

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §116.18, Electric Generating Facility Permits Definitions; §116.910, Applicability; §116.911, Electric Generating Facility Permit Application; §116.912, Electric Generating Facility Permit Application for Electing Electric Generating Facilities; §116.913, General and Special Conditions; §116.914, Emissions Monitoring and Reporting Requirements; §116.916, Permits for Grandfathered and Electing Electric Generating Facilities in El Paso County; §116.920, Public Participation for Initial Issuance; §116.921, Notice and Comment Hearings for Initial Issuance; §116.922, Notice of Final Action; §116.930, Modifications; and §116.931, Renewal. Sections 116.18, 116.910-116.914, 116.916, 116.920-116.922, and 116.931 are adopted with changes to the proposed text as published in the September 10, 1999 issue of the *Texas Register* (24 TexReg 7163). Section 116.930 is adopted without changes and will not be republished. The new sections will be submitted as a proposed revision to the state implementation plan (SIP).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill 7 (SB 7), 76th Legislature, 1999, amended Texas Utilities Code (TUC), Title 2, concerning Public Utility Regulatory Act, Subtitle B, concerning Electric Utilities, and created a new TUC, Chapter 39, concerning Restructuring of Electric Utility Industry. SB 7 requires the commission to implement the permitting and allowance requirements of new TUC, §39.264, concerning Emissions Reductions of “Grandfathered Facilities.” Section 39.264 requires electric generating facilities (EGF) that were existing on January 1, 1999, and that were not subject to the requirement to obtain a permit under Texas Clean Air Act (TCAA), §382.0518(g) to obtain a permit from the commission. These

facilities are referred to as grandfathered facilities. A grandfathered facility is one that existed at the time the Legislature amended the TCAA in 1971. These facilities were not required to comply with (i.e., grandfathered from) the then new requirement to obtain permits for construction or modifications of facilities that emit air contaminants.

These new sections are adopted concurrently with amendments and new sections in 30 TAC Chapter 101, concerning General Rules. The new Division 2, concerning Emission Banking and Trading of Allowances, in the new Chapter 101, Subchapter H, concerning Emissions Banking and Trading, sets out the allowance system to be used to assist grandfathered and electing EGFs in meeting the emission reduction requirements of TUC, §39.264. The purpose of the rulemaking in these chapters is to implement permit and emission control requirements, including emission banking and trading of allowances (EBTA), for grandfathered and electing EGFs and related permit application and public notice procedures. The permit application and public notice procedures are the subject of these amendments to Chapter 116. The adopted amendments to Chapter 101 are published in this issue of the *Texas Register*.

TUC, §39.264 requires owners or operators of grandfathered EGFs to apply for a permit to emit nitrogen oxides (NO<sub>x</sub>) and, for coal-fired grandfathered EGFs, sulfur dioxide (SO<sub>2</sub>) and particulate matter (PM) through opacity limitations. These applications are due on or before September 1, 2000. A grandfathered EGF that does not obtain a permit may not operate after May 1, 2003, unless the commission finds good cause for an extension. It is the intent of TUC, §39.264 that for the 12-month

period beginning May 1, 2003, and for each 12-month period following, annual emissions of NO<sub>x</sub> from grandfathered EGFs not exceed 50% of the NO<sub>x</sub> emissions reported to the commission for 1997.

Furthermore, it is the intent of the legislation that emissions of SO<sub>2</sub> from coal-fired grandfathered EGFs not exceed 75% of the SO<sub>2</sub> emissions reported to the commission in 1997. The described emission limitations may be satisfied by using control technology or by participating in the banking and trading of allowances. In addition TUC, §39.264(e) requires electric generating facility permit (EGFPs) for coal-fired, grandfathered EGFs to contain appropriate opacity limitations provided by the commission's rules in §111.111, of this title, Requirements for Specified Sources, thus permitting emissions of particulate matter.

Persons, municipal corporations, electric cooperatives, and river authorities owning permitted EGFs may elect to become subject to the permitting requirements and emission reductions. A municipal corporation, electric cooperative, or river authority may exclude any grandfathered EGF with a nameplate capacity of 25 megawatts or less from permitting and emission reduction requirements.

TUC, §39.264(d) requires notice of the intent to exclude these grandfathered EGFs by January 1, 2000.

#### SECTION BY SECTION DISCUSSION

The new §116.18 contains the following definitions. The definitions of "Allowance," "Coal," "Coal-fired," "Compliance account," "Control period," "Electric generating facility," "Electing electric generating facility," "Grandfathered electric generating facility," and "Person" were all revised to cross-reference concurrently adopted definitions of these terms in 30 TAC §101.330, Definitions.

“Nameplate capacity” means the maximum electrical output (expressed in megawatts) that an EGF can sustain over a specified period of time when not restricted by seasonal or other deratings. This definition is consistent with the definition used in the Federal Clean Air Act (FCAA) Amendments of 1990, Acid Rain Program. The commission believes that using this definition will reduce any confusion for grandfathered EGFs that are potentially subject to both the Acid Rain Program and the EBTA program proposed under Chapter 101, Subchapter H, Division 2. A “Peaking unit” is an EGF that has: 1) an average capacity factor of no more than 10% during the past three calendar years; and 2) a capacity factor of no more than 20% in each of those calendar years. “Capacity factor” is either: 1) the ratio of an EGF's actual annual electric output (expressed in megawatt-hours) to the EGF's nameplate capacity times 8,760 hours; or 2) the ratio of an EGF's annual heat input (in millions of British thermal units (MMBtu)) to the EGF's maximum design heat input (in MMBtu) times 8,760 hours. Both terms, “Peaking unit” and “Capacity factor,” are consistent with the same terms in the FCAA Acid Rain Program.

Section 116.910 states that a permit under this Subchapter I would authorize emissions of NO<sub>x</sub> for any grandfathered EGF, and PM through opacity limitations and emissions of SO<sub>2</sub> for coal-fired grandfathered EGFs. Owners or operators of electing EGFs may opt to obtain allowances under the EBTA in Chapter 101, Division 2. The electing EGF's existing new source review (NSR) permit will be altered using the procedures in §116.116(c). This NSR permit alteration will ensure that the existing NSR permit is changed to cross-reference to the EGFP. Section 116.910 specifies that the owner or operator who is authorized to act for the owner of a grandfathered or electing EGF is responsible for

complying with Subchapter I. Consistent with TUC, §39.264(d), a municipal corporation, electric cooperative, or river authority may exclude any grandfathered EGF with a nameplate capacity of 25 megawatts or less from Subchapter I. The municipal corporation, electric cooperative, or river authority must notify the commission by January 1, 2000, of its intent to exclude those grandfathered EGFs. In response to comments, the commission has revised §116.910(d) to allow municipal corporations, electric cooperatives, or river authorities to notify the commission of its intent to obtain a permit after January 1, 2000. Applications must still be submitted by the statutory deadline of September 1, 2000. A new §116.910(g) was added to the adopted rule that excludes an EGF that generates electric energy primarily for internal use, but that during 1997 sold, to a utility power distribution system, less than one-third of its potential electrical output capacity or less than 219,000 megawatt-hours. This exclusion eliminates cogeneration facilities that the commission believes were not intended to be included in this program. The reference to 219,000 megawatt-hours is added to exempt small cogenerators who may exceed the one-third limitation. This is more consistent with the Acid Rain Program exemption for affected units.

TUC, §39.264 requires grandfathered EGFs to obtain a permit from the commission that authorizes the emission of NO<sub>x</sub> and, for coal-fired EGFs, PM through opacity limitations and SO<sub>2</sub>. Grandfathered EGFs also emit products of combustion such as carbon monoxide (CO) and volatile organic compounds (VOC). At a coal-fired grandfathered EGF, the emissions may include mercury as well. The commission believes that the TUC, §39.264 authorization was only intended to authorize NO<sub>x</sub> and, if applicable, PM through opacity limitations and SO<sub>2</sub>. The commission also believes that the intent of

TUC, §39.264 was to eliminate the grandfathered status of EGFs. However, it is unclear how TUC, §39.264 authorizes or requires the permitting of anything other than NO<sub>x</sub> and for coal-fired EGFs, PM through opacity limitations and SO<sub>2</sub>. Furthermore, if the commission were to permit these other air contaminants in an EGFP, it is unclear what standards should be applied to these air contaminants. Therefore, the commission will use the emission control standards of the voluntary emission reduction permit (VERP) program adopted concurrently in this issue of the *Texas Register* under 30 TAC Chapter 116, Subchapter H, Voluntary Emission Reduction Permits. These other air contaminants from the EGFs will be reviewed under the requirements of the VERP program, but would only go through the public notice process one time.

The commission believes that it is appropriate to rely on the control methods and health effects requirements of the VERP program for the other air contaminants. The VERP program provides control method options that depend on the location of a grandfathered facility. The VERP program also describes the suggested methods for a health effects review for grandfathered facilities. The reliance on the VERP control methods and health effects review will provide a consistent basis of review for the other emissions from all grandfathered EGFs. The commission does not think it is appropriate to merely include other emissions in a grandfathered EGF's permit without a review of control methods and, if necessary, impacts. This is consistent with the commission's longstanding policy to not treat certain facilities as being "permitted" simply because the facilities are consolidated into an existing permit. For example, a facility that was originally authorized by an exemption will continue to be authorized under the exemption even though the exemption is consolidated with an NSR permit during

an amendment or at renewal. The final rules do not require applicants to permit these other air contaminants from EGFs.

Many power plants may have other grandfathered support facilities such as fuel storage tanks or coal handling facilities that are not EGFs. Because TUC, §39.264 addresses only those facilities which generate electricity for compensation, these support facilities are not explicitly required to obtain a permit under TUC, §39.264. To encourage the permitting of grandfathered support facilities, these facilities could apply for a VERP which would be consolidated with the EGFP. This would enable all the grandfathered facilities and EGFs at a site to go through a consolidated permitting process. Thus, all grandfathered facilities and EGFs would only go through the public notice process one time.

To address electing EGFs, §116.910(b) provides that the existing NSR permit be altered using the procedures in §116.116(c), Alterations. The altered NSR permit would continue to authorize emissions of all air contaminants, and would include a reference to the EGFP. The EGFP will contain the general and special conditions for electing EGFs. The unchanged, existing NSR permit conditions would not be subject to public notice since that permit will only be altered to reflect the existence of the EGFP.

The new §116.911 contains application procedures for grandfathered and electing EGFs to obtain an EGFP. As specified by TUC, §39.264(e), the new §116.911 requires owners or operators of grandfathered and electing EGFs to apply for a permit on or before September 1, 2000. The section also contains information concerning general content of the permit application for both grandfathered

and electing EGFs. Emissions of air contaminants other than NO<sub>x</sub> or, if applicable, PM through opacity limitations and SO<sub>2</sub> from an electing EGF already authorized by Chapter 116, are not required to be authorized under this subchapter. An EGFP will include provisions for measurement of emissions, monitoring, and reporting to calculate actual emissions over a control period. Although control technology is not explicitly required under TUC, §39.264, grandfathered or electing EGFs may propose the use of controls in their initial applications. The new provisions in §116.911(a)(2) require new controls to comply with specified provisions in §116.617, Standard Permits for Pollution Control Projects. The commission believes that relying on these existing procedures for the installation of controls will provide an efficient review process. The new §116.911(a)(3) specifies that, in cases where there are increased emissions from the addition of new controls, air dispersion modeling and/or ambient monitoring may be required to determine off-property impacts. TUC, §39.264(e) requires coal-fired EGFs to comply with the opacity limits specified in commission rules. Applicants must submit an application for an EGFP under the seal of a Texas licensed professional engineer, consistent with §116.110(e), concerning Applicability.

In response to comments, the commission deleted the references to federal rules and regulations in §116.911 and §116.913. This deletion will simplify the application process for EGFPs. However, EGFs must comply with any applicable federal requirements, including, but not limited to, nonattainment review, Prevention of Significant Deterioration (PSD) review, New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAPS), and NESHAPS for Source Categories. EGFs that are affected sources under FCAA, §112(g), concerning

Modifications, must comply with those requirements. The issuance of an EGFP does not modify or limit the applicability of these federal programs. If, during the review of an application for an EGFP the commission determines that the EGF is not in compliance with any applicable state or federal standards, the commission will initiate the appropriate enforcement action which may include a requirement to obtain an NSR permit or the applicable federal permit.

EGFs that are currently authorized under Chapter 116 may elect to participate in the EBTA under Chapter 101, Subchapter H, Division 2. The proposed §116.912 contained application requirements for electing EGFs that were in addition to those contained in the proposed §116.911. Those requirements are now in §116.911(b). Since an existing NSR permit may authorize multiple facilities, the permit application submitted under Subchapter I should identify which EGFs are to be included in the EGFP. The application must include documentation of the emissions from the 1997 Emissions Scorecard from the United States Environmental Protection Agency (EPA) Acid Rain Program, or if that information is not available, the actual emissions from that electing EGF for calendar year 1997. Applications must contain documentation of actual emissions as well as fuel consumption, fuel heating values, and heat input in MMBtu for calendar year 1997. This information will be used to calculate allowances for these EGFs and provide the data needed to meet the requirements of TUC, §39.264(i)(3), which restricts the banking and trading of allowances that result from reduced utilization and shutdown.

The new §116.912 was renamed “Electing Electric Generating Facilities.” The proposed §116.912 contained the application content requirements for electing EGFs. These requirements were moved to

the new §116.911(b). Section 116.912 now contains the requirements for opting in and out of the permitting program. An electing EGF may opt out of the requirements of this subchapter under certain conditions. The electing EGF must notify the commission of its intent to opt out prior to the beginning of the next control period and may not opt out during a control period. This notification requirement would prevent an EGF from opting out in order to avoid being out of compliance with the requirement to not exceed its allowances. The decision to opt out will become effective at the beginning of the control period following notification to the commission. All allowances for the electing EGF will be voided by the commission and may not be banked for subsequent use. Since the EGF would no longer be subject to the restrictions of the EBTA, it would be inappropriate to use those allowances at other EGFs, and no allowances will be allocated for subsequent control periods. Once an EGF has opted out, the EGF may not participate in the EBTA at any future date. Since TUC, §39.264 states that EGFs must elect to participate prior to September 1, 2000, there is not a subsequent opportunity for those EGFs to reelect. The commission believes that a one-time election and a one-time opt out provide sufficient flexibility without undermining the program. The owner or operator shall request an alteration to the electing facility's NSR permit to remove the conditions pertaining to the EGFP. This alteration would restore the NSR permit to its prior status.

The new §116.913 contains general conditions applicable to every EGFP unless specified differently in the permit, and authorizes the commission to include special conditions in the permit. An EGFP would authorize NO<sub>x</sub> emissions from EGFs, and from coal-fired EGFs, SO<sub>2</sub> emissions and PM through opacity limitations. The EGF must comply with the EBTA in Chapter 101, Subchapter H, Division 2.

