

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §§114.660 - 114.662.

Section 114.661 is adopted *with change* to the proposed text as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7476). Sections 114.660 and 114.662 are adopted *without changes* to the proposed text and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

Senate Bill (SB) 385, 82nd Legislature, 2011, amended the Texas Health and Safety Code (THSC) by adding Chapter 393, Alternative Fueling Facilities Program (program). This program is designed to provide funding for eligible entities to construct, reconstruct, or acquire a facility to store, compress, or dispense alternative fuels in a nonattainment area, as designated under Federal Clean Air Act, §107(d) (42 United States Code, §7407). 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. These rules are adopted to comply with THSC, §393.004(a), which requires the commission to adopt rules to establish criteria for prioritizing facilities eligible to receive grants under the program.

SB 20, 82nd Legislature, 2011, also established the Alternative Fueling Facilities Program under a different chapter number in the THSC. However, because SB 385 was enacted last, it is the operative legislation for this rulemaking.

Section by Section Discussion

§114.660, Purpose

Section 114.660 defines the purpose of the rules as the criteria that the executive director may use when establishing priorities for funding projects under the program, as required by THSC, §393.004.

§114.661, Criteria for Prioritizing Facilities Eligible to Receive a Grant

Section 114.661 outlines the criteria to be used for prioritizing facilities to receive grants under this program, as required by THSC, §393.004.

Subsection (a) lists criteria that may be used by the executive director to establish priorities for funding. Prior to each grant application period, the executive director will establish specific priorities for funding projects under that application period.

Under subsection (a)(1), the need for reductions in nitrogen oxides or other pollutants of concern in the area where the facility would be located can be considered in prioritizing the funding in order to meet or maintain federal air quality standards.

Under subsection (a)(2), the type of alternative fuel and the vehicles or equipment that would use the fuel may be considered by the executive director in establishing the funding priorities. This subsection allows the executive director to determine that certain types of alternative fuels or vehicles and equipment should receive greater priority in funding decisions in order to best implement the program.

Subsection (a)(3) allows the executive director to consider the potential for the project to increase the use of the alternative fuel in nonattainment areas and the state in general. Under this subsection, the likelihood that a project will provide broader benefits in increasing the use of the alternative fuel may be considered in determining the priorities for funding.

Subsection (a)(4), allows the executive director to consider the potential for the project to increase the use of alternative fuels and alternative fuel technologies produced, manufactured, or otherwise based in Texas. This provision allows the executive director to put a priority on the use of Texas-based fuels and technologies.

Subsection (a)(5) allows the executive director to consider the current and projected need for the facility. Use of this provision will help to ensure that facilities with the

greatest need or potential for use would receive higher priority over facilities where the need for the facility is less.

Subsection (a)(6) allows the executive director to consider the expected use of the facility for fueling vehicles funded under local, state, or federal incentive programs, including programs implemented under the Texas Emissions Reduction Plan. If this provision was used, the executive director could help support implementation of other funding programs for alternative fuel vehicles through prioritizing funding for facilities that would be used by those vehicles.

Subsection (a)(7) allows the executive director to consider the location of the proposed facility in relation to major highways and transportation routes, and the ease of access to the facility for use by the public. The ease of access to the facility could be a factor in the success of the grant-funded project, and this provision will allow the executive director to consider that factor in setting funding priorities.

Subsection (a)(8) allows the executive director to consider the location of the proposed facility in relation to an area where increased vehicle traffic would not be expected to negatively impact the region's air quality or sensitive receptors, or contribute to traffic congestion. This provision will allow the executive director to consider potential

negative impacts of increased vehicle traffic to a proposed facility on regional air quality and on sensitive receptors.

Subsection (a)(9) allows the executive director to consider the percentage of costs of the facility to be paid by the applicant and from other sources of funding. This provision takes into account that the financial stake that an applicant has in a project could be a factor in the potential success of the facility.

Subsection (a)(10) allows the executive director to consider the commitment by the applicant to operating the facility over a period of time. This provision will allow the executive director to set priorities for how long a facility would be operated and to place a priority on projects where an applicant intends to operate the facility for a longer period.

Subsection (a)(11) allows the executive director to consider technical and economic factors associated with a project. This provision will allow the executive director to assess the technical and economic feasibility of a project in determining the priorities for funding.

A new subsection (a)(12) is added from the proposed text. This subsection allows the executive director to consider the experience of the applicant in developing and

operating the type of project being proposed. This provision will allow the executive director to assess the ability of an applicant to complete the project and to operate the facility.

Subsection (b) authorizes the executive director to establish additional criteria for the award of a grant, including establishing certain operational, maintenance, and reporting requirements.

Subsection (c) authorizes the executive director to limit grants under a grant application period according to the priorities established for that grant application period. Under this provision, the priorities established for a particular grant application period may be used not only for ranking projects submitted by applicants but also to limit projects that may be funded to those meeting priorities.

§114.662, Implementation Schedule

Section 114.662 identifies the expiration date of the program, as stated in THSC, §393.007. Under this section, the program will expire on August 31, 2018.

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

The new Chapter 114 rules are adopted in accordance with SB 385, which added THSC, Chapter 393. The rules are part of the implementation of a new voluntary incentive program to increase the availability of alternative fueling facilities in nonattainment areas of this state. The program offers financial incentives for the voluntary construction, reconstruction, or acquisition of alternative fueling facilities. Because the rules place no involuntary requirements on the regulated community, the rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Also, none of the rules place additional financial burdens on the regulated community.

