The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §§114.670 - 114.672.

Section 114.671 is adopted *with change* to the proposed text as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7480). Sections 114.670 and 114.672 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 394, Texas Natural Gas Vehicle Grant Program (program). This program is designed to encourage eligible entities to replace on-road heavy-duty and medium-duty vehicles with natural gas vehicles and to replace on-road heavy-duty and medium-duty vehicle engines with natural gas engines. The program also includes incentives to fund a portion of the costs to install natural gas dispensing equipment at fueling stations along a Clean Transportation Triangle consisting of the interstate highways connecting the cities of Houston, San Antonio, Dallas, and Fort Worth. These rules are adopted to comply with THSC, §394.005(a), which requires the commission to adopt rules to establish criteria for prioritizing qualifying vehicles eligible to receive grants under the new 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

§114.670, Purpose

Section 114.670 defines the purpose of the rules as the criteria the executive director may use when establishing priorities for funding projects under the program, as required by THSC, §394.005.

§114.671, Criteria for Prioritizing Vehicles Eligible to Receive a Grant

Section 114.671 outlines the criteria to be used for prioritizing qualifying vehicles to receive grants under this program, as required by THSC, §394.005.

Subsection (a) lists the 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 executive director may consider the potential for different types of projects to achieve reductions in nitrogen oxides (NO_X) and/or other pollutants of concern, including consideration of the vehicle types, weight categories, and types of use with the greatest potential to achieve emissions reductions.

Under subsection (a)(2), the cost-effectiveness of a potential project, as determined by the cost per ton of expected reductions in NO_X and/or other pollutants of concern may be considered by the executive director.

Under subsection (a)(3), the potential for different types of projects to help increase the use of natural gas for transportation in Texas may be considered by the executive director.

Under subsection (a)(4), the areas of use of the grant-funded vehicles may be considered by the executive director, including consideration of the availability of fuel and fueling infrastructure and the need for emissions reductions in those areas in order to meet federal air quality standards. Language is added from the proposed text to also consider the need for vehicle fleets to support fueling infrastructure.

Under subsection (a)(5), the executive director could consider how a project may support the conversion of large regional vehicle fleets moving goods and materials along interstate highways connecting the cities of Houston, San Antonio, Dallas, and Fort Worth from gasoline or diesel fuel to natural gas.

Under subsection (a)(6), the executive director may assign a priority to projects that will help reduce exposure of vulnerable populations to pollutants of concern, including the conversion of school bus fleets and other fleets transporting children or the elderly from gasoline or diesel fuel to natural gas.

Under subsection (a)(7), the executive director may assign a priority to projects that would result in the conversion of public transportation fleets, such as school buses, transit buses, airport shuttle buses, and similar vehicle fleets from gasoline or diesel fuel to natural gas.

Under subsection (a)(8), the executive director may assign a priority to projects that will result in the conversion of public utility and service fleets, such as refuse vehicles, maintenance and utility vehicles, and similar fleets from gasoline or diesel fuel to natural gas.

Under subsection (a)(9), the executive director may assign a priority to projects that will support the use of natural gas and natural gas vehicles, engines, and associated technologies produced, manufactured, or otherwise based in Texas.

Under subsection (a)(10), the executive director may assign a priority to projects that will support the implementation of new and innovative natural gas vehicle and engine technologies.

Subsection (b) authorizes the executive director to limit grants under a grant application period according to the priorities established for that application period.

Subsection (c) requires that not less than 60% of the total amount of grants awarded in a fiscal biennium must be awarded to motor vehicles with a gross vehicle weight rating of at least 33,001 pounds. This subsection also provides that this restriction will not apply if the commission does not receive enough grant applications to satisfy the percentage of funding requirement. These provisions are required by THSC, §394.007(b).

§114.672, Implementation Schedule

Section 114.672 identifies the expiration date of the program, as stated in THSC, §394.012. Under this section, the program expires on August 31, 2017.

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 394. The rules are part of the implementation of a new voluntary incentive program with the goal of encouraging the use of natural gas in on-road heavy-duty and medium-duty vehicles and reducing emissions through the replacement or repower of older existing vehicles and engines with new cleaner models powered by natural gas. The program offers financial incentives for the voluntary replacement of vehicles and engines. 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 vehicles eligible to receive a grant as part of the implementation of a voluntary program and only affect motor vehicles which are not considered to be private real property. The promulgation and enforcement of the 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 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 Crossroads Equipment Lease & Finance, LLC (Crossroads), and United Parcel Service (UPS) in support of all or part of the rulemaking. The commission received written comments from America's Natural Gas Alliance (ANGA), Clean Energy Fuels (Clean Energy), and Pioneer Natural Resources USA, Inc. (Pioneer) in support of all or part of the rulemaking, with additional recommended minor modifications. The United States Environmental Protection Agency Region 6 (EPA) submitted comments providing one recommendation regarding the rules.

ANGA, Clean Energy, Crossroads, Pioneer, and UPS commented in support of the proposed rules.

ANGA, Clean Energy, and Pioneer discussed how the implementation of the Texas Natural Gas Vehicle Grant Program will benefit Texas on many levels, including job creation, increased revenues to the state, improved air quality, energy independence, and the promotion of Texas products. The comments from these entities also discussed the amount of natural gas produced in Texas and how utilization of this resource will benefit the Texas economy, the benefits to national security from use of natural gas as a vehicle fuel, and the benefits of assisting the state in its efforts to meet national ambient air quality standards under the Federal Clean Air Act.

