

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** March 9, 2012

Thru: Bridget Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Susana M. Hildebrand, P.E., Chief Engineer

Docket No.: 2011-1221-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 114, Control of Air Pollution from Motor Vehicles
SB 385: Alternative Fueling Facilities Program
Rule Project No. 2011-052-114-EN

Background and reason(s) for the rulemaking:

Senate Bill (SB) 385, 82nd Legislature, 2011, Regular Session, by Senators Williams and Fraser, creates a new Texas Health and Safety Code (THSC), Chapter 393. This new chapter establishes the Alternative Fueling Facilities Program (AFFP) to be funded from the Texas Emissions Reduction Plan (TERP) Fund and administered by the Texas Commission on Environmental Quality (commission). The commission is to establish by rule the criteria for prioritizing facilities eligible to receive grants under the AFFP. Facilities eligible to receive grants under the program include a facility to store, compress, or dispense alternative fuels in a nonattainment area. Under the program, alternative fuels are defined as a fuel, other than gasoline or diesel fuel, other than biodiesel fuel, including electricity, compressed natural gas, liquefied natural gas, hydrogen, propane, or a mixture of fuels containing at least 85% methanol by volume. The rules are to be adopted as soon as practicable after September 1, 2011, the effective date of SB 385. This proposed rulemaking is to comply with that requirement.

It should be noted that SB 20, 82nd Legislature, 2011, Regular Session, by Senators Williams and West, also established the AFFP under a different chapter number in the THSC. However, because SB 385 was enacted last, it is the operative legislation for this rulemaking.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do: Under THSC, §393.004(a), the commission is to adopt rules to establish the criteria for prioritizing facilities eligible to receive a grant. The proposed rules outline criteria that may be considered by the executive director in establishing the priorities for each application period.

B.) Scope required by federal regulations or state statutes: The adopted rules are required by THSC, Chapter 393, as added by SB 385.

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C.) Additional staff recommendations that are not required by federal rule or state statute: Staff is not recommending additional provisions beyond what is required under THSC, Chapter 393.

Statutory authority:

- Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties;
- TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of the state;
- TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission;
- THSC, §382.107, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act;
- THSC, §382.011, which authorizes the commission to establish the level of 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;
- THSC, Chapter 386, which establishes the TERP program; and
- THSC, Chapter 393.004, which directs the commission to adopt rules to establish criteria for prioritizing facilities eligible to receive grants under the Alternative Fueling Facilities Program.

Effect on the:

A.) Regulated community: These rules will not affect regulated entities.

B.) Public: The criteria for prioritizing the grants will affect any applicant for a grant under this program, including companies and other entities. The rules provide information to potential applicants on the criteria that may be used by the executive director in implementing the program. This information will help potential applicants determine what facilities may be most likely to be funded.

C.) Agency programs: Staff will need to develop processes, criteria, and forms for implementing the new grant program. Prior to each grant application period, the specific funding priorities for that grant round will need to be determined.

Stakeholder meetings:

Stakeholder meetings were not held for this rulemaking.

Public comment:

The proposal was published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7476). A public hearing was scheduled for November 29, 2011; however, since no one registered to provide comments, the hearing was not officially opened. The comment

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period closed on December 5, 2011. The commission received written comments from United Parcel Service (UPS) in support of all or part of the rulemaking. The commission received written comments from NRG Energy, Inc. (NRG) in support of all or part of the rulemaking, with additional recommended minor modifications. The United States Environmental Protection Agency Region 6 (EPA) submitted written comments recommending the rules not be submitted to the EPA for inclusion in the state implementation plan for credit. Significant comments and concerns are discussed further.

EPA recommended that the rules not be submitted to the EPA for inclusion in the state implementation plan for credit because the rules involve prioritizing eligibility criteria and are administrative in nature. EPA recommended the Alternative Fueling Facilities Program be submitted on a project-by-project basis, as part of an attainment state implementation plan. No changes were made to the proposed text in response to this comment, but it was determined to not submit the rules as a revision to the state implementation plan, as explained further in the next section outlining significant changes from the proposal.