In response to comments, former §116.913(a)(1)(C), concerning emissions of air contaminants other than NO<sub>x</sub>, SO<sub>2</sub>, and PM through opacity limitations from grandfathered EGFs, as defined in §116.10, concerning General Definitions, was reorganized and its provisions are now in §116.913(a)(2) and (3). An EGFP may permit emissions of all other air contaminants from grandfathered EGFs, provided the requirements of Chapter 116, Subchapter H are met. VERPs for grandfathered facilities as defined in §116.10 at sites with grandfathered or electing EGFs may be consolidated with an EGFP. The provisions for the EBTA require EGFs to maintain allowances in a compliance account. The EBTA in Chapter 101 contains all provisions for managing allowances. For emissions of NO<sub>x</sub> and, where applicable, SO<sub>2</sub>, the EGF shall hold in its account, on June 1 after every control period, a quantity of allowances equal to or greater than the amount of that air contaminant emitted since May 1 of the previous year. Holders of EGFPs shall comply with this requirement beginning May 1, 2004. Beginning May 1, 2004, holders of EGFPs must report annual actual emissions of NO<sub>x</sub> and, if applicable, SO<sub>2</sub>, for the previous control period. This emissions report must be submitted by June 30 of each year, and will be used to determine compliance with the requirement that the EGF hold allowances equal to or greater than the emissions over a given control period. The adopted section implements TUC, §39.264(e) and requires coal-fired EGFs to comply with the opacity limits specified in commission rules.

The new §116.914 specifies monitoring and reporting requirements for EGFPs, and the adoption was reorganized for clarity in response to comments. The commission is required by TUC, §39.264(k) to provide methods for use in determining compliance with permits and methods for monitoring and

reporting actual emissions of NO<sub>x</sub> and, if applicable, SO<sub>2</sub>. Title 40 Code of Federal Regulations (CFR) Part 75, concerning Continuous Emission Monitoring Under the Acid Rain Program (Acid Rain Program), contains monitoring requirements for SO<sub>2</sub> for affected units under that program. Since the acid rain program already requires extensive monitoring, the adopted rule authorizes the use of that monitoring for EGFs that are subject to the acid rain program for compliance with Subchapter I. EGFs not subject to the Acid Rain Program would have three choices in monitoring. The EGF may choose to meet either Part 75 monitoring requirements, or the requirements of Title 40 CFR Part 60, or the EGF may provide an alternative monitoring plan that would be incorporated into the permit conditions. Part 60 requirements are adopted as an alternative to Part 75 in order to be consistent with current NSR practices for facilities not required to comply with Part 75. Since Part 60 monitoring may be less accurate than Part 75 monitoring, the adopted rule requires Part 60 monitored data to have a relative accuracy of greater than 10% (i.e., measured values within 90-100% of the correct value). To account for this inaccuracy, the monitored value must be multiplied by a factor of 1.1. This factor has been included to account for the inequity between the monitoring accuracy of Parts 75 and 60. The commission believes that this factor, proposed in the Ozone Transport Commission's (OTC) Model Rule, is appropriate for the EBTA as well, based on the similarity of the OTC requirements and the goals of TUC, §39.264. The OTC Model Rule implements a NO<sub>x</sub> emission budget program to reduce ambient ozone concentrations. Although Texas is not required to participate in the OTC budget program, the commission believes that it is appropriate to model this budget rule after the OTC model rule. Additionally, EGFs with a heat input of less than 100 MMBtu/hour could use Appendix E of 40 CFR Part 75 to estimate NO<sub>x</sub> emissions. Appendix E relies on stack testing of the facility to develop a

relationship between the emission rate and heat input. The commission believes that it is appropriate to structure the monitoring requirements of Subchapter I on these existing requirements because many EGFs are currently using Part 75 and Part 60 monitoring methods. Data collected from these monitoring requirements would be used to calculate annual emissions that are reported to the commission for the purpose of demonstrating compliance with allowances. The new §116.914 also specifies that data collected from the monitoring of EGFs shall be detailed in an annual report as required under §116.913(a)(7). The commission will develop a form, AR-1, specifying the requirements of the report, which would be due on June 30 of each year.

The new §116.916, concerning Permits for Electric Generating Facilities in El Paso County, was renamed to “Permits for Grandfathered and Electing Electric Generating Facilities in El Paso County.” Consistent with TUC, §39.264(q), §116.916 would exempt EGFs in El Paso County from NO<sub>x</sub> allowance requirements if the commission or EPA determines that reductions in NO<sub>x</sub> emissions would lead to increased ambient levels of ozone. Currently, NO<sub>x</sub> reductions are not required for facilities in the El Paso nonattainment area because EPA has granted a waiver under FCAA, §182(f). Under this waiver, NO<sub>x</sub> reductions are not required if the attainment demonstration for compliance with the ozone National Ambient Air Quality Standard (NAAQS) can be made without a NO<sub>x</sub> control strategy. The existence of this waiver is not consistent with the provisions of TUC, §39.264(q) because it has not been demonstrated, under the §182(f) waiver or otherwise, that NO<sub>x</sub> reductions would increase ambient ozone in El Paso County. These EGFs would still be required to obtain a permit under 30 TAC Chapter 116, Subchapter I regardless of the determination that NO<sub>x</sub> reductions are counterproductive in

controlling ambient ozone levels in the El Paso Region. The commission believes that this requirement is appropriate, since TUC, §39.264(e) provides that EGFs without a permit may not operate after May 1, 2003, and TUC, §39.264(q) refers only to reduction requirements, not permitting requirements. Regardless of this determination, grandfathered EGFs in El Paso County would still be required to obtain a permit under Subchapter I.

The new §116.920 would require that applicants for initial issuance of an EGFP publish notice of intent to obtain a permit in accordance with 30 TAC Chapter 39, Subchapter K, concerning Public Notice of Air Quality Applications. Subchapter K implements the new requirements of TCAA, §382.056, as amended by the 76th Legislature by House Bill (HB) 801, an act relating to Public Participation in Certain Environmental Permitting Procedures of the TNRCC. TUC, §39.264 provides that public participation for initial issuance of an EGFP will be done in the manner of TCAA, §382.0561, concerning Federal Operating Permit; Hearing; and TCAA, §382.0562, concerning Notice of Decision. These sections allow for notice and comment hearings instead of contested case hearings under Texas Government Code, Chapter 2001, and require the commission to send notice of final action to persons who comment during the comment period or during a hearing. The adopted requirements of §116.920, 116.921, and 116.922 are based on the sections in 30 TAC Chapter 122, concerning Federal Operating Permits, that implement the requirements of TCAA, §382.0561 and §382.0562. Section 116.920 provides that any person who may be affected by emissions from the EGF may request a notice and comment hearing on an EGFP application within 30 days after the publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418, concerning Notice of Receipt of Application

and Intent to Obtain Permit. Grandfathered support facilities that elect to obtain a VERP and have it consolidated with an EGFP may publish a combined notice. Electing EGFs that are included in an EGFP are only included for the purpose of authorizing NO<sub>x</sub> emissions, and if applicable, PM through opacity limitations and SO<sub>2</sub>. The conditions of the electing EGF's existing NSR permit would be altered to cross-reference the EGFP. Since the rule was revised to require alterations to the electing EGF's existing NSR permit, the provision in §116.920(c), concerning public notice for emissions of air contaminants other than NO<sub>x</sub>, or if applicable, SO<sub>2</sub>, was deleted. The existing NSR permit conditions would not be subject to public notice. Any conditions in the EGFP concerning the electing EGFs would be subject to public notice. Persons affected by a decision to issue or deny an EGFP will be entitled to petition for a rehearing under the appropriate procedure in Chapter 50, concerning Action on Applications and Other Authorizations, and may seek judicial review under TCAA, §382.032, concerning Appeal of Commission Action. The commission made clerical changes to §116.920 to include references to grandfathered and electing EGFs and renumbered that section, since §116.920(c) was deleted. Section 116.920(g), now §116.920(f), was revised to clarify that a person affected by a decision of the commission to issue or deny an EGFP may seek judicial review. This change makes this subsection consistent with the language in §116.922(b)(3).

The commission made clerical revisions to §116.921 to add the terms "grandfathered" and "electing EGFs" as well as to delete references to draft permits and refer instead to draft EGFPs. The new §116.921 contains the hearing requirements for the initial issuance of EGFPs. The rule allows the commission to decide whether to hold a hearing based on the reasonableness of a request. The

commission is not required to hold a hearing if the basis of the request by a person who may be affected by emissions from the grandfathered or electing EGF is determined to be unreasonable. If a hearing is requested by a person who may be affected by emissions from the grandfathered or electing EGF, and that request is reasonable, the commission will hold a hearing. The section requires that notice of hearing on a draft EGFP be published in the public notice section of one issue of a newspaper of general circulation in the municipality or the nearest municipality where the EGF is located. The notice must be published at least 30 days prior to a hearing. The notice is published at the applicant's expense and the rule specifies the content of the notice. The rule provides the procedures for the submittal of comments at a hearing and specifically states that the period for submitting written comments extends to the close of the hearing and may be extended beyond the close of the hearing. Any person, including the applicant, may submit comments on whether the draft EGFP contains inappropriate conditions or whether the preliminary decision to issue or deny the EGFP is inappropriate. Commenters shall raise all issues and submit all comments supporting their position by the end of the public comment period. This requirement will assist the commission in developing its response to comments as required by new §116.922. To ensure a complete record of the comments, the rule prohibits the incorporation by reference of supporting materials for comments unless the materials meet the criteria in §116.921(g). The commission is required to keep a record of all comments submitted or raised at a hearing and to have an audio recording or written transcript of the hearing, and the record is available to the public. Draft EGFPs may be revised based on comments pertaining to whether the permit provides for compliance with the requirements for an EGFP.

The new §116.922 was revised to include a reference to the draft EGFP. The new §116.922 requires the commission to individually notify persons who commented, either during the public comment period or at a permit hearing, of the final action of the commission. The notice must be sent by first-class mail to the commenters and to the applicant. The notice must include the response to comments, the identification of any changes in the permit, and a statement that any person affected by the decision of the commission may petition for rehearing under the appropriate procedure in Chapter 50, concerning Action on Applications and Other Authorizations, and may seek judicial review under TCAA, §382.032.

TUC, §39.264 does not provide procedures for the modification of an EGFP. The commission believes that the requirements of the TCAA concerning modifications of existing facilities still apply. Therefore, the new §116.930 requires that any modifications to any facility in an EGFP are subject to the permitting requirements of the TCAA and the existing modification requirements in 30 TAC Chapter 116, Subchapter B.

Consistent with TUC, §39.264(r), the new §116.931 requires EGFPs to be renewed under the requirements of 30 TAC Chapter 116, Subchapter D, concerning Permit Renewals. The commission made a clerical revision to this section to delete the abbreviation of EGFP.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking meets the definition of a “major environmental rule” as defined in that statute. “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, 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. The adopted amendments to Chapter 116 are intended to protect the environment or reduce risks to human health from environmental exposure and may have adverse effects on grandfathered and electing EGFs which could be considered a sector of the economy. However, the analysis required by §2001.0225(c) does not apply, because the adopted amendments do not meet any of the four applicability requirements of a major environmental rule. The new sections do not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement, and they are not adopted solely under the general powers of the agency. The amendments to Chapter 116 are adopted specifically to implement TUC, §39.264. TUC, §39.264 requires grandfathered EGFs apply for a permit by September 1, 2000, and obtain a permit by May 1, 2003, or cease operating, absent a showing of good cause to continue operating. The adopted amendments allow the permitting of all other air contaminants for grandfathered EGFs using the VERP process. Support facilities may be permitted under a VERP which may be consolidated with an EGFP. There is no federal law or delegation agreement with a federal agency that requires the permitting of grandfathered EGFs.

## TAKINGS IMPACT ASSESSMENT

The commission has completed a takings impact assessment for the adopted rules. The following is a summary of that assessment. These new sections implement the requirements of TUC, §39.264. This section requires owners or operators of grandfathered EGFs to apply for a permit on or before September 1, 2000, and obtain a permit or cease operation by May 1, 2003. It is the intent of §39.264 that for the 12-month period beginning May 1, 2003, and for each 12-month period following, annual emissions of NO<sub>x</sub> from grandfathered EGFs not exceed 50% of the NO<sub>x</sub> emissions reported to the commission for 1997. Furthermore, it is the intent of the legislation that emissions of SO<sub>2</sub> from coal-fired EGFs not exceed 75% of the SO<sub>2</sub> emissions reported to the commission in 1997. NO<sub>x</sub> and SO<sub>2</sub> allowances will be allocated to EGFs by January 1, 2000. To assist EGFs in meeting the reduction requirements, a banking and trading program is adopted concurrently in Chapter 101. Although EGFs are required to make specific emission reductions, these facilities have alternatives available under the banking program that may allow the EGF to avoid installing add-on controls. Further, allowances can be transferred under the banking program so that EGFs have opportunities to buy and sell allowances in order to respond to business needs. The new sections do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Consequently, this adoption does not meet the definition of a takings under Texas Government Code, §2007.002(5). The reductions obtained from the issuance of EGFPs will assist in the efforts of the commission to attain the NAAQS. This action is taken in response to a real and substantial threat to public health and safety and significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, relating to Consistency with Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council. For the new sections related to the authorization of EGFPs, the commission has determined that the rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. This adoption is intended to reduce overall emissions of NO<sub>x</sub> and, if applicable, SO<sub>2</sub> from grandfathered EGFPs. This action is consistent with 40 CFR because it does not authorize an emission rate in excess of that specified by federal requirements.

#### PUBLIC HEARING AND COMMENTERS

The commission conducted public hearings concerning this adoption in El Paso and Lubbock on October 1, 1999, in Austin on October 4, in Irving on October 5, in Houston on October 7, and in Beaumont on October 7.

The following submitted written comments or provided testimony during the public comment period which closed on October 11, 1999: EPA - Acid Rain Division (EPA-ARD); EPA - Clean Air Markets Division (EPA-CAMD); EPA - Air Permits Division (EPA-APD); EPA - Air Planning Section (EPA-APS); University of Texas System, Office of General Counsel (UT); Enron, Central and South West Services, Inc. (CSW); TXU Business Services (TXU); Brazos Electric Power Cooperative, Inc. (Brazos); Baker & Botts, L.L.P. - Texas Industry Project (Baker & Botts); Clark & Seay, L.L.C. (Clark & Seay); Southwestern Public Service Company (SPS); Entergy Gulf States, Inc./Entergy Texas (Entergy); El Paso Electric Company (EPE); Lloyd, Gosselink, Blevins, Rochelle, Baldwin & Townsend, P.C. - City of Garland (Lloyd Gosselink); League of Women Voters of Texas (LWV-TX); The Center for Energy and Economic Development (CEED); Association of Electric Companies of Texas, Inc. (AECT); Reliant Energy (Reliant); Entergy Services Inc. (Entergy Services); Environmental Defense Fund (EDF); City of Austin/Austin Energy (AE); Sustainable Energy and Economic Development Coalition (SEED); Public Citizen, Texas Clean Water Action, Texas Communities Project (PC); City Public Service of San Antonio (CPS); Bracewell & Patterson (B&P); Lubbock Power & Light & Water (LP&L); Clark, Thomas & Winters (CT&W); Central & South West, City of Austin, City Public Service, El Paso Electric, Entergy, Reliant Energy, Southwestern Public Service, and TXU (Group A);(Group A); Mothers for Clean Air (MCA); Neighbors for Neighbors (NFN); and 17 individuals.

ANALYSIS OF TESTIMONY

One individual commented that the commission should exercise its authority to require significant reductions at power plants in East Texas, with another individual adding that the reductions should be permanent. Three individuals stated that the commission should enforce reduced emissions from grandfathered electric generating facilities, and two more individuals added that the commission should be as strict as possible in that enforcement.