In addition, a regulatory impact analysis is not required because the 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 adopted solely under the general powers of the agency, but is specifically authorized by the provisions cited in the Statutory Authority section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received regarding the regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to amend Chapter 114 in accordance with SB 385. The new rules

establish criteria for prioritizing facilities eligible to receive a grant as part of the implementation of a voluntary program. The promulgation and enforcement of the rules is neither a statutory nor a constitutional taking because participation in the program is voluntary and the program does not involve restrictions or controls on 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 adopted rulemaking and found the adoption 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.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding consistency with the CMP.

Public Comment

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 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 Alternative Fueling Facilities Program not be submitted to the EPA for inclusion in the state implementation plan for credit.

Response to Comments

NRG expressed support to the proposed rulemaking. EPA expressed appreciation for TCEQ's efforts to continually improve and expand the mobile source incentive programs and the eligibility of vehicles. UPS expressed support for the rulemaking and had no suggested changes.

NRG also provided information on its role in creating the nation's first comprehensive, privately funded, competitive, and sustainable electric vehicle ecosystem of home charging stations and high-powered, fast charging stations. NRG provided information on the benefits of electric vehicles for the state.

The commission appreciates the support expressed for this new program.

No changes to the proposed text were made in response to these comments.

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.

The commission agrees that the provisions in the rule do not provide enough information to determine that the Alternative Fueling Facilities Program would meet the criteria for credit of the emissions reductions to the state implementation plan. The rules will not be submitted as a revision to the state implementation plan at this time. If this program is submitted for possible credit in the state implementation plan in the future, the more detailed criteria and program guidelines would be submitted to the EPA at that time.

NRG commented that it generally supports the proposed criteria but that the criteria could benefit from some additional clarifications. 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 to adoption of 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 §114.661(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."

The commission appreciates NRG's comments. The concept of reducing barriers to adoption of alternative fuel vehicles is inherent in the commission's proposed text referring to the potential for the project to increase the use of the alternative fuel. The language of this subsection and the rules in general is sufficiently broad to allow the commission to be more specific in the criteria for a particular grant round. Therefore, no changes were made to the proposed text.

NRG commented that §114.661(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 also 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.

The commission agrees that this provision needs to be clarified. In addition to consideration of how vehicle traffic at a proposed facility may negatively impact air quality in the area, this provision is also intended to allow consideration of how vehicle traffic may contribute to traffic congestion or negatively impact access to the area. Issues and concerns regarding traffic congestion and access to an area apply to charging stations used by the general public for zero-emission vehicles as well as facilities used primarily by truck fleets that may have air emissions. In response to this comment, changes were made to the proposed text to refer to "vehicle" traffic, rather than "truck" traffic, and to include consideration of how vehicle traffic at the proposed facility may contribute to traffic congestion or negatively impact access to the area.

NRG 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 §114.661(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 Facilities Program.

The commission does not intend to establish a particular priority for privately funded projects over projects receiving other public funding at this time. The rule language is sufficiently flexible to allow the executive director to take into account other situations, not specifically outlined in the criteria listed in the rule, if needed in the future. Therefore, no changes were made to the proposed text.

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 §114.661(a)(12) be added 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."

The commission agrees with NRG's recommendation that an additional prioritization criterion be added to address the experience of the applicant with the type of project being proposed. An additional paragraph (12) was added to §114.661(a) 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.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 6: ALTERNATIVE FUELING FACILITIES PROGRAM

§§114.660 - 114.662

Statutory Authority

These new sections are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These new rules are also adopted under Texas Health and Safety Code (THSC), Texas Clean Air Act, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the THSC; THSC, §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; and THSC, §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. Finally, these new rules are adopted under THSC, §393.004, requiring the commission to establish by rule the criteria for prioritizing facilities eligible to receive a grant.

The new sections implement THSC, §393.004.

§114.660. Purpose.

(a) These rules establish the criteria that the executive director may use for prioritizing facilities eligible to receive grants under the Alternative Fueling Facilities Program, established under Texas Health and Safety Code, Chapter 393.

(b) The requirements of Texas Health and Safety Code, Chapter 393, apply to grants awarded under this program.

§114.661. Criteria for Prioritizing Facilities Eligible to Receive a Grant.

(a) Prior to each grant application period, the executive director will establish specific priorities for funding projects under that application period. Criteria that may be considered in establishing the funding priorities include, but are not limited to:

(1) the need for reductions in nitrogen oxides (NO_x) or other pollutants of concern in the area where the facility will be located in order to meet or maintain federal air quality standards;

(2) the type of alternative fuel and the vehicles or equipment that will use the fuel;

(3) the potential for the project to increase the use of the alternative fuel in nonattainment areas and Texas in general;

(4) the potential for the project to increase the use of alternative fuels and alternative fuel technologies produced, manufactured, or otherwise based in Texas;

(5) the need for the facility, based on the current and expected number of vehicles and equipment that would be served by the facility or the fuel made available as a result of the facility, and the availability of other sources of the alternative fuel in the area;

(6) the expected use of the facility for fueling vehicles funded under local, state, or federal incentive programs, including the programs implemented under the Texas Emissions Reduction Plan;

(7) the location of the proposed facility in relation to major highways and transportation routes and the ease of access to the facility for use by the public;

(8) the location of the proposed facility in relation to an area where increased vehicle traffic would not be expected to contribute to traffic congestion, reduce or negatively impact access to the area, or negatively impact the region's air quality or sensitive receptors;

(9) the percentage of costs of the facility to be paid by the applicant and other sources of funding;

(10) the commitment by the applicant to operating the facility over a period of time;

(11) consideration of technical and economic factors associated with a project; and (12) the experience of the applicant in developing and operating the type of project proposed.

(b) The executive director may establish additional criteria for the award of a grant, including establishing certain operational, maintenance, and reporting requirements.

(c) The executive director may limit the grants under a grant application period according to the priorities established for that grant application period.

§114.662. Implementation Schedule.

This division expires on August 31, 2018.