

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §114.620 and §114.622.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE EMERGENCY RULES

The 77th Texas Legislature, 2001, enacted Senate Bill 5 establishing the Texas Emissions Reduction Plan (TERP), which provides financial incentives for reducing emissions of on-road and non-road motor vehicles and equipment. House Bill (HB) 1796, 81st Texas Legislature, 2009, amended the Texas Health and Safety Code, Chapter 386, TERP Program to add a definition for stationary engine and to clarify requirements for projects involving non-road equipment used for natural gas recovery purposes.

SECTION BY SECTION DISCUSSION

§114.620, Definitions

Section 114.620 is amended to add a definition for stationary engine as required by Texas Health and Safety Code, §386.001. Texas Health and Safety Code, §386.001 was amended by adding Texas Health and Safety Code, §386.001 (10-a), which states: stationary engine means a machine used in non-mobile applications that converts fuel into mechanical motion, including turbines and other internal combustion devices.

§114.622, Incentive Program Requirements

Section 114.622 is amended to clarify requirements for projects related to non-road equipment used for natural gas recovery purposes, as required by Texas Health and Safety Code, §386.104(c).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the agency, but not for other units of state or local government as a result of administration or enforcement of the proposed rules. The agency will utilize available funding appropriated out of the TERP Account 5071 to implement the proposed rules.

The proposed rules amend Chapter 114 to implement certain provisions of HB 1796. The proposed rules add the definition of stationary engine as provided by HB 1796. This change will authorize the agency to fund projects involving stationary gas turbine engines under the TERP program. The proposed rules also provide that for projects involving non-road equipment used for natural gas recovery purposes, the equipment must be operated in a nonattainment area or affected county for a sufficient amount of use in order to meet the statutory cost effectiveness requirements. This provision would exempt this equipment from the requirement that the equipment operate at least 75% of the annual use in the nonattainment areas and affected counties for at least five years.

The TERP incentive grant program is applicable to 41 eligible counties in the state. The addition of eligible projects involving stationary gas turbine engines will require the agency to consider and fund a wider variety of projects using appropriated funds from the TERP Account 5071. The addition of eligible projects will affect the overall allocation of grant funding in the TERP program and may reduce the amount of grant money available for some governmental entities. However, the new projects are expected to reduce nitrogen oxide (NO_x), thus forwarding the TERP goal of reducing NO_x emissions. It is anticipated that the addition of eligible projects involving stationary engines will mostly affect gas turbine engines on gas pipeline compressors. At this time it is not known if any units of state or local

government own or operate these types of stationary engines. Owners or operators of affected gas turbine engines may be eligible to apply for grant funding if those engines meet grant requirements. The amount of grant funds will vary widely depending on the operating conditions of each grant applicant. TERP reimbursement for engine replacement or retrofit cost is estimated to range from \$30,000 to more than \$150,000 depending upon the amount of emission reductions achieved.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the anticipated public benefit from the changes seen in the proposed rules will be improvement in air quality in the 41 counties eligible to receive TERP incentive grant funding.

The proposed rules are anticipated to affect stationary engines in the 41 TERP eligible counties. Owners or operators of affected gas turbine engines may be eligible to apply for grant funding if those engines meet grant requirements. It is anticipated that this change will mostly affect stationary gas turbine engines on gas pipeline compressors. At this time, staff is not able to determine how many businesses or individuals own stationary engines and therefore may be eligible for TERP grant funding. Those that are eligible for funding may apply for funds to replace or retrofit the equipment if that equipment is determined to be eligible for a diesel emission incentive grant. The amount of the grant funds will vary widely depending on the operating conditions of each grant applicant. TERP reimbursement for engine replacement or retrofit cost is estimated to range from \$30,000 to more than \$150,000 depending upon the amount of emission reductions achieved.

No significant fiscal implications are anticipated for businesses with natural gas recovery interests due to

the proposed change, which will allow the commission to set the minimum project life requirements for non-road equipment used for natural gas recovery purposes.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules are expected to affect owners or operators of stationary engines in the 41 TERP eligible counties. It is further anticipated that this change will mostly affect stationary gas turbine engines on gas pipeline compressors. Any small or micro-businesses that own or operate stationary engines on gas pipeline compressors may be eligible to apply for grant funding if those engines meet grant requirements.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required by state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rule action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The amended Chapter 114 rules are proposed in accordance with HB 1796, which amended Texas Health and Safety Code, Chapter 386. The proposed rules add a new definition for stationary engine and clarify requirements for projects involving non-road equipment used for natural gas recovery purposes. Because the proposed rules place no involuntary requirements on the regulated community, the proposed 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, none of these amendments place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the proposed rules do not meet any of the four applicability criteria for requiring a regulatory analysis of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and

federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and is not 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 or federal program.