**While this adoption addresses grandfathered EGFs only, the commission is developing rules that will apply NO<sub>x</sub> restrictions on all EGFs in the East Texas Region. The specific level of emissions required from these facilities will be determined on computer analysis that indicates what reductions should be required to assist the affected nonattainment areas in meeting the NAAQS. The net reductions required under this adoption are permanent. The commission will exercise its full enforcement power as authorized by statute, rule, or as governed by enforcement policy. This adoption requires mandatory permitting for emissions of NO<sub>x</sub> and, if applicable SO<sub>2</sub> and PM through the commission's opacity standards, the rules provide options for the permitting of other air contaminants from grandfathered EGFs.**

Four individuals stated that the commission should seek improvements that address SO<sub>2</sub> particularly to improve visibility in Big Bend. Another individual added that the commission must require a larger NO<sub>x</sub> and SO<sub>2</sub> reduction to reduce acid rain and ozone in Texas nonattainment areas.

**In cooperation with EPA and the National Park Service, the commission is analyzing the nature and location of required reductions to address reduced visibility in Big Bend National Park. This analysis is incomplete and therefore, the commission believes that requiring reductions specifically to the Big Bend area prior to the completion of this analysis is premature. The authority granted to the commission under TUC, §39.264 and other existing authority allows the commission to seek additional reductions in SO<sub>2</sub> as needed. As stated previously, the commission is addressing additional NO<sub>x</sub> reductions that may be required to assist in the attainment of the NAAQS in a separate rulemaking. There are no areas in Texas that are nonattainment for SO<sub>2</sub>, and the commission is not aware of any areas that are adversely affected by acid rain.**

One individual stated that the commission should not allow a cap and trade or banking system because it avoids environmental justice issues and perpetuates emissions in low-income areas. The same individual suggested that the exclusion for individual units to be regulated under TUC, §39.264 be lowered to ten megawatts from 25 megawatts. This individual also stated that the commission estimate of cost of compliance with the requirements of the adoption is low, and it appears that the commission is allowing low-grade technology to be applied to the regulated units.

**The trading and banking provisions of this adoption are required elements of the reduction program under TUC, §39.264. SB 7 provides that total annual emissions of NO<sub>x</sub> from grandfathered EGFs will not exceed 50% of the NO<sub>x</sub> emissions in 1997 as reported to the commission and that for coal-fired grandfathered EGFs, the total annual emissions of SO<sub>2</sub> will not**

exceed 75% of the emissions during 1997, as reported to the commission. SB 7 also provides that the trades of allowances will only occur within the same region, either East Texas, West Texas, or El Paso. The effect of this will be an overall 50% reduction in NO<sub>x</sub> and a 25% reduction in SO<sub>2</sub> within the region. SB 7 does not require a specific level of reduction at any individual grandfathered EGF. The exemption level for individual generating units of 25 megawatts is specified in TUC, §39.264(d). As discussed elsewhere in the adoption preamble, the commission has also excluded EGFs that generate power primarily for internal use, but that during 1997 sold one-third of their generated power or less than 219,000 megawatt-hours to the utility power distribution system. The commission believes that excluding these EGFs is consistent with SB 7 and will not negatively affect the overall emission reductions required by the program. Lowering the exemption to 10 megawatts will require small generators to participate in the EBTA and permitting program and will achieve little environmental benefit in relation to the cost of compliance with the program. The commission has based its estimate of the cost of applying control technology to attain the 0.14 pound per MMBtu on the February 1999 joint Public Utility Commission of Texas (PUCT) and TNRCC report, *Electric Restructuring and Air Quality: A Preliminary Analysis of Reductions and Costs of Nitrogen Oxides Controls from Electric Utility Boilers in Texas*. The estimate does not limit the amount EGFs must spend to meet the EBTA and accounts for technology of necessary sophistication to meet the requirements of this adoption.

The Honorable Lon Burnam, State Representative, District 90, commented concerning the implementation of SB 7 and its impact on consumers from an economic perspective. Mr. Burnam

expressed his concerns that the commission implement the provisions of SB 7 free from the influence of lobbyists. Mr. Burnam urged the commission to consider public health in the process of implementing SB 7.

**The provisions of SB 7 concerning deregulation of the electric industry will be implemented by the PUCT. The commission conducted six hearings in order to seek the public comment of citizens, the regulated community, and environmental groups. The hearings were conducted in El Paso, Lubbock, Austin, Irving, Houston, and Beaumont. Prior to proposal, the commission held a stakeholder meeting to seek input from interested persons. Notice of this meeting was provided on the commission's web page. In addition, pre-proposal drafts of the rules were posted on the commissions's web page with a request for comments. The commission believes that the adopted rules are consistent with SB 7 and remains committed to implement the program in a fair and impartial manner. Since EGFs are being permitted under the requirements of TUC, §39.264, which does not require a health effects review, no review is included in this adoption. The commission believes that this program will reduce ambient levels of NO<sub>x</sub> and SO<sub>2</sub> and improve the overall air quality of the state. These reductions will assist the commission in its efforts to attain the health-based NAAQS.**

Clark & Seay and MCA commented that all power plants that are in or near an area with unsafe air should be required to meet the 0.14 pounds/MMBtu standard used in federal laws and to the level to which all grandfathered plants will be required to be cleaned up. In addition, LWV-TX commented

that the rules in general be expanded to require all power plants that are in areas with unsafe air or that contribute to those nonattainment areas meet the same standard.

**This adoption implements the requirements of TUC, §39.264 and application of this statute is limited to grandfathered EGFs and those EGFs that elect to participate in the permitting and trading program. The intent of SB 7 is not to achieve attainment with the NAAQS, but to permit and reduce emissions from grandfathered EGFs. While the implementation of SB 7 will provide emission reductions in areas near grandfathered EGFs, the commission recognizes that it will likely be necessary to adopt rules that will require air pollution control in attainment areas as well as additional rules for nonattainment areas. These controls would not only apply to emissions of NO<sub>x</sub> from grandfathered EGFs, but permitted EGFs and other sources of NO<sub>x</sub> as well. Further, specific emission rates will be established that have been determined necessary to meet air quality standards. Rules implementing these additional controls are scheduled for proposal in late 1999 or early 2000. The commission is not aware of any federal standards that require EGFs to meet a NO<sub>x</sub> emission restriction of 0.14 pounds/MMBtu.**

EDF commented that TUC, §39.264(n)(1) includes two specific penalties for facilities that exceed their allowances. The commenter noted that the proposed rules did not include any administrative penalties, and recommended that they be added at a level sufficient to deter noncompliance. EDF recommended three times the current market value of allowances.

**The commission does not typically address the amount of administrative penalties in specific rules. Rather, penalty amounts are established in accordance with the commission's penalty policy. All enforcement cases not referred to the Office of the Attorney General go through staff preparation of an administrative penalty recommendation in accordance with the commission's penalty policy. Staff obtains an agreement or litigates to obtain an order against the respondent that requires the payment of penalties. The commission determines the amount of the penalty in accordance with the commission's enforcement rules and penalty guidance. The statutory language requires "enforcing an administrative penalty" and not "assessing" an administrative penalty.**

Reliant requested that the published list of grandfathered EGFs be revised by deleting the Cedar Bayou Units 1 and 2 (Account Number CI-0012-D) because the units are no longer grandfathered and are permitted under Permit Number 1532. In addition, Reliant provided heat input information for facilities that were missing from the proposed list. CPS commented that V.H.Unit 1 should be corrected from 2,946,936 MMBtu to 2,949,512 MMBtu, as was submitted to EPA in the Acid Rain Database.

**The commission will make these corrections to the list entitled "Nitrogen Oxide and Sulfur Dioxide Allowances for Grandfathered Electric Generating Facilities."**

EPE commented that the language in TUC, §39.102(c) and §39.264(i) illustrate EPE's exemption from Chapter 39 and EPE's ability to elect to designate a facility to become subject to §39.264 and they noted that EPE is a "person" under PURA.

**The commission agrees that EPE is a "person" under the TUC. The commission has not revised the rule to exempt EPE from the program requirements. TUC, Subchapter C, Retail Competition, §39.102, concerns retail customer choice, and exempts from TUC Chapter 39, any electric utility that has a system-wide freeze for residential and commercial customers that is in effect from September 1, 1997 and extends beyond December 31, 2001, that has been found by a regulatory authority to be in the public interest. Subchapter C also contains §39.264, which requires any EGF that existed on January 1, 1999, that is not subject to the requirement to obtain a permit under TCAA, §382.0518(g), to apply for and obtain a permit from the commission.**

**Section 39.264 was added to SB 7 during the final weeks of the 76th Legislative Session. Its very specific intent is to require grandfathered EGFs to obtain a permit from the commission and to obtain reductions of NO<sub>x</sub> and SO<sub>2</sub> in the regions as defined by the bill. TUC, §39.264 contains several specific references to the El Paso area that make it clear that the Legislature intended EGFs in that area to be subject to the permitting and allowance program. TUC, §39.264(g) requires the commission to develop rules that define the "El Paso Region." TUC, §39.264(h) specifies an emission rate for the El Paso Region. TUC, §39.264(p) specifically requires the commission to develop rules to allow EGFs in the El Paso Region to meet emissions allowances by**

using credits from reductions made in Ciudad Juarez, United States of Mexico. Finally, TUC, §39.264(q) allows the commission to exempt EGFs in the El Paso Region if the commission determines that reductions in NO<sub>x</sub> would result in an increased amount of ambient ozone levels in El Paso County.

The Code Construction Act, §311.021, Texas Government Code, provides that “In enacting a statute, it is presumed that: (1) compliance with the constitutions of this state and the United States is intended; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest.” If TUC, §39.102 were read to exclude EGFs in the El Paso Region from the provisions of Chapter 39, the specific provisions of TUC, §39.264, concerning the El Paso Region, would be rendered ineffective. As prescribed by the Code Construction Act, the commission must interpret the provisions of Chapter 39 so that all sections can be given effect. To do otherwise would contravene the intent of the Legislature. Thus, the commission agrees that EPE is exempt from the provisions regarding customer choice in TUC, Chapter 39. However, if EPE were exempted from the permitting and EBTA requirements, the provisions of TUC, §39.264, concerning the El Paso Region, would be meaningless. The commission agrees that EPE may use the provisions of §116.912, concerning Electing EGFs.

Lloyd Gosselink commented that the rules do not address the use of oil as a backup fuel at a gas-fired facility. The commenter stated that under certain curtailment situations, gas may not be available, and

gas-fired facilities may be required to switch to oil as a fuel source, and that under these conditions, facilities should not be penalized for any additional NO<sub>x</sub> emissions.

**The commission believes that a facility has the latitude to use any fuel as long as actual emissions comply with its allotted allowances, and the use is authorized by the appropriate NSR authorization. The commission does not believe it is appropriate to revise the rules to include an exception to exceed allowances in the case of a curtailment because SB 7 does not allow for this exception. If a curtailment occurs, and emissions of NO<sub>x</sub> exceed an EGF's allowances, the commission will rely on its enforcement policy to determine the appropriate response. Use of previously unused fuels may constitute a modification and require an NSR permit. The rules have not been revised in response to this comment.**

LWV-TX commented that the TNRCC should restrict pollution trading in ways that assure significant reductions in air pollution.

**SB 7 requires the commission to allocate allowances to grandfathered EGFs in defined regions of the state. The specific intent of SB 7 is that total annual emissions of NO<sub>x</sub> from grandfathered EGFs will not exceed 50% of the NO<sub>x</sub> emissions in 1997 as reported to the commission and that for coal-fired grandfathered EGFs, the total annual emissions of SO<sub>2</sub> will not exceed 75% of the emissions during 1997, as reported to the commission. The adopted rules provide the requirements for both the permitting of these grandfathered EGFs, and an emission banking and**

**trading program. Both of these programs are critical to the successful reduction of the NO<sub>x</sub> and SO<sub>2</sub> emissions contemplated by SB 7. The EBTA contains restrictions on trading that will ensure that the required emission reductions are enforceable. The commission believes that the required reporting and monitoring, along with the statutorily defined enforcement provisions, will ensure that the program achieves the reductions intended by TUC, §39.264. The commission believes that the implementation and enforcement of the adopted rules will ensure that the reductions mandated by SB 7 occur and that no modification to the rule is necessary.**

CEED commented that the preamble referenced adopting additional requirements for EGFs in nonattainment areas, indicating further reductions of 88% in Dallas/Fort Worth (DFW) and 90% in Houston/Galveston (HGA) areas. The commenter stated that the emissions inventory shows that these point sources only represent a minor source of NO<sub>x</sub> emissions, since the majority of emissions are generated by on-road and off-road mobile and area sources, and that the inclusion of these statements regarding the further need to reduce emissions from EGFs continues to focus attention on sources which will not solve nonattainment problems in these areas. CEED also commented that the proposal preamble statements that EGFs must consider local impacts of allowance transfers and that “EGFs emit significant amounts of NO<sub>x</sub>, which has been shown to heavily influence local ozone levels” are comments without any qualifications to specific EGFs and perpetuate the opinion by some that all EGFs emit significant levels of emissions. CPS supports the removal of all references to SIP requirements from the SB 7 regulations. An example is on page 7140 of the proposal preamble, where it states that “...EGFs must consider local impacts of allowance transfers....” Furthermore, the preamble states that

“These EGFs (in near-nonattainment areas) emit significant amounts of NO<sub>x</sub> which has been shown to heavily influence local ozone levels.” CPS disagrees with this statement. First, the mandatory SB 7 program was designed to be flexible, and allow reductions to be made in the most cost-effective manner. Second, the utility plants in San Antonio, owned by CPS, do not contribute heavily to local ozone levels, as indicated by previous modeling performed by Alamo Area Council of Governments under the direction of the TNRCC. Therefore, TNRCC’s concern that SB 7 allowance trading will jeopardize the regional strategy is unwarranted, at least for the near-nonattainment area of San Antonio.

**The reductions mandated by SB 7 only apply to grandfathered EGFs in the defined regions of Texas. These reductions from grandfathered EGFs will be significant; however, it is unlikely that the reductions will be sufficient to address the need to further reduce emissions in both attainment and nonattainment areas. The commission believes that to achieve attainment with the NAAQS, it will be necessary to reduce emissions from all sources, both stationary and mobile, in both attainment and nonattainment areas. The reductions that will be achieved under the adopted rules will be significant towards reaching attainment. In addition, the commission believes that NO<sub>x</sub> emissions from EGFs are not minor, but significantly contribute to ground-level ozone formation. The preamble comments regarding the potential impacts of trading on near-nonattainment areas were included to recognize that emissions in near-nonattainment areas may have a negative impact on that areas ability to remain in attainment. Emission inventory information indicates that NO<sub>x</sub> emissions from EGFs are approximately 47% of the stationary source NO<sub>x</sub> emissions in the East Texas Region.**

EPA-CAMD commented that the cost effectiveness numbers of \$4,000 per ton of NO<sub>x</sub> removed in the absence of emissions trading, or \$2,000 per ton of NO<sub>x</sub> removed with emissions trading, seem far too high. For example, in the May 25, 1999 Final Rule under §126 of the FCAA (64 FR 28300), EPA determined an average cost-effectiveness of \$1,468 per ton of NO<sub>x</sub> removed from electric generating units greater than 25 megawatts with emissions trading. Estimates for cost effectiveness of NO<sub>x</sub> control under Ozone Transport Committee NO<sub>x</sub> Budget Program range from \$950-1,600 per ton. Furthermore, the commenter noted that some gas-fired units can achieve an average NO<sub>x</sub> emission rate of 0.14 lb/MMBtu simply using combustion controls.

