

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

If adopted, the new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan.

Background and Summary of the Factual Basis for the Proposed 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 80% methanol by volume. These rules are proposed 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 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

Proposed §114.660 would define the purpose of the proposed 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

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

Proposed 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 would establish specific priorities for funding projects under that application period.

Under proposed subsection (a)(1), the need for reductions in nitrogen oxides or other pollutants of concern in the area where the facility would be located could be considered

in prioritizing the funding, in order to meet or maintain federal air quality standards.

Under proposed subsection (a)(2), the type of alternative fuel and the vehicles or equipment that would use the fuel could be considered by the executive director in establishing the funding priorities. This proposed subsection would allow 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.

Proposed subsection (a)(3) would allow consideration of the potential for the project to increase the use of the alternative fuel in nonattainment areas and the state in general. Under this proposed subsection, the likelihood that a project would provide broader benefits in increasing the use of the alternative fuel could be considered in determining the priorities for funding.

Proposed subsection (a)(4), would allow 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 could be considered. This proposed provision would allow the executive director to put a priority on the use of Texas-based fuels and technologies.

Proposed subsection (a)(5) would allow the executive director to consider the current and projected need for the facility. Use of this provision would 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.

Proposed subsection (a)(6) would allow 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 (TERP). If this provision were 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.

Proposed subsection (a)(7) would allow 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 would allow the executive director to consider that factor in setting funding priorities.

Proposed subsection (a)(8) would allow the executive director to consider the location of the proposed facility in relation to an area where increased truck traffic would not be expected to negatively impact the region's air quality or sensitive receptors. This

provision would allow the executive director to consider potential negative impacts of increased truck traffic to a proposed facility on regional air quality and on sensitive receptors.

Proposed subsection (a)(9) would allow 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 would take into account that the financial stake that an applicant has in a project could be a factor in the potential success of the facility.

Proposed subsection (a)(10) would allow the executive director to consider the commitment by the applicant to operating the facility over a period of time. This provision would 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,

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

Proposed subsection (c) would authorize 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 could 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

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

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, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules are administrative in nature and establish the criteria for prioritizing alternative fueling facilities eligible to receive grants under the program funded by Account 5071 - TERP. The agency will implement the program using currently available resources, and funds allocated to funding fueling facilities in the program are approximately \$2.2 million.

SB 385 authorizes the agency to create the program using a portion of the funds appropriated in Account 5071 - TERP. The proposed rules, as required by SB 385, would add a new division to Chapter 114 to outline the criteria that will be used to

prioritize facilities eligible to receive a grant under the voluntary program. The rules are administrative in nature, and detailed program criteria and procedures will be developed separate from these rules and enforced through a grant contract. A separate, but related rulemaking establishes the criteria for prioritizing vehicles eligible to receive grant funding.

The proposed rules are not expected to have a significant fiscal impact on state agencies or units of local government since they are administrative in nature. However, these government entities could choose to apply for and receive a grant under the program. The grant could not be used for administrative expenses, and grant awards would be limited to the lesser of 50% of eligible costs or \$500,000. The program is voluntary, and it is not known at this time how many governmental entities would apply for this type of grant.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be an increase in available alternative fueling facilities for alternative fuel vehicles or engines, providing more choices to the public for use of alternative fuels.

The proposed rules are not expected to have a direct significant fiscal impact on individuals since they are administrative in nature and establish the criteria that will be used to prioritize facilities eligible to receive a grant under the voluntary program. However, if an individual becomes eligible to apply for and receive a grant to pay the costs of an alternative fueling facility, that individual could experience the same cost savings as a governmental entity or business that qualifies for a grant award.

The proposed rules are not expected to have a significant fiscal impact on large businesses since the rules are administrative in nature. However, large businesses could choose to apply for and receive a grant under the program to offset the cost of providing such a facility. The grant could not be used for administrative expenses, and grant awards would be limited to the lesser of 50% of eligible costs or \$500,000. The program is voluntary, and it is not known at this time how many large businesses would apply for this type of grant.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules since the rules are administrative in nature. If a small business voluntarily applies for a grant and receives a grant award under the program, the small business could expect to receive the same type of benefit as a large business.

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 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 Determination

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 proposed in accordance with SB 385, which added THSC, Chapter 393. The proposed 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 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. Also, none of the proposed rules 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 and 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 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 proposed 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 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 is part of implementing 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 29, 2011, 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. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-052-114-EN. The comment period closes December 5, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Stephen Dayton, Implementation Grants Section, (512) 239-6824.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 6: ALTERNATIVE FUELING FACILITIES PROGRAM

§§114.660 - 114.662

Statutory Authority

These new rules 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. These new rules 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; 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 proposed new rules are proposed under THSC, §393.004, requiring the commission to establish by rule the criteria for prioritizing facilities eligible to receive a grant.

The proposed rules 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 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 truck traffic would not be expected to 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, and

(11) consideration of technical and economic factors associated with a project.

(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.