

The Texas Natural Resource Conservation Commission (commission) proposes new §114.322 (Control Requirements), §114.324 (Registration of Gasoline Producers and Importers), §114.326 (Recordkeeping Requirements), §114.327 (Exemptions), and §114.329 (Affected Counties and Compliance Dates). These revisions are proposed to Chapter 114 (Control of Air Pollution from Motor Vehicles), Subchapter H (Low Emission Fuels), new Division 3 (Reformulated Gasoline), and to the State Implementation Plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The commission proposes these revisions to Chapter 114 and to the SIP in order to control ground-level ozone in the Dallas-Fort Worth (DFW) ozone nonattainment area. The proposed revisions are one element of the control strategy for the proposed DFW Attainment Demonstration SIP. The purpose of these proposed rules is to extend the federal reformulated gasoline (RFG) air pollution control strategy to all 12 counties of the DFW consolidated metropolitan statistical area (CMSA), to reduce emissions of oxides of nitrogen (NO_x) and volatile organic compounds (VOC) necessary for the counties included in the DFW nonattainment area to be able to demonstrate attainment with the national ambient air quality standard (NAAQS) for ozone. The commission looked at all possible areas for reduction, and each control strategy chosen is integral and necessary to the attainment demonstration. The commission looked at other fuel options, e.g., California RFG and low sulfur gasoline and found the extension of federal phase II RFG to the eight perimeter counties of the DFW CMSA to be the most reasonable in terms of distribution, most cost effectiveness, and most enforceable through reliance on federal certification.

The proposed revisions would implement a state RFG program requiring all gasoline stored and sold for use in the coverage area to be federally certified phase II RFG. The proposed RFG will lower the emissions of NO_x and VOC from fuel combustion. Because NO_x and VOC are precursors to ground-level ozone formation, reduced emissions will result in ground-level ozone reductions. To comply with the proposed state RFG regulations, gasoline producers and importers must ensure gasoline distributed to the coverage area meets the specifications stated in these rules.

The proposed new rules will require federally certified phase II RFG in eight additional counties within the 12-county DFW CMSA. These additional eight counties include Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, and Rockwall Counties.

The North Texas Clean Air Steering Committee (steering committee) representing the DFW ozone nonattainment area counties requested that an ozone pollution control strategy involving the use of federally certified phase II RFG be established to reduce NO_x emissions necessary for the counties included in the DFW ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS.

At the request of the steering committee and after a review of other alternatives, the commission developed a state RFG ozone control strategy which requires gasoline content limits identical to the current federal gasoline regulations in the four-county nonattainment area. Because the standards in this proposed rule are identical to the federal standards, this state program is not preempted by federal law. Currently, federal phase II RFG is required in Collin, Dallas, Denton, and Tarrant Counties. The

proposed state RFG requirements developed by the commission for this NO_x emission reduction strategy will differ from the federal phase II RFG program by requiring federally certified phase II RFG to be used in the eight counties of the CMSA surrounding the ozone nonattainment area. The proposed state RFG rules will result in greater coverage area than required by federal phase II RFG regulations and, therefore, greater emission reductions.

Modeling performed for the steering committee assessing the benefits of this NO_x emission reduction strategy demonstrated that significant emission reductions could be achieved from using phase II RFG as specified by the commission's proposed state RFG requirements. By 2007, the state RFG fuel program will reduce NO_x emissions in the affected area by an additional 3.1 tons per day. The current statewide average retail price of phase I RFG is \$.01 to \$.02 less expensive per gallon than conventional gasoline and phase II RFG is estimated to cost \$.01 to \$.02 more per gallon than phase I RFG. However, the cost of producing phase II RFG is anticipated to be \$.03 to \$.05 over that of current conventional gasoline, which may impact costs to consumers. It is anticipated that this additional RFG production cost will be passed on to the consumers in the form of higher prices at the pump.

SECTION BY SECTION DISCUSSION

A new Division 3 of Subchapter H is proposed which will include the new RFG rules proposed in this rulemaking.

The proposed new §114.322 requires all gasoline produced for delivery and ultimate sale to the consumer in the affected area be certified through the United States Environmental Protection Agency (EPA) as compliant with all of the requirements for federal phase II RFG as specified in Title 40 of the Code of Federal Regulations (40 CFR), Part 80 (Regulation of Fuels and Fuel Additives), Subpart D (Reformulated Gasoline).

The proposed new §114.324 requires gasoline producers and importers that provide fuel to the affected area to register with the commission using forms prescribed by the executive director. Registrants are also required to sign a statement of acceptance of the rules and a statement of consent allowing the commission access to transfer documentation and records. This registration system will be used by the commission as an enforcement tool.