**The commission supports the preamble language. The listed values were based on information developed for the joint Public Utility Commission of Texas (PUCT) and TNRCC report published in February 1999, entitled *Electric Restructuring and Air Quality: A Preliminary Analysis of Reductions and Costs of Nitrogen Oxides Controls From Electric Utility Boilers in Texas*. For simplicity in the report, the costs of emission reductions were analyzed on a unit-by-unit basis. Thus, the potential for “over-compliance” for certain generating units in cases where it may be more cost-effective was not captured in the analysis. A subcommittee of the Ozone Transport Assessment Group (OTAG) has analyzed market-based emission trading options, such as the EBTA, estimating potential savings of as much as 50%, compared to the costs of unit-by-unit compliance. This analysis is applied to all utility generating units in the state, which may overstate the magnitude of the estimated compliance costs. The commission believes that, in**

**practice, the costs of permitting and participation in the EBTA will be much less than what was estimated in the proposal.**

EPA-APD commented on its understanding that the TNRCC will use emission reductions which occur under these regulations to help demonstrate attainment and maintenance of NAAQS. The commenter further understood that the reductions will not be used for offsets and netting under NSR. With this understanding, EPA-APD supported the adoption of these regulations if the TNRCC adequately addresses the remaining comments.

**The EBTA and EGFP programs will be submitted as a revision to the SIP. The resulting reductions will be used by the commission to further its attainment goals. Allowances cannot be used to satisfy emission offset requirements under federal NSR; thus, they will not be used as netting for PSD or for offsets under a nonattainment NSR permit.**

EPA-APD asked whether standard permits will be incorporated into a facility's federal operating permit through 30 TAC Chapter 122's permit modification provisions. AE recommended that once an EGFP is issued, any needed revisions to the site's federal operating permit (FOP) should be automatically incorporated as administrative corrections and not require an additional public comment period associated with changes to the FOP.

**The commission does not anticipate developing a standard permit for use by grandfathered EGFs for the purpose of complying with TUC, §39.264. However, a grandfathered EGF is not prohibited from using any of the standard permits that are currently available. At this time, the commission's FOP program does not include the commission's NSR program as an applicable requirement. Only PSD, nonattainment permits, and case-by-case maximum available control technology (MACT) review under FCAA, §112(g) or (j), are required to be included in a FOP as applicable requirements. If and when the EPA determines that the commission's NSR program is an applicable requirement, holders of FOPs may be required to include references to standard permits in their FOP. If a FOP must be revised to address changes to applicable requirements as a result of the EGFP, then, depending on the nature of the revision, the appropriate revision process under Chapter 122 would be used.**

PC recommended substituting renewable energy for electricity or energy used at a grandfathered facility, stating that this could provide a low cost way to reduce emissions and result in the building of additional new clean energy sources. The commenter stated that concurrent rulemaking at the PUCT to implement the renewable portfolio standard in SB 7 has resulted in the development of capacity factors and other evaluation procedures that can be useful to the commission in converting renewable capacity to energy for purposes of calculating avoided emissions and provide for a periodic update for that factor. PC stated that these rules developed by the PUCT should be incorporated by reference into the commission's rules.

**The purpose of this rulemaking is to obtain emissions reductions from EGFs based on the specific provisions of SB 7; in particular, the 50% NO<sub>x</sub> reductions and the 25% SO<sub>2</sub> reductions, if applicable. These reductions are to be made based on certain emission rates set forth in TUC, §39.264(h). It is possible that a grandfathered or electing EGF could make reductions relying on the use of renewable energy and that the factors developed by the PUCT may be used to evaluate such a proposal. Since the commission can consider the rules of the PUCT among many sources of information to make such decisions, the commission does not believe it is necessary to incorporate the PUCT rules into Chapter 101 or 116. The commission agrees that using renewable energy to achieve emission reductions is a viable option and one that might result in cost savings to certain facilities. As the commission continues to develop the permitting and EBTA programs, issues concerning renewable energy can be considered. In addition, if a grandfathered or electing EGF substitutes renewable energy, the resulting emissions should be lower, requiring less allowances for compliance, thus creating an economic incentive.**

PC believes that the proposed rules will fail to assure that emissions are actually reduced. PC believes that the utilities are unlikely to offer a reduction at any plant other than those that are oldest and used the least. Many of these plants are permitted as base-load plants which operate 60-80% of the time, but are kept only for peak use and are used infrequently, less than 20% of the year. Thus, a facility might be glad to modify its permit by reducing permitted emissions that it would never really produce. PC recommends that the rule should be modified to require permit reductions based on the last five years of actual emissions.

**The commission believes that the specified emission rates in the statute and the corresponding rules will achieve the target reductions. The intent of SB 7 is to achieve overall reductions of 50% NO<sub>x</sub> emissions and 25% SO<sub>2</sub> emissions. An electing EGF would receive allowances equal to actual 1997 emissions, not permit allowable emissions, and would only be able to generate surplus allowances by reducing emissions below actual 1997 levels. Also, an electing EGF may not transfer or bank allowances that are conserved as a result of reduced utilization or shutdown unless the reduced utilization or shutdown results from the replacement of thermal energy from the electing EGF with thermal energy generated by any other EGF. Further, since SB 7 provides that 1997 is the base year for determining reductions, the commission does not believe it has the authority to require permit reductions based on the last five years of actual emissions. Therefore, the commission has not changed the rules in response to this comment. Therefore, the commission has not revised the rule in response to this comment.**

PC commented that the rules adopted for the implementation of SB 7 should be structured in such a way as to allow the purchase and retirement of NO<sub>x</sub> allowables issued under the SB 7 program to be used as project emission reduction credits under SB 766. PC recommended two alternatives. First, the TNRCC could allow a retail electric provider (REP) to sell renewables to the owner of a grandfathered facility and assume that there will be a reduction in emissions per megawatt hour (MW) at the average rate of emissions per MW for the power plants in the area. The commenter stated that this is the least costly way to assure that the program will work, and since Texas is effectively an isolated electrical grid, will assure that emissions are reduced in the state. The EPA has recognized the OTAG debates

that add-on units that produce solar electricity or solar water heaters mitigate emissions. PC argued that a wind turbine, a solar water heater, or gases from landfills can similarly be rated based on capacity, converted into energy, and emissions reductions could thus be calculated. Secondly, TNRCC could allow the REP to buy and retire NO<sub>x</sub> credits from the SB 7 trading program established in Chapter 101. This will assure that the emissions are actually reduced in the 60-county east Texas airshed, but it would add to the cost. The commenter further stated that since the transaction is on the open market, it may be far less costly than permit emission reductions purchased from the competitor; and the commission can significantly reduce the cost of the renewable energy used in the program by declaring that the renewable plants built to meet a contracted load under this program are pollution control devices as defined in Health and Safety Code, Chapter 383. If renewable energy installations are certified under Health and Safety Code, §383.004, the certification will exempt the owners from property taxes and allow them to qualify for pollution abatement bonds issued by local governmental units as provided by Health and Safety Code, §383.021. The combination of these two financial benefits could erase the premium price of renewable energy and make it the most cost-effective way to reduce emissions.

**The commission will explore whether it has the authority to declare a renewable energy source, such as wind power, to be a pollution control device for the purposes of property tax exemptions and pollution abatement bonds. As the EBTA and permitting programs continue to develop, the commission can consider issues such as the use of add-on units that produce solar electricity or solar water heaters to reduce emissions. The commission agrees that REPs can buy and retire**

**SB 7 allowances under Chapter 101 and that this transaction might be approved for use as a project emission reduction credit under the VERP program established by SB 766, as long as those allowances are not used to meet the requirements of SB 7.**

One individual commented that health effects reviews should apply not only for grandfathered plants, but secondary sources as well.

**The rules were not revised in response to this comment. The permitting program required by TUC, §39.264 does not include a health effects review. Emissions from grandfathered EGFs other than NO<sub>x</sub>, and for coal-fired EGFs, SO<sub>2</sub> and PM may be permitted using the VERP program requirements. If an owner or operator chooses to permit grandfathered support facilities at sites with EGFs, the owner or operator may submit an application for a VERP under Chapter 116, Subchapter H. The VERP program provides for a health effects review.**

One individual commented that companies have been grandfathered long enough and that the commission should tighten permitting regulations. SEED and two individuals commented that grandfathered energy producers should undergo a health effects review.

**Since EGFS are being permitted under the requirements of TUC, §39.264, which does not require a health effects review, no review is included in this adoption. The commission believes that this**

**program will reduce ambient levels of NO<sub>x</sub> and SO<sub>2</sub> and improve the overall air quality of the state. These reductions will assist the commission in its efforts to attain the health-based NAAQS.**

MCA commented that all grandfathered power plants should meet today's BACT or the federal NSPS for pollutants such as CO, SO<sub>2</sub>, PM, and VOCs, and that this is especially important in areas such as the HGA region where there is not yet a demonstration of compliance with the ozone standard and where the area is bordering violation of the PM standard. NFN and LWV-TX commented that all grandfathered power plants should meet today's BACT or the federal NSPS if they are located in nonattainment areas or east of IH-35 and north of IH-37. Ten individuals commented that all grandfathered plants east of I-35 and north of I-37 must be required to use BACT or NSPS for pollutants such as CO, particulate, and VOC. One individual also recommended that the rules require grandfathered power plants to meet BACT or NSPS for other pollutants, as well as CO, PM<sub>10</sub> and all fluoro-organic compounds. Three individuals commented that grandfathered plants should use BACT. One individual commented and supported the comments of SEED and other environmental groups targeting power plants, and suggested that the commission require BACT for power plants in the Metroplex area, require compliance with federal laws, and use a wide net in a wide geographic area, since pollution comes from sources far away from Dallas. Two individuals added that the commission should require reductions in CO and VOC as well as NO<sub>x</sub> and SO<sub>2</sub>, with one stating that control of radioactivity should also be included in the adoption. One commenter stated that the commission should allow no emissions of NO<sub>x</sub>, VOC, or particulate greater than any United States-built power plant.

The commission has made no changes in response to these comments. SB 7 does not prescribe specific control requirements. However, the commission notes that all EGFs must comply with any applicable NSPS and other federal standards. The use of BACT is only required if a grandfathered EGF is modified, consistent with the state or federal definition of “modification.” EGFs applying for a permit under these adopted rules that do not initiate a modification to the EGF will only be subject to the specific reduction requirements of TUC, §39.264. They are required to achieve the 50% reduction in NO<sub>x</sub> or the 25% reduction in SO<sub>2</sub>, whichever is applicable, or meet the reduction requirements through the EBTA. TUC, §39.264 does not specifically require reductions or permitting of other pollutants; however, the adopted rules allow for the permitting of other air contaminants using the control technology and review process established in Chapter 116, Subchapter H, concerning the VERP program for grandfathered facilities.

In addition, SB 7 did not distinguish between grandfathered EGFs located in nonattainment areas versus attainment areas, nor does it require BACT or NSPS if an EGF is located in a nonattainment area. The commission has rules that address emissions from facilities in nonattainment areas, including EGFs and will be proposing additional rules that will require emission reductions from EGFs in both nonattainment and attainment areas east of IH-35 and east of IH-37. The commission will propose rules that address power plants and other sources in the DFW area and eastern Texas that will consider the effects of transport.

PC urged the commission to reduce emissions for all power plants in the 60-county Texas Clean Air Strategy area to no more than 0.10 pounds/MMBtu for coal and 0.06 pounds/MMBtu for natural gas plants. PC noted that the commission estimated in its February 1999 study that if these standards were adopted, NO<sub>x</sub> emissions would drop by 96,000 tons per year. PC commented that the commission should propose rules at the earliest possible opportunity that require emission reductions in the 60-county area east of IH-35 and north of IH-37 to 0.14 pounds/MMBtu because data from the commission and from OTAG documents that this is the most cost-effective way to reduce ozone emissions in the state and is less costly than other options being considered, like inspection and maintenance and reducing emissions from grandfathered facilities or reformulating gasoline or buying low emission vehicles. If the commission were to enact this standard, PC estimates that an additional 80,000 tons per year of NO<sub>x</sub> would be removed from the airshed. PC stated that the 0.14 pounds/MMBtu standard was assumed by the Legislature for the grandfathered facilities and had it been in place during the ozone season of 1997 and 1998, PC believes that 40-70% of the ozone exceedances in DFW could have been avoided. PC added that a level of 0.05 pounds/MMBtu would reduce even further the emissions from grandfathered units. Six individuals commented that all power plants should be required to meet the 0.14 pounds/MMBtu standard for NO<sub>x</sub>.

**Before the end of 1999 the commission will propose rules and additional amendments to the SIP that require reduction in NO<sub>x</sub> emissions for permitted electric generating utilities and other industrial sources. The reductions are intended to reduce the amount of ozone and ozone precursor gases transported into DFW and other nonattainment areas. These rules will be**

**proposed concurrently with several other rules as part of a program to reduce NO<sub>x</sub> in the eastern portion of Texas. The commission has identified mobile sources as significant contributors to ozone levels, particularly in DFW, and intends to require reductions from these sources as well. The SIP amendments will target significant emission sources and require NO<sub>x</sub> reductions where they will be most effective and do not unnecessarily burden a particular segment of the economy. The specific NO<sub>x</sub> emission limits are also established according to these goals. The reductions achieved under the adoption of these rules implementing SB 7 will also be a part of this program.**

SEED and PC commented that SB 7 must be read broadly to require the creation of a *de novo* permitting standard that at least provides for parity between Texas-grandfathered plants and new plants built today. SB 7 strictly indicated that the Legislature's intent was to remove special historical exemptions for older power plants to eliminate unfair competitive advantages and excess pollution, and that in SB 7, the Legislature intended that grandfathered units face the same permitting hurdles as those faced by new plants built today. TUC, §39.264(e) requires that grandfathered units must apply for *de novo* permits on or before September 1, 2000. TUC, §39.264(f) requires the TNRCC to develop rules for this permitting process. TUC, §39.264(g)-(j) instructs the TNRCC to also develop a system for allowances for sulfur and nitrogen emissions and set forth specific starting allowance formulas. The commenters stated that nowhere did the Legislature indicate that the TNRCC should not exercise its general organic authority in existing regulatory framework in reviewing and acting upon these *de novo* permit applications. The Legislature went even further and stated that it does not intend to "limit the authority of the TNRCC to require further reductions of nitrogen oxides, sulfur dioxide, or any other

pollutant from generating facilities subject to” the law. Additionally, the Legislature provided for stranded cost recovery of unit cleanup costs. Finally, the Legislature also authorized cost recovery where the “amount and location of resulting emission reductions is consistent with the air quality goals and policies of the TNRCC.” The commenters also stated that *de novo* permitting of grandfathered facilities should include at least NSR for NO<sub>x</sub> and SO<sub>2</sub> as well as appropriate limits for air toxics and mercury, and that grandfathered facilities should at least meet the NSR performance requirements that would have to be met by new coal or gas plants sited in Texas today. Reasons for this include concerns with ozone, nitrogen enrichment in estuaries, acid deposition, haze, PM<sub>2.5</sub>, and mercury and other hazardous air pollutants. SEED included health effects and coal combustion wastes. PC commented that, in particular, the rules should provide that EGFs be treated as would any new coal, oil, or gas power plant applying for *de novo* permitting. At a minimum, the TNRCC should thus require EGF’s seeking permitting under the rules to meet BACT or lowest achievable emission rate (LAER) standards for NO<sub>x</sub> and SO<sub>2</sub> depending on whether the units are located in an attainment or nonattainment area. In addition, the TNRCC should require these applying plants to meet appropriate net carbon dioxide limits and toxic emission limits for mercury and other air toxics.

