TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AGENDA ITEM REQUEST

for Withdrawal of Sections from the State Implementation Plan

AGENDA REQUESTED: September 9, 2015

DATE OF REQUEST: August 21, 2015

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Derek Baxter, (512) 239-2613

CAPTION: Docket No. 2015-1025-SIP. Consideration of the withdrawal from the United States Environmental Protection Agency of portions of 30 Texas Administrative Code Section 116.128, as adopted by the Commission on February 8, 2012, as a revision to the State Implementation Plan (SIP). Specifically, Section 116.128(a), (b), (c)(1)(A)(i)(I) - (IX), (XII), and (XIII), (c)(1)(B) - (F), (c)(2) - (4), (f), and (h) would be withdrawn from consideration as a SIP revision.

Section 116.128 implemented House Bill 2694, 82nd Texas Legislature, 2011, Regular Session, which established public notice, comment, and contested case hearing deadlines and procedures for permit amendment applications for electric generating facilities which are reducing emissions to comply with a Maximum Achievable Control Technology standard under the Federal Clean Air Act, Section 112. Although these portions of Section 116.128 would be withdrawn from consideration as a SIP revision, the rule is not proposed for repeal and will remain in effect until it expires pursuant to Section 116.128(h). (Michael Wilhoit, Janis Hudson)

Jayme Sadlier for Steve Hagle
Deputy Director

Erin Selvera for Michael Wilson
Division Director

Derek Baxter
Agenda Coordinator

Copy to CCC Secretary? NO X YES

Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners **Date:** August 21, 2015

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2015-1025-SIP

Subject: Commission Withdrawal of State Implementation Plan (SIP) Submittal
Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, Subchapter B, § 116.128
Project No. 2015-033-SIP-NR

Background and reason(s) for the withdrawal:
House Bill (HB) 2694, 82nd Texas Legislature, 2011, created new Texas Health and Safety Code (THSC), §382.059, which established expedited procedures and timelines associated with permit amendments for electric generating facilities (EGF) subject to new Federal Clean Air Act (FCAA), §112 Maximum Achievable Control Technology (MACT) standards for electric utilities (the Utility MACT). The new THSC section provided specific time periods for TCEQ to draft permit amendments and for parties to request hearings on the draft amendment. THSC, §382.059 limits the scope of the hearing to whether the choice of technology approved in the draft permit meets the MACT requirement of FCAA, §112. Rule language to implement HB 2694 and THSC, §382.059 was adopted under Title 30 Texas Administrative Code (TAC) §116.128 on February 8, 2012. After adoption, portions of §116.128 were submitted to the United States Environmental Protection Agency (EPA) as a SIP revision.

At this time, the EPA has not yet formally acted on TCEQ's request for §116.128 to be approved as a SIP revision. However, since the adoption of §116.128, circumstances relating to the EPA's §112 Utility MACT, the power industry, and §116.128 itself make it no longer necessary for §116.128 to be approved as a SIP revision. First, the nominal compliance date for the Utility MACT was April 16, 2015, and sources could request an extension for compliance until April 16, 2016. TCEQ received extension requests regarding 29 of the 42 operating coal-fired EGUs at 21 power plants in Texas that are subject to the Utility MACT. The extension requests were based on a variety of reasons, and many of those units do not need the full year to come into compliance.

Second, TCEQ has not received any applications for New Source Review (NSR) permits under §116.128 in the more than three years since the rule was adopted to meet the compliance date. Further, applicants that received a compliance extension are not expected to rely on §116.128 for the extended April 2016 compliance date. Based on the information received with the extension requests, it is not anticipated that those companies will need to file a Prevention of Significant Deterioration (PSD) major new source review (NSR) permit application for which §116.128 will be an attractive or

necessary option. In addition, §116.128 does not provide any significant additional regulatory benefit not already available in other TCEQ rules. It is anticipated that many of those facilities which received compliance extensions will use the minor NSR Pollution Control Project Standard Permit for authorization, rather than a case-by-case permit amendment under §116.128.