The commission invites public comment on the draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination 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 this rulemaking action and performed an analysis of whether the proposed rules are subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with HB 1796. The rules make revisions to a voluntary program and only affect motor vehicles and equipment that are not considered to be private real property. Therefore, promulgation and enforcement of the proposed rules is neither a statutory nor a constitutional taking because it does 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 proposed rulemaking and found the proposal 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 a voluntary incentive grant program and does not govern air pollution emissions. 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 November 16, 2009 at 10:00 a.m. in Building E, Room 201 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 Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>.

File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-048-114-EN. The comment period closes on November 23, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Steve Dayton, Air Quality Division, 512-239-6824 or sdayton@tceq.state.tx.us.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR ON-ROAD

AND NON-ROAD VEHICLES

§114.620, §114.622

STATUTORY AUTHORITY

These amendments are proposed under Texas Water Code, §5.102, which provides the commission with the general powers to carry out its duties under the Texas Water Code; Texas Water Code, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state; and Texas Water Code, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These amendments are also proposed under Texas Health and Safety Code, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Health and Safety Code; §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; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and Texas Health and Safety Code, Chapter 386, which establishes the Texas Emissions Reduction Plan. Finally, these amendments are proposed as part of the implementation of House Bill 1796.

The proposed amendments implement Texas Health and Safety Code, Chapter 386.

§114.620. 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 which 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) Cost-effectiveness--The total dollar amount expended divided by the total number of tons of nitrogen oxides emissions reduction attributable to that expenditure. In calculating cost-effectiveness, one-time grants of money at the beginning of a project shall be annualized using a time value of public funds or discount rate determined for each project by the commission, taking into account the interest rate on bonds, interest earned by state funds, and other factors the commission considers appropriate.

(2) Guidelines--*Texas Emissions Reduction Plan: Guidelines for Emissions Reduction Incentive Grants Program* (RG-388) adopted by the commission under Texas Health and Safety Code, §386.053, as amended.

(3) 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 and may include added lease or fuel costs as well as additional capital costs.

(4) Motor vehicle--A self-propelled device designed for transporting persons or property on a public highway that is required to be registered under Texas Transportation Code, Chapter 502.

(5) Non-road diesel--A vehicle or piece of equipment, excluding a motor vehicle or on-road diesel, that is powered by a non-road engine, including: non-road non-recreational equipment and vehicles; construction equipment; locomotives; marine vessels; and other high-emitting diesel engine categories.

(6) Non-road engine--An internal combustion engine that is in or on a piece of equipment that is self-propelled or that propels itself and performs another function, excluding a vehicle that is used solely for competition, or a piece of equipment that is intended to be propelled while performing its function, or a piece of equipment designed to be and capable of being carried or moved from one location to another.

(7) On-road diesel--An on-road diesel-powered motor vehicle that has a gross vehicle weight rating of 8,500 pounds or more.

(8) Qualifying fuel--Any liquid or gaseous fuel or additives registered or verified by the United States Environmental Protection Agency that is ultimately dispensed into a motor vehicle or on-road or non-road diesel that provides reductions of nitrogen oxides emissions beyond reductions required by state or federal law.

(9) 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.

(10) 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.

(11) Small business--A business owned by a person who:

(A) owns and operates not more than two vehicles, one of which is:

(i) an on-road diesel with a pre-1994 engine model; or

(ii) a non-road diesel with an engine with uncontrolled emissions; and

(B) has owned the on-road or non-road diesel for more than one year.

(12) Stationary engine--A machine used in non-mobile applications that converts fuel into mechanical motion, including turbines and other internal combustion devices.

§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_x) 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_x 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 or a project involving non-road equipment used for natural gas recovery

purposes, not less than 75% 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 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.

(d) To be eligible for a grant, the cost-effectiveness of a proposed project as listed in subsection (a) of this section, except for infrastructure projects and infrastructure purchases that are part of a broader retrofit, repower, replacement, or add-on equipment project, must not exceed a cost-effectiveness of \$15,000 per ton of NO_x emissions reduced. The commission may set lower 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_x emissions in relation to the funds to be awarded.

(e) 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.

(f) 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.

(g) A proposed retrofit, repower, replacement, or add-on equipment project must achieve a reduction in NO_x 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.

(h) 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.

(i) 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. Notwithstanding 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.