The proposed new §114.326 requires all parties in the distribution chain (producers, importers, terminals, pipelines, truckers, rail carriers, and retailers) to maintain records of transfer documents for a minimum of two years and upon request, make such records available to representatives of the commission, EPA, or local air pollution agency having jurisdiction in the area. This section makes it clear that enforcement may be taken against anyone in the chain of possession. Those entities which do not maintain adequate records will be presumed to be selling noncompliant fuel.

The proposed new §114.327 establishes an exemption from §114.322 and §114.326 for all gasoline solely intended for use as aviation gasoline, because aviation gasoline is not regulated by the federal RFG program. The proposed new §114.327 also contains a provision allowing for the transfer or

storage of gasoline, which does not meet the requirements of the proposed new §114.322, within the affected area as long as the fuel is not ultimately used in this area. This provision would allow gasoline intended for sale in other areas to pass through the DFW CMSA because the gasoline would not contribute to the vehicle emissions in the DFW nonattainment area.

The proposed new §114.329 specifies the counties in which all persons are subject to the new requirements and by which date these new requirements are to be implemented.

FISCAL NOTE

Bob Orozco, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments to Chapter 114 are in effect there will be no significant fiscal implications to any single unit of state and local government as a result of administration or enforcement of the proposed amendments.

The proposed amendments to Chapter 114, together with the current federal RFG program, would implement a state RFG program requiring all gasoline used in the DFW CMSA to be federally certified phase II RFG. The RFG program is an air pollution control program developed as part of the strategy to reduce emissions of NO_x and VOC necessary for the counties included in the DFW nonattainment area to be able to demonstrate attainment with the NAAQS for ozone. The steering committee representing the DFW ozone nonattainment area counties has requested an air pollution control strategy, including the use of RFG, to be established to reduce NO_x and VOC emissions necessary to demonstrate attainment with the NAAQS. Dallas, Collin, Denton, and Tarrant Counties are in the

DFW nonattainment area, which already has a federal RFG program. The proposed amendments are part of the commission response to the request from the DFW nonattainment area steering committee and one element of the proposed DFW Attainment Demonstration SIP. A SIP is a plan developed for any region where existing (measured and/or modeled) ambient levels of pollutant exceeds the levels specified in a national standard. The plan sets forth a control strategy that provides emission reductions necessary for attainment and maintenance of the national standards.

The proposed amendments would implement a state RFG program, which together with the current federal RFG program, would require all gasoline used in the 12-county DFW CMSA to be federally certified phase II RFG. The DFW CMSA consists of Collin, Dallas, Denton, Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties. To comply with the proposed RFG program, beginning May 1, 2002, gasoline fuel producers and importers must ensure that gasoline distributed to the outlying eight counties of the DFW CMSA is federally certified phase II RFG. The EPA, in their fact sheet, EPA 420-F-99-040, dated November 1999, estimated the additional cost of producing phase II RFG to be \$.03 to \$.05 per gallon more than conventional gasoline. It is anticipated that approximately 3.5 million gasoline-fueled vehicles in the DFW CMSA will be affected by the additional \$.03 to \$.05 per gallon cost for phase II RFG. It is also anticipated that all producers, importers, retailers, and purchasers of phase II RFG in the DFW CMSA will be affected by the proposed amendments. The proposed amendments will also require RFG producers and importers who provide fuel to the outlying eight counties of the DFW CMSA to register with the commission, certify that the fuel complies with the proposed requirements, and allow the commission access to the transfer documentation and records.

Gasoline solely intended for use as aviation gasoline is exempt from the control and recordkeeping requirements in the proposed amendments. Also, gasoline that does not meet the requirements of phase II RFG and is being transferred, placed, stored, or held within the DFW CMSA is exempt from the requirements of the proposed amendments, provided that the gasoline is not ultimately used to power a gasoline-fueled, spark-ignition engine in the outlying eight counties of the DFW CMSA.

Units of state and local government within the DFW CMSA that own or operate gasoline-fueled vehicles will likely be required to pay an additional \$.03 to \$.05 per gallon for phase II RFG. There are approximately 8,725 state and local government gasoline-fueled vehicles in the DFW CMSA. The total fiscal impact to state and local government vehicles is estimated to be in the range of approximately \$185,000 to \$309,000 or approximately \$21 to \$36 per year per vehicle.

PUBLIC BENEFIT

Mr. Orozco also has determined that for each year of the first five years the proposed amendments to Chapter 114 are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be the potential reduction of on-road mobile source emissions, potential reduction in NO_x and VOC emissions, potentially improved air quality, and contribution toward demonstration of attainment with the ozone NAAQS.