SEED and PC commented that the TNRCC should take supplemental comments on specific performance criteria to be met under *de novo* grandfathered facility permitting. In its narrative to the present proposal, the TNRCC states that if it embraced permitting standards beyond the minimum specified in SB 7, it “is unclear what standards these air contaminants should be held to.” SEED commented that it is reasonably possible for these standards to be developed, and for nitrogen and

sulfur that BACT and LAER provide an appropriate departure point. SEED and PC recommended that further supplemental comments be solicited in the second phase of this proceeding to allow for a more detailed discussion. SEED and PC commented that they are in support of the provisions in proposed §116.911 and §116.913, in that they retain the TNRCC's authority in the *de novo* permitting process.

**The commission does not agree that the intent of TUC, §39.264 was to require *de novo* permitting of EGFs under the TCAA. While TUC, §39.264(e) requires EGFs to apply for a permit on or before September 1, 2000, that section goes on to say that the permit shall require the EGF to achieve emission reductions or allowances as provided by §39.264. TUC, §39.264(h) provides specific direction to the commission to base allowances on 1997 heat input, and it states emission rates for each of the defined regions. The heat input formulas were designed to achieve the 50% NO<sub>x</sub> reductions and the 25% SO<sub>2</sub> reductions. The commission does not believe that it is appropriate to revise those formulas to require further reductions from grandfathered EGFs under the SB 7 program. The provisions of TUC, §39.264 do not specifically prohibit the commission from relying on the permitting requirements of the TCAA; however, the commission believes that had the Legislature intended this result, it would have placed the EGF permitting requirements in TCAA, Chapter 382. In fact, early drafts of SB 766, which did amend the TCAA, contained the permitting and allowance provisions for EGFs. Even though the EGFs included in an EGFP will not undergo a BACT and impacts analysis for initial issuance, future modifications to the EGFs themselves will be required to be processed under Subchapter B of Chapter 116. The permitting and EBTA programs will achieve a certain amount of reductions**

based on the provisions of TUC, §39.264. The provision in TUC, §39.264(s) recognizes that the commission has the existing authority to require additional reductions from EGFs. The commission does not believe that this section was intended to support further reductions from EGFs under the SB 7 program. Rather, it appears that the section was worded to recognize the fact that under existing law, the commission may require additional reductions from EGFs through other commission rules, such as the reasonably available control technology rules.

Even though EGFPs will not be issued using the procedures in the TCAA, these permits will not authorize noncompliance with any applicable state or federal standards, including NSPS, NESHAPS, MACTs, and federal NSR permitting requirements. The commission does not believe that it is appropriate to require grandfathered EGFs to meet the NSPS for new coal or gas plants, or to meet BACT or LAER, depending on location. As previously noted, TUC, §39.264 provided specific emission rates and goals that are to be used to implement the program. If a grandfathered EGF has made a major modification under the PSD or nonattainment NSR programs, then the facility must comply with those programs. This is a separate requirement from SB 7 and is not negated by the issuance of an EGFP.

Section 116.910(e) provides that emissions of air contaminants other than NO<sub>x</sub>, and if applicable PM and SO<sub>2</sub> may be permitted by an EGFP if the grandfathered EGFs meet the requirements of Chapter 116, Subchapter H, concerning VERPs. Section 116.910(f) provides that other grandfathered facilities at a site may be permitted in an EGFP if these facilities meet the

**requirements to obtain a VERP. SB 7 does not require the permitting of any air contaminants other than NO<sub>x</sub>, and if applicable PM and SO<sub>2</sub>. Therefore, the commission chose to rely on the VERP program created by SB 766 to provide a basis of review for other air contaminants from grandfathered EGFs or grandfathered facilities so that all facilities at a site may be permitted. SB 766 provides specific control and other requirements for the permitting of grandfathered facilities. Since the Legislature passed SB 7 and SB 766 during the same session, the commission believes it is appropriate to review the grandfathered facilities and the other emissions from a grandfathered EGF using the VERP process. The commission does not believe that it is necessary to take additional comments on this issue at this time.**

CSW, Entergy, Entergy Services, Reliant, CPS, Group A, and AECT commented that the permitting program as described in proposed §§116.911-116.913 is contrary to the permitting program contemplated by §39.264 of SB 7. The commenters stated that based on the language in §39.264 and the legislative history underlying it, it is clear that the SB 7 permitting program is supposed to be very different than the existing commission NSR permitting program. However, the SB 7 permitting program that proposed §§116.911-116.913 would establish is very similar to the existing commission NSR permitting program and clearly was patterned after the language in §116.111 and §116.115 of the NSR permitting program. CPS noted that in SB 7, the Legislature envisioned a program similar to EPA's Acid Rain Program.

The commenters stated that the existing NSR permitting program is a review-intensive, command and control system. Under the existing NSR permitting program rules, a permit application is subjected to a detailed and complex review that includes a BACT review, off-site impacts review, and a review to determine compliance of the proposed new or modified facility with NSPS, NESHAPs, and other state and federal air quality rules. TUC, §39.264 clearly provides that an EGF may meet its NO<sub>x</sub> and/or SO<sub>2</sub> allowance(s) without adding or implementing any emissions control whatsoever. Instead, §39.264 provides that an EGF may meet its NO<sub>x</sub> and/or SO<sub>2</sub> allowance(s) through emissions trading, in lieu of adding or implementing emissions controls. Moreover, nothing in §39.264 specifies, or even indicates, that if the owner/operator chooses to add or implement emissions control to cause the EGF to meet its NO<sub>x</sub> and/or SO<sub>2</sub> allowance(s), that any commission review of such emissions control is to be conducted or that the commission must approve of such control. The commenters further stated that TUC, §39.204 establishes a permitting program that gives owners/operators of EFGs great flexibility in their use of NO<sub>x</sub> and/or SO<sub>2</sub> allowances in exchange for severe penalties if they do not comply with their allowable allocation. AE believes that the permit program envisioned under §39.264 should be designed to be very simple and straightforward. AE believes that the application should be very short if the applicant chooses to use the FCAA required continuous emission monitoring systems (CEMS) and will use allocations derived from the Acid Rain Database.

Based on the foregoing reasons, the commenters believe that §§116.911 - 116.913 should be significantly simplified so that the SB 7 permitting program is less like the review-intensive, command control approach of the existing NSR permitting program, and more like the flexible permitting

program that is described by the language of §39.264 of SB 7 and was contemplated by the Texas Legislature when it drafted and passed SB 7.

**The commission agrees with the commenters that the permitting program required under TUC, §39.264 is narrowly constructed to permit grandfathered EGFs and to achieve a target reduction of NO<sub>x</sub> and, if applicable, SO<sub>2</sub>. The commission has made significant revisions to the sections in Chapter 116, Subchapter I that have simplified the application content sections and in general, the requirements of the permit program. For example, the requirements to demonstrate compliance with federal standards have been deleted. Further, the provisions regarding control methods in §116.911(a)(2) have been rewritten to address applications that propose new control technology in order to meet the emission limitations of TUC, §39.264. Subsection (a) now refers to the standard permit for the installation of controls as the basis for the review that will be used by the commission to approve these new controls. The specific revisions and responses to comments for §§116.911-116.913 follow this response.**

EPA-APD commented that §§116.911(a), 116.914(f)(2), and 116.915(b) refer to miscellaneous forms. The commenter stated that the TNRCC should address why these forms are not included in the proposed rulemaking and subject to public review and comment.

**The text of the application forms are not part of the rules; however, the commission welcomes comment at any time whenever forms, instructions, and guidance documents can be improved or**

**clarified. Section 116.915, concerning Emission Control Changes, has been deleted from the adopted rule package for reasons discussed elsewhere in this adoption preamble.**

B&P commented that §116.18(2)(B) should be revised so that the EGF's maximum design heat input is measured in MMBtu per hour versus MMBtu to calculate capacity factor.

**The commission agrees, and has revised the definition of "Capacity factor" in §116.18(2)(B) accordingly.**

Reliant commented that §116.910(a) should be revised as follows: "The owner or operator of a grandfathered facility (as defined in 116.10 of this title (relating to general definitions)) at sites with EGFs ...." As proposed, the word "grandfathered" is not defined in this section of the regulations. The commenter suggested that the commission refer to §116.10 to avoid ambiguity.

**The commission has not revised §116.910(a) in response to this comment. The commission instead chose to revise the definition of "Electric generating facility" and to include a definition of "Grandfathered EGF" to make a clear distinction that a "Grandfathered EGF" means an EGF that is not subject to the requirement to obtain a permit under TCAA, §382.0518(g). Section 116.910(a) was also revised in response to this comment.**

Lloyd Gosselink commented that §116.910(a) does not apply to municipal utilities or electric cooperatives. TUC, §39.002 (Applicability) provides that Chapter 39 (except for §§39.157(e), 39.203 and 39.904) does not apply to a municipally-owned utility or an electric cooperative. Thus, TUC, §39.264 does not apply. Lloyd Gosselink recommended that §116.910(a) be revised to read: “The owner or operator of a grandfathered electric generating facility (EGF) shall apply for a permit to operate that facility under this Subchapter. This requirement does not apply to a municipally owned utility or an electric cooperative.” PC commented that SB 7 requires emission reductions from grandfathered power plants owned by investors or municipalities.

**The commission has made no changes in response to this comment. TUC, §39.002, addresses the applicability of Chapter 39, Restructuring of Electric Utility Industry. That section excludes “municipally owned utilities” and “electric cooperatives” from the requirements of Chapter 39, with some exceptions. TUC, §39.264 was added to SB 7 during the final days of the legislative session. Its very specific intent is to require grandfathered EGFs to obtain a permit from the commission and to obtain reductions of NO<sub>x</sub> and SO<sub>2</sub> in the regions as defined by the bill.**

**The Code Construction Act, §311.021, Texas Government Code, provides that “In enacting a statute, it is presumed that: (1) compliance with the constitutions of this state and the United States is intended; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest.” Although the commenter is correct in noting that TUC, §39.002 specifically**

excludes municipally owned utilities, that section must be read in context with the rest of Chapter 39.

TUC, §39.264 defines an “electric generating facility” as a facility that generates electricity for compensation and is owned or operated by a person in this state, including a municipal corporation, electric cooperative, or river authority. No definition of “municipal corporation” is provided in SB 7; thus, it is appropriate to consider the definition of “municipally owned utility” for guidance on what was intended to be covered by the term “municipal corporation.” The term “municipally owned utility” is defined in TUC, §11.003(11) as a “utility owned, operated, and controlled by a municipality or by a nonprofit corporation the directors of which are appointed by one or more municipalities.” It is reasonable to interpret the term “municipal corporation” to be the same as the term “municipally owned utility,” since the terms are both used in the context of the electric utility industry in SB 7. Since the definition of “electric generating facility” includes “municipal corporations,” it is appropriate to conclude that the Legislature intended for municipal corporations to be specifically included in the permitting program. The Legislature specifically noted exceptions for applicability in TUC, §39.264, and in spite of the undefined term “municipal corporation,” the commission believes that the specific permitting requirements of TUC, §39.264 control over the general applicability requirements of TUC, §39.002. By interpreting TUC, §39.264 in this manner, a just and reasonable result occurs, since the interpretation enables the affected sections of Chapter 39 to be effective. The exemption provided by TUC, §39.002 allows municipal utilities and electric cooperatives to be exempt from the

**deregulation provisions. Municipal corporations and electric cooperatives with EGFs with nameplate capacities of 25 megawatts or less are not required to participate in the EBTA or the permitting program. Those over that amount must obtain permits and participate in the EBTA. Since TUC, §39.264 does not specifically exempt municipal corporations and electric cooperatives with EGFs with nameplate capacities over 25 megawatts, the commission does not believe it is appropriate to exclude those EGFs. The commission believes that the applicability exceptions in TUC, §39.002 are intended to exempt EGFs from the competition provisions of Chapter 39, not the permitting program.**

EPA-ARD commented that various paragraphs in §116.910 are not clear as to who is taking action. For example, subsection (b) presumes that it is the owner or operator, and subsection (e) presumes that it is the commission.

**The commission believes that clarification of the rules is warranted. The commission believes the proposed rule was clear as to who was taking action in §116.910(b), concerning electing facilities; however, to ensure clarity, the commission has revised subsection (b) to include a reference to “owners or operators.” The commission has not revised §116.910(e), since that subsection was intended to address which air contaminants can be permitted under the requirements of Subchapter H and which may be permitted using the procedures in Chapter 116, Subchapter I, concerning the VERP program.**

Reliant, TXU, Brazos Electric, Entergy, Entergy Services, Group A, AECT, and CPS commented that electing EGFs should not be subject to a full permit review as part of their electing, but that instead, their allowances should be issued through a permit alteration. The commenters stated that the proposal's requirements for electing EGFs are far more complex than intended in SB 7. SB 7 only requires that electing EGFs must be allocated NO<sub>x</sub> and SO<sub>2</sub> allowances and that they specify the identity of the electing EGFs. SB 7 has no other requirements for electing EGFs. The commenters stated that §116.910(a) and (b) and §116.913 should be revised to meet these goals. A similar comment was received from EPA-APD, noting that §116.912 should be clarified that all conditions in the existing permits of electing EGFs should continue to apply and are carried into the EGF permit. The TNRCC must authorize any changes or revisions to the conditions of the existing NSR permit (including PSD and nonattainment (NA) review permits) consistent with Chapter 116, Subchapter B.

**The commission believes that SB 7 allows an EGF not covered by TUC, §39.264 to become subject to the requirements of TUC, §39.264, which include the requirement to obtain an EGFP. The commission agrees that the process to include electing EGFs in the Subchapter I permitting program can be simplified. Accordingly, the commission has revised §116.910(b) to allow for the electing EGF's NSR permit to be altered consistently with the requirements for alterations in §116.116(c). Electing EGFs must notify the commission of their intent to be included in the EGF permit program under Subchapter I for the purpose of obtaining allowances for NO<sub>x</sub> and, if applicable, SO<sub>2</sub>. The commission believes that it is necessary to alter the NSR permit to include a cross- reference to the EGFP. Electing EGFs must submit a separate application by September 1,**

**2000. After reviewing both the application for the EGFP and the alteration, the EGFP that goes to public notice will include only those conditions that are required under Subchapter I. The terms and conditions of the altered NSR permit will not be subject to public notice. The EGFP may include certain provisions from the NSR permit that are necessary to ensure compliance with the allowance system. Because the rule has been revised to include the permit alteration procedures, the references to “combined permits” have been deleted from §116.18(4) and §116.912(a)(3) and (4) and (b)(6). Further, to simplify the provisions for electing EGFs, many of the provisions in §116.912, concerning application content for electing EGFs, were moved to §116.911. Section 116.912(b) is now §116.912(a) and contains the provisions for opting in and out of the permitting program.**

EPA-APD commented that §116.910(b) requires electing facilities to consolidate existing NSR terms into the EGFP. EPA-APD interpreted this to include all applicable terms of the existing NSR permit, including terms and conditions of PSD, nonattainment, and minor NSR permits. EPA-APD requested confirmation of this interpretation.

**As discussed previously in this adopted preamble, the commission has deleted the procedures for combining NSR permits with EGFP from the adopted rule. Since the existing NSR permits will only be altered to include a reference to the EGFPs for the electing EGF, the terms and conditions of the NSR permit will continue to apply.**

EPA-ARD suggested moving §116.910(c) closer to the beginning, since it is basic to the entire section.