NRG requested consideration of several suggested changes. NRG commented that one of the key elements to ensuring widespread adoption of vehicles that use alternative fuels that are beneficial to the environment is to reduce the barriers for transition to such vehicles. NRG stated that electric vehicles offer a great opportunity to improve the overall emissions profile for the transportation sector, and existence of a comprehensive network of charging facilities will be necessary to solve the problem of “range anxiety” and ensure that consumers are comfortable adopting electric vehicles. NRG recommended that §114.660(a)(3) of the proposed text be revised to add additional clarifying language at the end of the proposed text of subsection (a) to read “by reducing barriers to adoption of alternative fuel vehicles, including ultra-low emissions or zero-emissions vehicles.” No changes were made to the proposed text in response to this comment.

NRG also commented that §114.660(a)(8) of the proposed text is not relevant to projects that address charging stations for personal vehicles used by the general public, but instead is focused solely on truck fleets. NRG commented that such criterion is also not relevant to zero-emissions vehicles, which by definition provided that increased zero-emission vehicle traffic would have no adverse impact on the region’s air quality. NRG recommended that subsection (a) be revised to add the words “if applicable” to the beginning of the subsection. Changes were made to the proposed text in response to this comment as explained further in the next section regarding significant changes from the proposal.

NRG additionally commented that it should be preferable to taxpayers and to the state to ensure that private investment is the primary driver behind development of alternative fueling infrastructure, rather than simply government funding. NRG recommended that §114.660(a)(9) be modified to clarify that preference will be given to projects that are privately funded but for the amount made available through the Alternative Fueling

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Facilities Program. No changes were made to the proposed text in response to this comment.

NRG commented that the TCEQ needs to have assurance that the funding awarded through this grant program will be money well-spent and suggests that the applicant should have a demonstrated track record of developing projects similar to those proposed. NRG recommended that an additional subsection (a)(12) be added to §114.660 to address the applicant's experience with the type of project proposed. NRG recommended the following language be added: "(12) the experience of the applicant in developing the type of project proposed." Changes were made to the proposed text in response to this comment as explained further in the next section regarding significant changes from the proposal.

Significant changes from proposal:

In response to the EPA's comment, the rules will not be submitted as a revision to the state implementation plan at this time. If it is determined in the future to use this program for possible credit in the state implementation plan, the more detailed criteria and program guidelines may be submitted to the EPA as a revision to the state implementation plan.

In response to NRG's comment that §114.660(a)(8) does not pertain to charging stations for personal vehicles, changes were made to the proposed text. The changes make it clear that subsection (a)(8) pertains not only to consideration of how vehicle traffic at a proposed facility may impact air quality in the area, but also how vehicle traffic may lead to traffic congestion or otherwise impact access to the area.

In response to NRG's final recommendation that an additional prioritization criterion be added, an additional §114.660(a)(12) is added from the proposed text to state that the experience of the applicant in developing and operating the type of project being proposed may be considered in prioritizing the funding.

Changes were not made to the proposed text in response to NRG's other recommendations.

Potential controversial concerns and legislative interest:

The rules incorporate provisions required under THSC, Chapter 393. The proposal does not go further than what is required to comply with the statutory changes. Therefore, staff does not anticipate any concerns being raised about the rules, beyond the comments received on the proposed text. Staff expects that the legislators involved in SB 385 and stakeholders will be interested in how the commission implements the new provisions.

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

Prior to each grant application period, the specific priorities for that grant round will need to be developed.

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

This rulemaking is required to implement the AFFP under THSC, Chapter 393, as added by SB 385. If rulemaking is not completed, implementation of the program could not be put into effect. Possible alternatives are not adopting the rules or adopting the rules at a later date and delaying implementation of the program.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** November 4, 2011

Anticipated *Texas Register* publication date: April 13, 2012

Anticipated effective date: April 19, 2012

Six-month *Texas Register* filing deadline: May 4, 2012

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