Finally, the provisions of §116.128 and THSC, §382.059 contain a built-in expiration provision, which takes effect on the sixth anniversary of the date the EPA administrator adopts standards for existing EGFs under the FCAA, §112, unless a stay of the rule is granted. The EPA adopted the Utility MACT on December 16, 2011, so the corresponding expiration date of §116.128 is December 16, 2017.

Separately, on June 29, 2015, the United States Supreme Court remanded the Utility MACT rule to the EPA to consider the costs associated with the rule, including the cost of compliance. Because a number of power plants in Texas, as well as throughout the country, are currently in compliance with the Utility MACT and others are continuing plans for compliance with regard to implementation of controls, the remand to the EPA is not expected to result in the use of §116.128.

For these reasons, staff recommends that the commission withdraw the request for the EPA to approve portions of §116.128 as a SIP revision.

Scope of the withdrawal:
This action would withdraw the TCEQ's outstanding request for the EPA to approve the following as a SIP revision: § 116.128(a), (b), (c)(1)(A)(i)(I) - (IX), (XII) and (XIII), (c)(1)(B) - (F), (c)(2) - (4), (f), and (h). Although this action would withdraw the request for EPA to approve these rules as part of the SIP, the rules would not be repealed, and will remain in effect until the section expires pursuant to §116.128(h).

A.) Summary of what the rulemaking will do: The withdrawal will remove the referenced portions of §116.128 from consideration as a revision to the Texas SIP. EPA will return the submitted sections, and no further action will be taken by the EPA regarding the commission's previous request to consider them as a revision to the SIP.

B.) Scope required by federal regulations or state statutes: N/A

C.) Additional staff recommendations that are not required by federal rule or state statute: None.

Statutory authority:
This request to withdraw the above-noted rules is made under the commission's authority in Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rules necessary to carry out its powers

and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The withdrawals are also adopted under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, State Air Control Plan, which authorizes the commission to develop a general, comprehensive plan for the control of the state's air.

Effect on the:

A.) Regulated community: None.

B.) Public: None.

C.) Agency programs: None.

Stakeholder meetings:
No stakeholder meetings were held.

Public comment:
The withdrawal has not been subject to public comment independent of the posting for consideration on the September 9, 2015, commission agenda. There is no requirement for public comment for withdrawal of SIP submittals.

Significant changes from proposal:
There is no proposal action associated with this withdrawal request.

Potential controversial concerns and legislative interest:
No controversial issues have been identified or are expected.

Does this action affect any current policies or require development of new policies? No.

What are the consequences if this action does not go forward? Are there alternatives?
If this withdrawal is not approved by the commission, the EPA is expected to disapprove the rule as a SIP revision. The EPA cannot approve the rule unless the rule is amended to expressly provide that any PSD permit issued under §116.128 is available to the public. Although TCEQ provides permit conditions for its NSR permits on the TCEQ's webpage, the EPA needs a legal basis to approve the rule as a SIP revision for PSD permits. A rule amendment would likely take several months to complete, and the EPA's SIP review process would take at least six months to complete; all of this would, therefore, be

completed after the extended compliance date of the Utility MACT, which will be moot due to the Supreme Court's opinion.

Agency contacts:
Michael Wilhoit, Project Manager, (512) 239-1222, Air Permits Division
Janis Hudson, Staff Attorney, (512) 239-0466
Derek Baxter, Texas Register Coordinator, (512) 239-2613

Attachments
N/A

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Stephen Tatum
Office of General Counsel
Michael Wilhoit
Derek Baxter

ORDER

Docket No. 2015-1025-SIP

On September 9, 2015, the Texas Commission on Environmental Quality (Commission) considered the withdrawal of 30 Tex. Admin. Code § 116.128(a), (b), (c)(1)(A)(i)(I) - (IX), (XII), and (XIII), (c)(1)(B) – (F), (c)(2) – (4), (f), and (h), as adopted by the Commission on February 8, 2012, from consideration by the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP).

IT IS THEREFORE ORDERED BY THE COMMISSION that the portions of 30 Tex. Admin. Code § 116.128 referenced above, are hereby withdrawn from submission to EPA as revisions to the SIP.

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

Issued date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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Bryan W. Shaw, Ph.D., P.E., Chairman

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