**The commission has made no changes in response to this comment. The commission believes that the organization of §116.910 is clear as to the rule's applicability.**

LP&L requested that the commission add the following sentence to §116.910(d): "If the municipal cooperation, electric cooperative, or river authority reevaluates its intent to exclude the Electric Grandfathered Facilities (EGFs) it notified the commission of prior to January 1, 2000, it may choose to elect to permit any of those EGFs at a later date." LP&L believes that this statement, if added, would bring more exempted EGFs into the emissions trading and allowance program after they have had a chance to fully evaluate the compliance costs associated with the EGF permit.

**The commission believes that a municipal corporation, electric cooperative, or river authority with grandfathered EGFs with a nameplate capacity of 25 megawatts or less or electing EGFs owned by these entities can decide to participate in the permitting program under Subchapter H at a date later than January 1, 2000, by using the provisions in §116.912, concerning electing EGFs.**

**However, applications for EGFPs must be submitted by September 1, 2000. Section 116.910(d) has been revised to allow municipal corporations, electric cooperatives, or river authorities to reevaluate their decision to exclude certain EGFs and to participate in the permitting program. Further, §101.333(4)(A)(ii), now §101.333(5)(A)(ii), has been revised to provide that allowances**

**for municipal corporations, electric cooperatives, or river authorities, that choose to participate in the permitting and EBTA program, will be issued by January 1, 2001.**

B&P commented that §116.910(e) states that the permitting requirements apply to “any EGF” or “coal fired EGFs.” The commenter stated that this language should be revised to provide that the permitting requirements apply only to grandfathered and electing EGFs, and that “emissions of other air contaminants from EGFs ...,” should be changed to refer to only grandfathered EGFs. EPA-ARD commented that clarification is needed in §116.910(e) on whether the trading program only applies to coal-fired facilities, since only coal-fired EGFs are permitted for SO<sub>2</sub>.

**The commission agrees, and has added the term “grandfathered and electing EGFs” to §116.910(e). The rule has also been revised to clarify that emissions other than NO<sub>x</sub>, SO<sub>2</sub>, or PM from grandfathered EGFs may be permitted using an EGFP, provided that the conditions of Subchapter H are met concerning VERPs. The EBTA applies to grandfathered and electing EGFs that emit NO<sub>x</sub> and, if coal-fired, SO<sub>2</sub>.**

CSW, Reliant, TXU, Lloyd Gosselink, CEED, Entergy Services, and AECT commented on §116.910(e) and §116.913(a) that the TNRCC does not have statutory authority to impose ten-year old BACT on contaminants other than NO<sub>x</sub> and SO<sub>2</sub>. CSW commented that the intent of SB 7 is to permit all other air contaminants at their existing (grandfathered) allowables. LP&L commented that §116.913(a)(1)(C) and all other references to EGFs meeting the requirements of Chapter 116,

Subchapter H, should be deleted from the proposed regulations, and that the language as stated in SB 7 does not authorize the commission to apply emission control standards other than NO<sub>x</sub> and SO<sub>2</sub>. The legislation also does not authorize the commission to develop and regulate EGF permits as those permits in the VERP program. B&P commented that §116.913(a)(1)(C) provides that each EGFP will include a general condition that authorizes emissions of air contaminants other than NO<sub>x</sub> and SO<sub>2</sub> from EGFs meeting the requirements of Chapter 116, Subchapter H. The commenter stated that the section should be revised, since emissions of other air contaminants from electing EGFs will not be authorized under Chapter 116, Subchapter H.

**The permitting program established by SB 7, which is contained within the TUC rather than the TCAA, addresses only emissions of NO<sub>x</sub>, SO<sub>2</sub>, and, by including a standard for opacity, PM. Other pollutants, such as VOC and CO, were not addressed and therefore, are not required to undergo a permitting process under TUC, §39.264. The commission believes the intent of SB 7 was also to eliminate the grandfathered status of EGFs. However, SB 7 did not specify the criteria for permitting air contaminants other than those addressed by SB 7, nor does it require the permitting of other air contaminants from grandfathered EGFs. The commission believes that it is not appropriate to merely include the existing allowable emission rates for emissions other than NO<sub>x</sub>, or, if applicable, SO<sub>2</sub> for grandfathered EGFs in an EGFP. This is consistent with the commission's longstanding policy to not treat certain facilities as being "permitted" simply because the facilities are consolidated into an existing permit. For example, a facility that was originally authorized by an exemption will continue to be authorized under the exemption even**

though the exemption is consolidated with an NSR permit during an amendment or at renewal. Since the Legislature passed SB 7 and SB 766 during the same session, the commission believes that it is appropriate to review the grandfathered facilities and the emissions of contaminants not addressed by SB 7 from a grandfathered EGF using the VERP process. SB 766 provides specific control and other requirements for the permitting of grandfathered facilities. In order to provide an option for the complete permitting of grandfathered EGFs under the TCAA, §116.910(e) provides that emissions of air contaminants other than NO<sub>x</sub>, SO<sub>2</sub>, and PM may be permitted by an EGFP if the grandfathered EGF meets the requirements of the VERP program. Section 116.910(e) does not require grandfathered EGFs to permit emissions other than NO<sub>x</sub>, SO<sub>2</sub>, or PM. The choice to permit other air contaminants from grandfathered EGFs or grandfathered non-EGFs remains with the applicant. The rule provides that if those emissions or non-EGFs are to be permitted, they will be reviewed using the VERP process. Section 116.913(a)(1)(C) has been deleted. A new §116.913(a)(2) and (3) is included in the final rule. Section 116.913(a)(2) provides that an EGFP may permit emissions of all other air contaminants from grandfathered EGFs, provided the EGFs meet the requirements of the VERP program. Section 116.913(a)(3) allows grandfathered EGFs to consolidate a VERP with an EGFP.

EPA commented that §116.910(e) states that “other contaminants may be permitted ....” EPA-APD asked if this means that a facility can remain grandfathered for VOC, PM, CO, and lead. Secondly, EPA-APD stated that it appears that §116.913(a)(1)(C) requires inclusion of these contaminants in the permit.

The permitting program established by SB 7, which is contained within the TUC rather than the TCAA, addresses only emissions of NO<sub>x</sub>, SO<sub>2</sub>, and, by including a standard for opacity, PM. Other pollutants, such as VOC and CO, were not addressed and therefore, are not required to undergo a permitting process under TUC, §39.264. Because the TCAA requires that facilities rather than pollutants be permitted, the EGF itself would remain grandfathered since not all emissions from the EGF would have been through a permit review process. In order to facilitate the permitting of grandfathered EGFs under the TCAA, §116.910(e) provides that emissions of air contaminants other than NO<sub>x</sub>, SO<sub>2</sub>, or PM may be permitted by an EGFP if the grandfathered EGFs meet the requirements of Chapter 116, Subchapter H, relating to VERP, which provides specific control and other requirements for the permitting of grandfathered facilities. Since the legislature passed SB 7 and SB 766 during the same session, the commission believes that using the VERP process is appropriate to review the pollutants not addressed by SB 7. The adopted rule does not require owners or operators to permit the other pollutants from grandfathered EGFs. This is an option that may be exercised by the owner or operator. As stated previously in this adopted preamble, TUC, §116.913(a)(1)(C) was deleted.

EPA-ARD commented that clarification is needed in §116.911(a) regarding the definition of “authorized representative” and asked if this is the same person as “authorized account representative.”

The authorized representative referred to in §116.911(a) is any person who is authorized to sign a form PI-1-U on behalf of the applicant. This requirement is consistent with §116.111, concerning

**general applications for permits under Chapter 116. The “authorized account representative” is the person who is authorized to transfer or otherwise manage allowances under Chapter 101 concerning the EBTA. The rule has not been revised in response to this comment.**

Reliant commented that references to other applicable requirements (i.e., nonattainment, PSD, and §112(g)) are unnecessary and should be deleted. However, if retained, Reliant recommended that the language be revised to clarify that these programs would apply only if the EGF is undergoing a modification or other action triggering applicable requirements. B&P commented that §116.911(a)(3) and (4) should simply state that the proposed Subchapter I cannot be used to authorize construction or operation of a new source or a modification of an existing source. EPA-APD commented that §116.911(a)(3), (4), and (5) require an EGF to comply with applicable requirements of nonattainment review, PSD, and reconstructed major sources. The commenter stated that these provisions apply to new and modified sources and do not appear to apply to “grandfathered sources,” and that these provisions may apply to sources which elect to opt into the program. EPA-APD further commented that first, these sections must also ensure that an electing source continues to meet all applicable provisions. Secondly, the TNRCC must add “applicable requirements of the Texas State Implementation Plan including such provisions as reasonably available control technology.”

Lloyd Gosselink commented that §116.913(a)(9) should be deleted, because NSPS requirements are imposed on facilities that were constructed or modified after the publication of the applicable standard. The commenter also stated that §116.913(a)(10) should be deleted, because NESHAPS requirements are

imposed on facilities that were constructed or modified after the publication of the applicable standard. Lloyd Gosselink also commented that §116.913(a)(11) should be deleted, because the requirements for NESHAPS for source categories are imposed on facilities that were constructed or modified after the publication of the applicable standard.

**The commission has revised the rule in response to these comments. Section 116.911(a)(3)-(5) and §116.913(a)(9)-(11) have been deleted. These paragraphs dealt with NSPS, NESHAPs, NESHAPs for source categories, nonattainment review, PSD review, and construction or reconstruction of major sources of hazardous air pollutants. The commission agrees that TUC, §39.254 does not require EGFs to address the applicability of, or compliance with, federal standards as a condition of obtaining an EGFP or for participation in the EBTA. However, even though these paragraphs have been deleted, EGFs must still comply with these federal standards, if they are applicable. If, during the review of an application for an EGFP, the commission discovers that an EGF is out of compliance with any federal standards, the commission will initiate the appropriate enforcement action.**

CSW, Entergy Services, and AECT commented that §116.911(a)(1) should be deleted in that such requirements are adequately addressed in §116.914 except for cases where alternative monitoring methods are used. CSW also commented that §116.914(d) should be revised to require submission of information to support alternative monitoring requests as soon as possible, but not later than May 1, 2002.

**The commission has revised §116.911(a)(1) in response to this comment to clarify that an application must contain sufficient information for the commission to evaluate the proposed monitoring. The commission does not believe that this subsection should be deleted, since information is needed to know what emissions monitoring and reporting requirement the applicant has chosen. In addition, if the applicant is submitting a plan to comply with §116.914(d) (now §116.914(b)), it is necessary for the commission to review and approve the monitoring plans. The commission believes that the initial application submitted by September 1, 2000 should include contain sufficient detail regarding alternative monitoring requests. The commission needs sufficient time to review all monitoring proposals to ensure consistency and reliability. During the application review process, the commission will work with applicants to further refine the alternative monitoring proposal as necessary. The commission has not revised §116.914(d) (now §116.914(b)) in response to this comment.**

AECT and Entergy Services commented that §116.911(a)(6) should be deleted because the proposed §116.911(a)(6) does not relate to grandfathered facilities, but rather to the use of standard permits described in §116.915 for pollution control projects. The commenters stated that in many instances, use of the §116.915 standard permit will not occur by September 1, 2000, the date the SB 7 permit application is due. Therefore, it will not be possible in many cases to include in the SB 7 permit application the information requested in §116.911(a)(6). B&P commented that in §116.911(a)(6), there is a reference to §116.915(b)(2), which does not exist. Also, B&P commented that §116.911(a)(6) is not necessary because there should be no rules that require air quality impacts analysis where there is an

increase in emissions. TXU also commented that §116.911(a)(6) should be deleted because that language is not supported by §39.264 of SB 7. SB 7 does not impose any type of control technology, but specifically allows flexibility to determine what controls, if any, will be used to achieve necessary reductions. For the same reason, Reliant commented that certain parts of §116.915 should be revised to be consistent with §116.617 (Standard Permit). Specifically, §116.915 deviates from §116.617 in two respects. First, the review time should be 30 days, not the proposed 45 days; second, the proposal omits the language allowing for emission increases associated with a derate resulting from the installation of control equipment. Reliant commented that the proposed §116.915(d) does not have a counterpart in §116.617, and should be deleted, or state that these federal requirements apply if the EGF is undergoing a modification or other action triggering review under these requirements.

**The commission has deleted §116.915 from the adopted rules in response to these comments. The commission will withdraw this proposed section. Since Chapter 116, Subchapter F, §116.617, Standard Permits for Pollution Control Projects, already provides the procedures for installing pollution control projects, it will simplify the adopted rule to include a cross-reference in §116.911(a)(2) to specific sections in Chapter 116, Subchapter F. The commission has revised §116.911(a)(6) (now §116.911(a)(3)) to delete the reference to §116.915 and to refer to the new §116.911(a)(2), regarding controls. This paragraph is necessary, because the commission may require modeling or monitoring to ensure public health and safety when evaluating proposed controls which cause an increase in emissions.**

CSW, Reliant, TXU, Entergy, Entergy Services, B&P, Group A, AECT, and CPS commented that §116.911(a)(2) should be deleted, because that language is not supported by §39.264 of SB 7. The commenters stated that SB 7 does not impose any type of control technology, but specifically allows flexibility to determine what controls if any will be used to achieve necessary reductions.

**The commission agrees that the TNRCC cannot require a grandfathered or electing EGF to use any specific control technology to ensure that their actual emissions do not exceed their allotted allowances. However, the commission does believe that if controls are going to be used to meet their emission requirements, the commission must ensure that the requirements of §116.911(2) are met. The language in §116.911(a)(2) has been revised to reference §116.617, regarding the requirements for pollution control projects, which will provide the commission sufficient information on any proposed emission controls. The requirements in §116.617 are intended to allow for the addition of new controls in a streamlined manner while ensuring that any associated emission increases will not cause adverse off-property health impacts.**

EPA-ARD commented that §116.911(b) would be clear if stated in the active voice, and recommended the following language: “The owner or operator of a grandfathered EGF must submit an application for a permit on or before September 1, 2000.” EPA-ARD also commented that “Grandfathered EGF” is not defined.

**The commission agrees that the suggested language is clearer, and has revised the rule. The revised language is now in §116.911(c). The commission has also defined the term “Grandfathered EGF” in §116.18(9).**

B&P commented that §116.911(c) should be revised to provide that applications for EGFP must be submitted under the seal of a professional engineer (P.E.) only when the capital cost of the project is greater than \$2 million as provided in §116.110(e). AE questioned the need for a P.E. seal (in §116.911(c)) on a streamlined application, and stated that a P.E. seal may be required if the applicant chooses an alternate means of demonstrating compliance, such as one that would require specific engineering calculations.

**The commission agrees that submittal of an EGFP application under the seal of a licensed P.E. should be done only in accordance with §116.110, as was the intent of the proposed §116.911(c). The commission has reworded this concept to clarify the intent, and moved the language to §116.911(d).**

B&P commented that §116.912(a) states that electing EGFs shall submit an application “to authorize” NO<sub>x</sub> and SO<sub>2</sub> emissions. The commenter stated that the TNRCC needs to revise this language, since electing EGFs are already authorized under their NSR permit.