ANGA, Clean Energy, and Pioneer commented that it is critical that the TCEQ retain flexibility to change priorities as the program matures and that the rules as proposed achieve this goal.

Crossroads provided information regarding its experience in California and nationally in financing and assisting entities to apply for and receive grant funding for programs like the Texas Natural Gas Vehicle Grant Program. Crossroads commented that the rules demonstrate TCEQ's acknowledgement of potential challenges entities face when soliciting applicants for funding and that the provisions for executive director discretion will allow for flexibility.

The commission appreciates the support expressed for the new Texas Natural Gas Vehicle Grant Program and these rules. The commission agrees that the program will provide a variety of benefits to the state. No changes were made to the proposed text in response to these comments.

Clean Energy and Pioneer also commented that is it important that TCEQ continue to keep stakeholders well-informed of the goals it seeks to accomplish in each grant round and to allow stakeholder input as to how those goals can be accomplished.

The commission agrees that it is important to keep stakeholders engaged in the program. Where appropriate, stakeholder input will be solicited as the program matures and decisions are made regarding priorities for funding. Also, workshops, training events, and informational meetings will be held as needed to explain the program requirements and procedures to dealers, potential applicants, and other stakeholders. No changes were made to the proposed text 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 proposed rules involve prioritizing eligibility criteria and are administrative in nature. EPA recommended the Texas Natural Gas Vehicle Grant 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 program will 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 may be submitted to the EPA at that time.

ANGA, Clean Energy, and Pioneer commented in support of the Clean Transportation Triangle Program, established in THSC, Chapter 394, along with the Texas Natural Gas Vehicle Grant Program. These entities commented that the Clean Transportation Triangle Program requires promotion of both an increased use of natural gas vehicles and the availability of natural gas infrastructure and that the success of both programs depends on the location of vehicles and infrastructure along the triangle in support of each other. These entities recommended that §114.671(a)(4) be broadened to include the concept that vehicles also need to be strategically located to support the infrastructure in the Clean Transportation Triangle. These entities recommended language to be added to subsection (a) as follows: "(4) the areas of use of the grant-funded vehicles, including consideration of the availability of fuel and fueling infrastructure, *the need for vehicle fleets to support fueling infrastructure*, . . . "

The commission agrees that, where appropriate, it is important that vehicle fleets and fueling infrastructure be developed in a complimentary approach. Additional language was added to §114.671(a)(4) from the proposed text to include consideration of the need for vehicle fleets to support fueling infrastructure.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS
DIVISION 7: TEXAS NATURAL GAS VEHICLE GRANT PROGRAM
§§114.670 - 114.672

Statutory Authority

The 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, §394.005(a), as added by Senate Bill 385, directing the commission to establish by rule the criteria for prioritizing qualifying vehicles eligible to receive a grant.

The adopted new sections implement THSC, §394.005.

§114.670. Purpose.

(a) These rules establish the criteria that the executive director may use for prioritizing qualifying vehicles eligible to receive grants under the Texas Natural Gas Vehicle Grant Program, established under Texas Health and Safety Code, Chapter 394.

(b) The requirements of Texas Health and Safety Code, Chapter 394, apply to grants awarded under this program.

§114.671. Criteria for Prioritizing Vehicles Eligible to Receive a Grant.

(a) Prior to each grant application period, the executive director will establish 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 potential for different types of projects to achieve reductions in nitrogen oxides (NO_X) and/or other pollutants of concern over the required period of use of the grant-funded vehicles, including consideration of the vehicle types, weight categories, and types of use with the greatest potential to achieve emissions reductions;

(2) the cost-effectiveness of potential projects, as determined by the cost per ton of expected reductions in NO_X and/or other pollutants of concern;

(3) the potential for different types of projects to help increase the use of natural gas for transportation in Texas;

(4) the areas of use of the grant-funded vehicles, including consideration of the availability of fuel and fueling infrastructure, the need for vehicle fleets to support fueling infrastructure, and the need for emissions reductions in those areas in order to meet federal air quality standards;

(5) support for conversion of large regional vehicle fleets moving goods and materials along interstate highways connecting the cities of Houston, San Antonio, Dallas, and Fort Worth from gasoline or diesel fuel to natural gas;

(6) support for projects to reduce exposure of vulnerable populations to pollutants of concern, including conversion of school bus fleets and other fleets transporting children or the elderly from gasoline or diesel fuel to natural gas;

(7) support for conversion of public transportation fleets, such as school buses, transit buses, airport shuttle buses, and similar vehicle fleets from gasoline or diesel fuel to natural gas;

(8) support for conversion of public utility and service fleets, such as refuse vehicles, maintenance and utility vehicles, and similar fleets from gasoline or diesel fuel to natural gas;

(9) support for the use of natural gas and natural gas vehicles, engines, and associated technologies produced, manufactured, or otherwise based in Texas; and

(10) support for implementation of new and innovative natural gas vehicle and engine technologies.

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

(c) Not less than 60% of the total amount of grants awarded in a fiscal biennium must be awarded to motor vehicles with a gross vehicle weight rating of at least 33,001 pounds. However, this restriction does not apply if the commission does not receive enough grant applications to satisfy the percentage of funding requirement.

§114.672. Implementation Schedule.

This division expires on August 31, 2017.