There are fiscal implications anticipated to individuals, state and local units of government, and businesses as a result of implementing the proposed amendments. It is anticipated that phase II RFG producers that supply fuel to the DFW CMSA will incur additional costs to produce phase II RFG. The

cost of producing phase II RFG is estimated to be \$.03 to \$.05 per gallon more than the current costs of producing conventional gasolines. It is anticipated that this additional cost will be passed on to consumers in the form of higher prices at the pump. There are no anticipated significant additional costs for phase II RFG fuel producers and importers associated with registering with the commission or recordkeeping.

It is estimated that approximately 3.5 million vehicles in the DFW CMSA consume approximately 2.5 billion gallons of gasoline on an annual basis. It is anticipated that individual motorists, state and local government agencies, and businesses with gasoline-fueled vehicles in the DFW CMSA will likely pay approximately \$.03 to \$.05 more per gallon of phase II RFG. The total fiscal impact for the price increase in phase II RFG associated with the proposed amendments in the DFW CMSA is estimated at approximately \$124.6 million or \$21 to \$36 per year per vehicle.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

There are no anticipated significant fiscal implications to small businesses and micro-businesses as a result of implementing the proposed amendments. There are no known phase II RFG fuel producers or importers that would be considered small or micro-businesses. However, it is anticipated that many independent retailers of gasoline in the DFW CMSA are small or micro-businesses. The increased production costs of approximately \$.03 to \$.05 per gallon are not anticipated to affect the independent retailers of gasoline except for passing increased costs of production through to consumers. The fiscal implications for small businesses and micro-businesses would include additional costs of approximately \$.03 to \$.05 per gallon for phase II RFG fuel for business-owned, gasoline-fueled vehicles. The

additional costs would depend on the amount of fuel used by the businesses. On an average basis, the annual cost to small and micro-businesses within the DFW CMSA is estimated to be approximately \$21 to \$36 per year per vehicle. There is no feasible way for the proposed rule to be written to mitigate the costs to small and micro-businesses.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking meets the definition of a “major environmental rule” as defined in that statute. “Major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone and may affect in a material way, a sector of the economy, i.e. the fuel production and distribution network which could be considered to be a sector of the economy, although the effect for individual vehicles is relatively small.

The proposed amendments are intended to implement a state RFG program as part of the strategy to reduce emissions of NO_x for the counties included in the DFW nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The steering committee representing the DFW ozone nonattainment area counties has requested an air pollution control strategy, including the use of RFG, to reduce NO_x emissions necessary to demonstrate attainment with the ozone NAAQS. The proposed amendments are part of the commission response to the request and one element of the proposed DFW

Attainment Demonstration SIP. In addition, Texas Government Code, §2001.0225, only applies 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 is not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed rule does not meet any of the four applicability requirements. Specifically, the RFG requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), §7409, and therefore meet a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once EPA has established those standards. Under the FCAA, §7410 and related provisions, states must submit, for EPA approval, SIPs that provide for the attainment and maintenance of NAAQS through a control program directed to sources of the pollutants involved. This proposal is not an express requirement of state law, but was developed specifically in order to meet the air quality standards established under federal law as NAAQS, as authorized under the TCAA, §382.012 (concerning State Air Control Plan). This proposal is intended to help bring the DFW ozone nonattainment area into compliance. The proposed amendments do not exceed a standard set by federal law, exceed an express requirement of state law unless specifically required by federal law, nor exceed a requirement of a delegation agreement. The proposed amendments were not developed solely under the general powers of the agency, but were

specifically developed to meet the air quality standards established under federal law as NAAQS. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rulemaking is to extend the federal phase II RFG program to include the remaining eight counties of the 12-county CMSA, which will act as an air pollution control strategy to reduce NO_x emissions necessary for the four counties included in the DFW ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. The proposed affected area consists of the eight additional counties of the DFW CMSA which include Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, and Rockwall Counties. Promulgation and enforcement of the rules may possibly burden private, real property because this proposed rulemaking action may result in investment in the permanent installation of new refinery processing equipment. This additional production investment is anticipated to increase the cost of production \$.03 to \$.05 per gallon over the current cost of producing conventional gasoline. This additional production investment is anticipated to be passed along to the consumers in the form of higher prices at the pump. Although the proposed rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the FCAA, §7410. Specifically, the emission limitations and control requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the FCAA, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has

established them. Under the FCAA, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement federal phase II RFG which is necessary for the DFW nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a takings under the Texas Government Code, Chapter 2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). No new sources of air contaminants will be

authorized by the rule amendments. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

PUBLIC HEARING

The commission will hold public hearings on this proposal at the following times and locations:

January 24, 2000, 2:00 p.m., City of El Paso Council Chambers, 2 Civic Center Plaza, 2nd floor, El Paso; January 25, 2000, 10:00 a.m., Building E, Room 201S, Texas Natural Resource Conservation Commission Complex, 12100 Park 35 Circle, Austin; January 26, 2000, 10:00 a.m., Longview City Hall Council Chambers, 300 West Cotton Street, Longview; January 26, 2000, 7:00 p.m., City of Irving Central Library Auditorium, 801 West Irving Boulevard, Irving; January 27, 2000, 10:00 a.m., Dallas Public Library Auditorium, 1515 Young Street, Dallas; January 27, 2000, 7:00 p.m.; Lewisville City Council Chambers, Municipal Center, Lewisville; January 28, 2000, 10:00 a.m., Council Chambers, 2nd floor, Fort Worth City Hall, 1000 Throckmorton Street, Fort Worth; January 31, 2000, 1:30 p.m., John Gray Institute, 855 Florida Avenue, Beaumont; and January 31, 2000, 7:00 p.m., Houston-Galveston Area Council, 3555 Timmons Lane, Houston. The hearings are 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 occur during the hearing; however, agency staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Ms. Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 99055B-114-AI. Comments must be received by 5:00 p.m., February 1, 2000. For further information, please contact Alan Henderson at (512) 239-1510 or Morris Brown at (512) 239-1438.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.011, which provides the commission the authority to control the quality of the state's air; §382.012, which provides the commission the authority to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.019, which provides the commission the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037(g), which provides the commission the authority to regulate fuel content if it is demonstrated to be necessary for attainment of the NAAQS; and §382.039, which provides the commission the authority to develop and implement transportation programs and other

measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The new sections implement TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; §382.037(g), relating to Vehicle Emissions Inspection and Maintenance Program; and §382.039, relating to Attainment Program.

SUBCHAPTER H: LOW EMISSION FUELS

DIVISION 3: REFORMULATED GASOLINE

§§114.322, 114.324, 114.326, 114.327, 114.329

§114.322. Control Requirements.

No person shall sell, offer for sale, supply, offer for supply, dispense, transfer, allow the transfer, place, store, or hold in any stationary tank, reservoir, or other container any gasoline in the counties listed in §114.329 of this title (relating to Affected Counties and Compliance Dates), which may ultimately be used to power a gasoline-fueled, spark-ignition engine in the affected counties, that has not been certified through the EPA as compliant with all of the requirements for federal phase II reformulated gasoline as specified in Title 40 Code of Federal Regulations, Chapter 80 (relating to Regulation of Fuels and Fuel Additives), Subpart D (relating to Reformulated Gasoline), dated February 16, 1994.

§114.324. Registration of Gasoline Producers and Importers.

Each producer and importer that sells, offers for sale, supplies, or offers for supply from its production facility or import facility reformulated gasoline (RFG) to counties listed in §114.329 of this title (relating to Affected Counties and Compliance Dates) shall register with the executive director, or his designated representative, by December 1, 2001, or beginning June 1, 2002, 30 days in advance of the first date that such person will produce or import RFG. Registration shall be on forms prescribed

by the executive director, or his designated representative, and shall include a statement of acceptance of the standards and enforcement provisions of this division; and shall include a statement of consent by the registrant that the executive director, or his designated representative, shall be permitted access to documentation and records. The executive director, or his designated representative, shall maintain a listing of all registered suppliers.

§114.326. Recordkeeping Requirements.

All parties in the distribution chain (producer, importer, terminals, pipelines, truckers, rail carriers, and retailers) must maintain records of transfer documents for a minimum of two years and shall upon request, make such records available to representatives of the commission, EPA, or local air pollution agency having jurisdiction in the area. The records must contain, at a minimum, the type and date of transfer, blend identity, blend batch numbers, volume of transfer, container or transport type, test results, and certification that the fuel complies with the requirements specified in §114.322 of this title (relating to Control Requirements).

§114.327. Exemptions.

The following exemptions apply in the counties listed in §114.329 of this title (relating to Affected Counties and Compliance Dates).

(1) All gasoline solely intended for use as aviation gasoline is exempt from §114.322 and §114.326 of this title (relating to Control Requirements and Recordkeeping Requirements).

(2) Gasoline that does not meet the requirements of §114.322 of this title, and is being transferred, placed, stored, or held within the affected counties is exempt from the requirements of §114.322 of this title, provided that the gasoline is not ultimately used to power a gasoline-fueled, spark-ignition engine in the counties listed in §114.329 of this title.

§114.329. Affected Counties and Compliance Dates.

Beginning May 1, 2002, all affected persons in the following counties shall be in compliance with §§114.322, 114.324, 114.326, and 114.327 of this title (relating to Control Requirements; Registration of Gasoline Producers and Importers; Recordkeeping Requirements; and Exemptions): Ellis, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, and Rockwall Counties.