**The commission agrees that electing EGFs already had authorization to emit NO<sub>x</sub> and SO<sub>2</sub>; however, submitting an application under Chapter 116, Subchapter I is requesting a new authorization for NO<sub>x</sub>, and if applicable SO<sub>2</sub>. This authorization is necessary to allow the electing facility to obtain allowances and to participate in the EBTA. The commission believes that this is consistent with the requirements of TUC, §39.264(i). Therefore, the rule has not been revised in response to this comment. The commission notes that the NSR authorization for the NO<sub>x</sub>, and if applicable, SO<sub>2</sub> and PM from electing EGFs continues in effect as enforceable permit conditions. Section 116.912(c)(1) and (2) was moved to §116.911(a)(3) in order to consolidate the application requirements for grandfathered and electing EGFs.**

EDF commented that §116.912(b) allows electing EGFs to opt out of the program, and that this is not allowed in SB 7, but appears to have been added to offer additional flexibility to utility companies. The commenter stated that facilities have ample time to decide whether or not to opt in, and that this provision is not necessary. EDF commented that if the TNRCC chooses to revise the provision, the commission should allow electing EGFs to opt out only before the first control period. One individual commented that once an EGF opts into the program, it should always be in.

**The rule has not been revised in response to these comments. The commission agrees that TUC, §39.264 does not expressly provide for electing EGFs to opt out of the program. However, opting out is not prohibited. Since electing EGFs are voluntarily participating in the program and are already authorized by a NSR permit, emissions reductions will not be jeopardized by allowing**

**opting out. The commission believes that it is appropriate to allow electing EGFs to notify the commission of the decision to opt out prior to the beginning of the next control period. As the implementation of the permitting and allowance program proceeds, future rules and regulations may require operational changes at electing EGFs that may not be consistent with its allowances. Further, electing EGFs may modify a facility, thereby making its participation impracticable. The commission believes that it is appropriate to give this flexibility to an owner/operator who voluntarily participates in this program. The provisions for opting out of the program are now in §116.912(a).**

B&P commented that §116.912(b)(1) and (2) should be replaced with the statement that an electing EGF's decision to opt out will become effective at the beginning of the control period following notification of the TNRCC. The commenter also stated that proposed §116.912(b)(3), (4), and (6) should be revised so that each begins with the statement, "once an EGF has opted out."

**The provisions in §116.912 have been reorganized in response to this comment. The commission agrees that the rule should address when the decision to opt out will become effective and has included that language.**

EPA-APD commented that §116.913(a)(1)(B) should clearly define a coal-fired EGF that is subject to limitations of SO<sub>2</sub>. The commenter stated that it is clear that the rule applies to EGFs that fire 100%

coal, but that the rule should further clarify whether these requirements apply to EGFs which fire coal in combination with other fuels and EGFs which are capable of but not presently firing coal.

**The commission has not revised §116.913(a)(1)(B) in response to the comment. The commission agrees that it is appropriate to define “coal” and “coal-fired,” and has revised §101.330 and §116.18 to include the following definitions: (1) “Coal” means all solid fuels classified as anthracite, bituminous, subbituminous, or lignite by the American Society for Testing and Materials Designation ASTM D388-92 “Standard Classification of Coals by Rank” (as incorporated by reference in Title 40 Code of Federal Regulations, §72.13 (effective June 25, 1999)). (2) “Coal-fired” means the combustion of fuel consisting of coal (as defined in §116.18(3)) or any coal-derived fuel (except a coal-derived gaseous fuel with a sulfur content no greater than natural gas), alone or in combination with any other fuel. The definition is independent of the percentage of coal or coal-derived fuel consumed during any control period.**

EPA-APD commented that it is not clear how §116.913(a)(2) differs from §116.913(a)(1), and that if the intent is to consolidate for sources other than an EGF, e.g., a non-related boiler, it may be more clear to include the distinction in the rule.

**Proposed §116.913(a)(2) (now §116.913(a)(3)) provided that the owner or operator of grandfathered facilities could consolidate the EGFP with a VERP issued under Chapter 116, Subchapter H. Proposed §116.913(a)(1) set out the applicability of the EGFP and stated that it**

**authorized NO<sub>x</sub> from all grandfathered or electing EGFs and, where applicable, SO<sub>2</sub>. Section 116.913(a)(1)(C) provided that emissions from EGFs besides NO<sub>x</sub> or SO<sub>2</sub> could be permitted using the requirements of the VERP program. The rule has been revised to separate §116.913(a)(1)(C) and to create a new §116.913(a)(2). This clarifies that the VERP requirements are not part of the mandatory EGFP program.**

Reliant commented that §116.913(a)(5) should be revised to read that an EGF should hold a quantity of allowances for emissions of NO<sub>x</sub> and SO<sub>2</sub> in its compliance account by June 30 instead of May 1.

**The commission agrees that allowing EGFs a period of time to reconcile their allowance accounts is appropriate, but has revised §116.913(a)(5) (now §116.913(a)(6)) to allow a 30-day reconciliation period rather than the 60-day period requested by Reliant. The commission believes that 30 days is sufficient for reconciliation. EGFs now have until June 1 after every control period to sell or purchase allowances in order to reconcile the amount of allowances in their compliance account to ensure that the number of allowances in their account are equal to, or exceed, the amount of emissions from the prior control period.**

EPA-ARD commented that §116.913(a)(6) is unclear in defining who is responsible for submitting reports of NO<sub>x</sub> and SO<sub>2</sub> emissions to the permits section, and that quarterly reports may be more applicable so that sources can be evaluated each quarter instead of all at one time. Reliant commented

that the report of annual actual emissions required by §116.913(a)(6) shall be submitted by August 1 instead of June 1. This would allow an additional 60 days for reconciliation.

**The commission revised §116.913(a)(6), now §116.913(a)(7), to refer to owners or operators. The commission believes that requiring reports of trades within 30 days of the trade, and the annual report, will provide sufficient time for a determination of compliance with the EBTA and the EGFP. The commission has revised §116.913(a)(7) to refer to the report required under §101.336(b), which requires a report of the amount of emissions of each allocated air contaminant during the preceding control period. This will clarify the reporting requirements, since it might have been unclear that the report under §116.913(a)(7) is the same as the report required under §101.336(b). The commission believes that submittal of these reports as quickly as reasonably possible is critical to expedite the review and reconciliation of compliance accounts to allot allowances for the next control period. The commission believes that 60 days is a reasonable time frame for this purpose; therefore, the rule has not been revised to allow the reports to be submitted by August 1.**

B&P commented on §116.913(a)(6) and suggested that the word “prior” be added before “control period.”

**The commission agrees that §116.913(a)(6), now §116.913(a)(7), should be revised and has added the words “from the prior” before control period. This will clarify that the reports that are due are those that reflect the actual annual emissions from the previous control period.**

EPA-APD noted that §116.913(a)(7) requires coal-fired EGFs to meet opacity limitations in 30 TAC §111.111. The commenter stated that for permitted EGFs which opt-in to the program, such EGF must also meet a more stringent opacity limit as specified in a permit issued by the TNRCC under Chapter 116 or issued by EPA under 40 CFR §52.21.

**The commission agrees that if an electing EGF has an opacity limitation in its existing NSR authorization, the electing EGF must comply with the most stringent limitation. Further, electing EGF cannot remove any existing control technology unless the modification is authorized under Chapter 116, Subchapter B. The rule was not revised in response to this comment; however, because §116.913 was revised for other reasons, §116.913(a)(7) is now §116.913(a)(8).**

Reliant, Entergy, Group A, and CPS commented that §116.913(a)(8) should be deleted because SB 7 does not impose any requirement to use or not use any control technologies. Brazos Electric commented that this proposed section would prevent an electing EGF from switching to more efficient control technology or methodologies. Entergy commented that SB 7 establishes severe mandatory and permissive penalties to EGFs that exceed its allowances; thus, it is unnecessary and redundant for the proposal to contain these permit-related provisions. EPA-APD noted that §116.913(a)(8) does not

permit removal of existing control technology, and that the rule should clarify whether replacement of equipment or retirement of a part of the source should be exempt from this provision.

**The commission agrees that SB 7 does not impose any requirements regarding the use of control technology and has deleted §116.913(a)(8). The commission believes that a limitation of the removal of control technology is already addressed by §116.930, concerning modifications. An electing EGF is free to modify its facility as long as it obtains the appropriate NSR approval. Therefore, this provision has been deleted from §116.913(a)(8).**

Lloyd Gosselink commented that §116.913(b) should be deleted, because this section fails to provide notice of what conditions might be anticipated by the TNRCC.

**The commission has not revised the rule in response to this comment. The commission anticipates that special conditions may be necessary, for example, to include requirements for alternative monitoring plans or for controls that an applicant may propose to meet allotted allowances. The commission does not intend to use special conditions to place restrictions on grandfathered or electing EGFs that are more restrictive than the requirements of SB 7.**

EPA-ARD commented that in §116.914(a)(1), it may be beneficial to refer to “the most current version” of 40 CFR Part 75 instead of a specific published version. This would alleviate the need to revise the regulation whenever federal rules are revised.

**In order to ensure that EGFs can locate the most current version of state or federal regulations, the commission believes it is appropriate to include the date that the regulation or law was promulgated or last revised.**

EPA-ARD commented that monitoring requirements in §116.914(c) for EGFs not subject to 40 CFR Part 75 should be identical to the monitoring requirements for EGFs that are subject to 40 CFR Part 75 to ensure that the amount of emissions that each allowance represents will be equivalent from one EGF to another. The commenter stated that in addition, EGFs that volunteer to join the trading program should likewise be required to monitor their emissions in accordance with 40 CFR Part 75 to ensure monitoring consistency and to not allow any cost advantage due to relaxed emissions monitoring requirements.

**The commission has not revised the rule in response to this comment. However, §116.914 was reorganized for clarity. The prior §116.914(c) is now §116.914(b). The commission believes that it is appropriate to continue using 40 CFR Part 75 monitoring for those EGFs already subject to the Acid Rain Program. However, the commission does not see a basis for requiring EGFs not subject to the Acid Rain Program to implement monitoring that is more costly and beyond the requirements of 40 CFR Part 60. 40 CFR Part 60 as currently used with EGFs provides a sufficient level of accuracy that does not justify requiring the implementation of a new monitoring system. The commission believes that the use of the 1.1 adjustment factor will minimize differences in reported emissions.**

EPA-ARD commented on §116.914(c) that if relative accuracies greater than 10% are allowed, an adjustment factor of 1.1 should be applied for monitors as in the OTC NO<sub>x</sub> Budget Program.

**The commission agrees, and the proposed and adopted rule reflect this understanding. In addition, the commission has added the descriptive phrase “adjustment factor” in relation to the 1.1 multiplier to §116.914(b)(2). The rule has not been revised in response to this comment.**

AE commented that it is not clear in §116.914(c) whether the TNRCC is referring to all CEMS that exceed 10% relative accuracy, or just CEMS that are not subject to 40 CFR 75 that are over the 10% relative accuracy. The commenter stated that the sentence should be changed to read: “For all CEMS not subject to 40 CFR 75 that exceed 10% relative accuracy, actual emissions must be determined by multiplying the CEMS data by 1.1.” However, Reliant commented that monitors on facilities not subject to 40 CFR 75 should not be required to apply the 1.1 factor, because 40 CFR 60 does not require it and is widely recognized and utilized by industry and regulatory agencies.

**The commission agrees, and has reorganized §116.914(c), now §116.914(b)(2), to clearly indicate that the 1.1 adjustment factor only applies to CEMs data using a monitoring system other than 40 CFR Part 75. The 1.1 adjustment factor does not apply to CEMs data obtained under 40 CFR Part 75 because 40 CFR Part 75 invalidates any data with deviation greater than 10%.**

**To maintain consistency between 40 CFR Part 75 which allows adjustments up to 10% relative accuracy, any alternative monitoring including 40 CFR Part 60 will be required to apply the 1.1 adjustment factor. 40 CFR Part 60 allows up to a 20% relative accuracy, while 40 CFR Part 75 allows up to 10%. The 1.1 adjustment factor compensates for the 10% discrepancy. Therefore, the rule has not been revised to remove to remove the 1.1 adjustment factor.**

EPA-ARD commented that §116.914(d) should provide standards for alternative monitoring such as what is listed under 40 CFR Part 75. EPA-APD commented that any monitoring alternatives must be approved by EPA or address why EPA approval is not applicable in this case.

**In the adopted rules, the commission moved §116.914(d) to a new §116.914(b)(3) for purposes of clarity. The commission believes that the majority of grandfathered and electing EGFs are already using 40 CFR Part 75 or Part 60 monitoring, and that the majority of grandfathered and electing EGFs not required to monitor under 40 CFR Part 75 will rely on 40 CFR Part 60 for monitoring. If an EGF proposes a monitoring alternative outside of 40 CFR Part 75 or Part 60, the commission will review the proposal using existing NSR guidance for approving alternate monitoring systems. The commission does not believe that it is necessary to obtain EPA approval of alternative monitoring proposals. If an EGF which is already required to use either Part 75 or Part 60 monitoring, proposes to deviate from those programs, EPA approval must be obtained. The commission does not believe that many EGFs will propose alternative monitoring. In those instances, commission staff has ample experience and guidance to approve alternative monitoring**

**systems. Many permits issued by the commission provide for case-by-case monitoring of discrete emission points or factors. These day-to-day decisions are not individually approved by the EPA. Since the alternative monitoring will likely be similar to Part 75 or Part 60 monitoring, the commission should be able to review and approve these alternative proposals. Commission decisions concerning alternative monitoring will be subject to public notice, since each EGFP will be subject to public notice prior to initial issuance. Interested persons and the EPA may comment on all the conditions of the permit including those relating to monitoring. The alternative plan could only be implemented after agency approval.**

Reliant commented that §116.914(e)(3) should be removed because §116.914(e) sets forth the minimum requirements to be contained in a monitoring report. The commenter stated that subsection (e)(3) is ambiguous in this context and should be removed.

**Section 116.914(e)(3), now §116.914(c), requires other information as needed; for example, periodic calibration results and maintenance logs. This requirement for supporting information was included to make clear that information submitted to support all monitoring protocols would need to be in sufficient detail to satisfy staff as to its effectiveness.**

On the subject of public notification of an intent to apply for a permit, one individual stated that the commission should require contested case hearings in addition to notice and comment hearings. Two individuals suggested that the commission require the use of all media in an affected area for permit

notice, and three more individuals stated that the commission should require publication across the state. An individual stated that the commission should require the printing of public notice in the newspaper of largest circulation in the area of the proposed permit and throughout the airshed.

**TUC, §39.264(r) provides that applicants for EGFPs must publish notice in accordance with TCAA, §382.056. Section 382.056 outlines the procedures required of applicants for air permits. Permits must be noticed in a newspaper of general circulation in the municipality in which the facility is located or in the nearest municipality. If applicable, bilingual newspaper notice is required. In all cases, the applicant must post signs at the facility and the permit application must be available for review in a public place. In addition, HB 801, 76th Legislature, revised the public notice requirements for commission permits and provided additional opportunities for input, e.g., earlier notice to encourage public participation. In addition to the previous notice requirements, notices of intent to obtain a permit must include information about the opportunity to be included on mailing lists to receive updated on specific applications and the opportunity for public meetings. Because the commission believes that the notice requirements will provide ample information to ensure effective public participation, the rules have not been revised.**

**The commission is required to provide an opportunity for a public hearing and the submission of comment and send notice of a decision on an application in the same manner as provided by TCAA, §382.0561 and §382.0562. These sections set out the requirements for public participation for FOPs. Hearings for FOPs are not required to be conducted under the APA. Since EGFPs are**

**to be issued using the same process as that for FOPs, hearings for EGFPs are also not required to be held under the contested case provisions of the APA. The commission does not believe it is necessary to hold two different types of hearings for EGFPs. If any facility authorized by an EGFP is modified, as that term is defined for state or federal purposes, the facility is required to obtain appropriate authorization under Chapter 116, Subchapter B. That modification would be subject to public notice and an opportunity to request a contested case hearing. The rules have not been changed in response to the comment.**

One individual commented that the rules do not allow sufficient time for public comment on individual permits. The individual objected having to raise all issues by the end of the public comment period, and opposed the commission's not allowing incorporation by reference of hearing material, since this causes increased copying costs for citizens, discourages public participation, and wastes natural resources. The individual objected to the terms "reasonable" and "unreasonable" that the commission proposed in the evaluation of hearing requests.

