal from the state of Texas in specific grants

where the applicant has provided sufficient assurances that the old locomotive will not be returned to the state of Texas.

(f) [(e)] For a proposed project to replace a motor vehicle, the vehicle and engine must be decommissioned by crushing the vehicle and engine, by making a hole in the engine block and permanently destroying the frame of the vehicle, or by another method approved by the executive director that permanently removes the vehicle and engine from operation in this state. For a proposed project to repower a motor vehicle, the engine being replaced must be decommissioned in a manner consistent with the requirements for decommissioning an engine as part of a vehicle replacement project. The executive director shall allow an applicant for a motor vehicle replacement or repower project to propose an alternative method for complying with the requirements of this subsection.

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

(h) [(g)] The commission may set cost-effectiveness limits as needed to ensure the best use of available funds. The commission may also base project selection decisions on additional measures to evaluate the effectiveness of projects in reducing NO<sub>x</sub> emissions in relation to the funds to be awarded.

(i) [(h)] The executive director may waive eligibility requirements established under subsections (b) - (f) of this section on a finding of good cause, which may include a waiver of

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

(j) [(i)] Projects funded with a grant from this program may not be used for credit under any state or federal emissions reduction credit averaging, banking, or trading program except as provided under Texas Health and Safety Code, §386.056.

(k) [(j)] A proposed project as listed in subsection (a) of this section is not eligible if it is required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document. This subsection does not apply to:

(1) an otherwise qualified project, regardless of the fact that the state implementation plan assumes that the change in equipment, vehicles, or operations will occur, if on the date the grant is awarded the change is not required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document; or

(2) the purchase of an on-road diesel or equipment required only by local law or regulation or by corporate or controlling board policy of a public or private entity.

(l) [(k)] A proposed retrofit, repower, replacement, or add-on equipment project must achieve a reduction in NO<sub>x</sub> emissions to the level established in the commission's *Texas*

*Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program (RG-388)*

for that type of project compared with the baseline emissions adopted by the commission for the relevant engine year and application.

(m) [(l)] If a grant recipient fails to meet the terms of a project grant or the conditions of this division, the executive director can require that the grant recipient return some or all of the grant funding to the extent that emission reductions are not achieved or cannot be demonstrated.

(n) [(m)] Criteria established in the guidelines, including revisions to the commission's Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program (RG-388), apply to the Texas Emissions Reduction Plan program. Regardless of the provisions of this chapter, as authorized under Texas Health and Safety Code, §386.053(d), revisions to the guidelines may include, among other changes, adding additional pollutants; adding stationary engines or engines used in stationary applications; adding vehicles and equipment that use fuels other than diesel; or adjusting eligible program categories; as appropriate, to ensure that incentives established under this program achieve the maximum possible emission reductions.