**The adopted rules allow 30 days for the submission of public comment and, if a hearing is requested and held, the comment period automatically extends to the end of the hearing. A 30-day comment period is used for all air permits, except renewals and concrete batch plants, that are subject to public notice and, in the experience of the commission, that time period has proved to be sufficient for interested persons to submit comments on permits. Further, TUC, §39.264 directs the commission to provide notice consistent with the requirements of the TCAA which**

**requires a 30-day public comment period. In order for the commission to respond to comments in a timely manner, it is important for all comments to be submitted within a specified time period. This ensures that all comments are considered at the same time. The rules do not prohibit incorporation by reference of existing documents. Rather, they provide criteria that ensures that the documents supporting comments on permits are easily obtained and verifiable, since these documents will be included in the public record concerning an EGFP application.**

**Since TUC, §39.264 requires that public notice and opportunity for a hearing be done in the same manner as for FOPs, the commission is not required to hold a hearing if the basis of a request by a person who may be affected is determined to be unreasonable. Thus, reasonableness is the standard by which the commission must evaluate a hearing request on an EGFP. The commission believes that “reasonable” is a term that is circumstantial, but with a common understanding. The reasonableness of each request must be considered in light of the particular permit, the application, and the arguments raised by the protestant. For example, a hearing request based on water concerns would not be a reasonable basis for a hearing on an EGFP. Similarly, emissions from non-EGFs at a site would not be relevant to the issuance of an EGFP. Because reasonableness is very case-specific, the commission does not believe that it is appropriate to revise the rule in response to this comment.**

AE commented that the term “APA” is not defined in §116.920(c).

**The rule has not been revised in response to this comment. Section 3.2 of 30 TAC Chapter 3, Definitions, defines the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001 and abbreviates this term as “APA.” Section 3.1, Applicability, provides that words and terms, when listed in Chapter 3 and used in commission rules, shall have the meanings in that chapter, unless the context clearly indicates otherwise. However, a definition in Chapter 3 shall not apply to another chapter of the commission rules if the word or term is defined in that chapter. Since Chapter 116 does not define “APA” differently from the definition in Chapter 3, the term does not need further definition.**

NFN commented on §116.920, that the publication of notice of permit hearing should not only be published in the local area, but also in the largest nearby metropolitan areas that might be affected.

LWV-TX commented that the rules should require public notice in all news media in all affected areas, not just in the local newspaper. This will give citizens every opportunity for meaningful input into the permitting process. PC urged the commission to require real notice of public hearings to press in all affected areas, not just in the nearest municipality. The commenter stated that the rules only require that the local newspaper be notified, but surely this type of information could be given by the TNRCC to newspapers in communities affected by transportation and also made available on the website. One individual commented that the rules should require more public notice beyond a small ad in a newspaper and urged the use of community newspapers in addition to large newspapers in large cities.

PC commented that public notice should be given in the municipality adjacent to a plant due to the fact

that there are people who are affected who live upwind or downwind and are affected by transport of emissions from power plants.

**The rule has not been revised in response to these comments. TUC, §39.264(r) requires applicants for EGFPs to publish notice of intent to obtain a permit in accordance with TCAA, §382.056, which outlines the procedures required of applicants for air permits. Permits must be noticed in a newspaper of general circulation in the municipality in which the facility is located or the nearest municipality. If applicable, bilingual notice is required. In all cases, applicants must post signs at the facility. HB 801 revised the public notice requirements for commission permits. In addition to the previous notice requirements, notices of intent to obtain a permit must include information about the opportunity to be included on mailing lists to receive updates on specific applications and the opportunity for public hearings. The commission is required to provide an opportunity for public hearing and for the submission of public comment and to send notice of a decision on the application in the same manner as provided by TCAA, §382.0561 and §382.0562, which are the hearing and notice requirements for FOPs. The commission believes that these procedures adequately notify persons who may be affected by emissions from EGFs. The adopted rule requires that notice be provided in the nearest municipality if no newspaper of general circulation is available in the municipality where the EGF is located. Since the commission is proposing additional SIP rules intended to address the issue of transport, the opportunity to comment on transport issues will occur during the public comment period on those rules instead of during the consideration of individual EGFPs. The rule has not been revised in response to this comment.**

Reliant commented that §116.921(a) should be revised to require public notice only for grandfathered EGFs and not for electing EGFs, since they have already undergone public review for their existing permit.

**The commission revised the provisions in Subchapter I, concerning the inclusion of NSR permits for electing EGFs in an EGFP. Because the NSR permit will now only be altered to include a reference to the EGFP, the provision in §116.920(c), concerning public notice, is no longer necessary. Only the EGFP will be subject to public notice and if necessary, it will include provisions from the NSR permit. The NSR permit itself will not be subject to public notice.**

EPA-APD noted that under §116.921(a), the notice and comment hearing requirements only apply to the initial issuance of an EGFP. The commenter stated that the TNRCC should address why it is not requiring notice and comment hearing for subsequent revisions to the EGFP.

**The rule has not been revised in response to this comment. Section 116.930 provides that modifications to EGFs must comply with Chapter 116, Subchapter B. Therefore, any modification to an EGF would have to be done under existing NSR permitting procedures. The NSR procedures utilize contested case hearings and not notice and comment hearings. Since §116.921 is specifically for initial issuance and §116.930 is for modifications to EGFs, the commission does not believe it is necessary to revise §116.921(a).**

EPA-APD commented that §116.921(b) should define what is a “reasonable” or “unreasonable” request for hearing, and that if these terms are defined elsewhere in the regulations or in the statute, a cross-reference to the applicable definition or provision of the regulation or statute would be helpful.

**TUC, §39.264(r) requires applicants for EGFPs to publish notice of intent to obtain a permit in accordance with TCAA, §382.056. The commission is required to provide an opportunity for public hearing, for the submission of public comment, and to send notice of a decision on the application in the same manner as provided by TCAA, §382.0561 and §382.0562, which are the hearing and notice requirements for FOPs. TCAA, §382.0561 provides that the commission is not required to hold a hearing if the basis of the request by a person who may be affected is determined to be unreasonable. Therefore, reasonableness is the standard by which the commission must evaluate the basis of a hearing request. The commission believes that “reasonable” is a term that is circumstantial, and that the reasonableness of each request must be considered in light of the particular permit, the application, and the arguments raised by the protestant. For example, a hearing request based on water concerns would not be a reasonable basis for a hearing on an EGFP. Similarly, emissions from non-EGFs at a site would not be relevant to the issuance of an EGFP. Because reasonableness is very case-specific, the commission does not believe that it is appropriate to revise the rule in response to this comment.**

AE commented that §116.921(e) states that a written transcript or tape recording must be made available to the public without stating which entity is responsible for providing this.

**Because the hearings for EGFPs are notice and comment hearings, the commission does not anticipate using court reporters to create transcripts for the hearings. Commission staff will oversee each hearing and will create an audio recording of the proceedings. Copies of this tape can be obtained from the commission upon request. The commission will charge a reasonable fee to cover the cost of coping, the cost of the tape, and the transcription of the tape.**

Reliant commented that §116.930 should be deleted or should clarify that other permitting options are available.

**Section 116.930 provides that modifications to EGFs must comply with Chapter 116, Subchapter B. Subchapter B allows modifications under other chapters or subchapters, as appropriate. Therefore, any modification to an EGF would have to be done under NSR permitting procedures. The commission believes that this section is necessary to ensure that permit holders are aware of the process to modify EGFs and has not deleted the section in the adopted rule.**

#### STATUTORY AUTHORITY

The new sections are adopted under TUC, §39.264, which authorizes the commission to develop rules for the permitting of electric generating facilities; and Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of

the TCAA; §382.051, which authorizes the commission to issue permits; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA; §382.0515, which requires applicants to provide information that assures compliance with state and federal laws and regulations; §382.0518, which authorizes the commission to issue permits for new construction and modifications; §382.0519, which authorizes the commission to issue voluntary emission reduction permits, §382.05191, which authorizes public notice for voluntary emission reduction permits; §382.05193, which authorizes permits through emissions reductions, §382.055, which authorizes the commission to establish procedures for review or renewal of a permit; §382.056, which authorizes the commission to require public notice of certain permit applications and procedures for requesting hearings and responding to comments; §382.0561, which authorizes hearing procedures for FOPs; §382.0562, which requires notices of decision; and §382.061, which authorizes the commission to delegate permitting authority to the executive director; and Texas Water Code, §5.122, which authorizes the commission to delegate uncontested matters to the executive director.

## SUBCHAPTER A : DEFINITIONS

### §116.18

#### §116.18. Electric Generating Facility Permits Definitions.

The following words and terms, when used in Subchapter I of this chapter (relating to Electric Generating Facility Permits) shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Allowance** - As defined in §101.330(1) of this title (relating to Definitions).

(2) **Capacity factor** - Either:

(A) the ratio of an electric generating facility's (EGF) actual annual electric output (expressed in megawatt-hours) to the EGF's nameplate capacity times 8,760 hours; or

(B) the ratio of an EGF's annual heat input (in millions of British thermal units (MMBtu)) to the EGF's maximum design heat input (in MMBtu per hour) times 8,760 hours.

(3) **Coal** - As defined in §101.330(6) of this title.

(4) **Coal-fired** - As defined in §101.330(7) of this title.

(5) **Compliance account** - As defined in §101.330(8) of this title.

(6) **Control period** - As defined in §101.330(9) of this title.

(7) **Electing EGF** - As defined in §101.330(11) of this title.

(8) **Electric generating facility (EGF)** - As defined in §101.330(12) of this title.

(9) **Grandfathered EGF** - As defined in §101.330(14) of this title.

(10) **Nameplate capacity** - The maximum electrical output (expressed in megawatts) that an EGF can sustain over a specified period of time when not restricted by seasonal or other deratings.

(11) **Peaking unit** - An EGF that has:

(A) an average capacity factor of no more than 10% during the past three calendar years; and

(B) a capacity factor of no more than 20% in each of those calendar years.

(12) **Person** - As defined in §101.330(17) of this title.

## **SUBCHAPTER I : ELECTRIC GENERATING FACILITY PERMITS**

### **§§116.910-116.914, 116.916, 116.920-116.922, 116.930, 116.931**

#### STATUTORY AUTHORITY

The new sections are adopted under Texas Utilities Code, §39.264, which authorizes the commission to develop rules for the permitting of electric generating facilities; and Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.012, which provides the commission the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.0513, which authorizes the commission to establish and enforce permit conditions consistent with the TCAA; §382.051, which authorizes the commission to issue permits; §382.0518, which authorizes the commission to issue permits for new construction and modifications; §382.0519, which authorizes the commission to issue voluntary emission reduction permits, §382.05191, which authorizes public notice for voluntary emission reduction permits; §382.05193, which authorizes permits through emissions reductions, §382.055, which authorizes the commission to establish procedures for review or renewal of a permit; §382.056, which authorizes the commission to require public notice of certain permit applications and procedures for requesting hearings and responding to comments; §382.0561, which authorizes hearing procedures for FOPs; §382.0562, which requires notices of decision; and §382.061, which authorizes the commission to delegate permitting authority to the executive director; and Texas Water Code, §5.122, which authorizes the commission to delegate uncontested matters to the executive director.

**§116.910. Applicability.**

(a) The owner or operator of a grandfathered electric generating facility (EGF) shall apply for a permit to operate that facility under this subchapter.

(b) Owners or operators of electing EGFs opting to obtain allowances under Chapter 101, Subchapter H, Division 2 of this title (relating to Emissions Banking and Trading of Allowances), shall submit a request to alter any related existing New Source Review (NSR) permits at the time of application for a permit under subsection (a) of this section. Alterations must be consistent with the requirements of §116.116(c) of this title (relating to Changes to Facilities).

(c) The owner, or the operator who is authorized to act for the owner, of a grandfathered or electing EGF is responsible for complying with this subchapter.

(d) A municipal corporation, electric cooperative, or river authority may exclude any EGF with a nameplate capacity of 25 megawatts or less from this subchapter. The municipal corporation, electric cooperative, or river authority must notify the commission by January 1, 2000, of its intent to exclude those EGFs. If the municipal corporation, electric cooperative, or river authority reevaluates its intent to exclude EGFs, it may choose to permit any of those EGFs consistent with the requirements of this subchapter.

(e) Emissions of nitrogen oxides shall be permitted under this subchapter for any grandfathered or electing EGF. Emissions of sulfur dioxide and particulate matter shall be permitted under this subchapter only for grandfathered or electing coal-fired EGFs. Emissions of other air contaminants from grandfathered EGFs may be permitted under this subchapter, provided the grandfathered EGFs meet the requirements of Chapter 116, Subchapter H of this title (relating to Voluntary Emission Reduction Permits).

(f) Owners or operators of grandfathered facilities as defined in §116.10 of this title (relating to General Definitions) at sites with grandfathered or electing EGFs subject to this subchapter may consolidate any permit issued under Chapter 116, Subchapter H of this title with a permit issued under this subchapter.

(g) An EGF that generates electric energy primarily for internal use but that during 1997 sold, to a utility power distribution system, less than one-third of its potential electrical output capacity, or less than 219,000 megawatt-hours, is not subject to the requirements of this chapter.

**§116.911. Electric Generating Facility Permit Application.**

(a) Owners or operators of grandfathered or electing electric generating facilities (EGF) shall submit an application to authorize nitrogen oxides (NO<sub>x</sub>) emissions and, if applicable, sulfur dioxide (SO<sub>2</sub>) and particulate matter (PM) emissions. The application must include a completed Form PI-1-U,

General Application. The Form PI-1-U must be signed by an authorized representative of the applicant. The Form PI-1-U specifies additional support information which must be provided before the application is deemed complete. In order to be granted an electric generating facility permit (EGFP), the owner or operator shall submit information to the commission which demonstrates that all of the following are met.

(1) Measurement of emissions and performance demonstration. Applicants must propose monitoring and reporting for the measurement of emissions and demonstration of performance consistent with §116.914 of this title (relating to Emissions Monitoring and Reporting Requirements).

(2) Control method. New control methods proposed in initial applications must comply with the requirements in §116.617(1), (3), (4)(A) and (B) and (5) - (9) of this title (relating to Standard Permit for Pollution Control Projects).

(3) Air dispersion modeling or ambient monitoring for pollution control projects. Computerized air dispersion modeling and/or ambient monitoring may be required by the commission's Air Permits Division where there is an increase in emissions to determine the air quality impacts from controls proposed under paragraph (2) of this subsection.

(4) Opacity limitations for coal-fired grandfathered and electing EGFs. The coal-fired grandfathered and electing EGFs must meet the opacity limitations of §111.111 of this title (relating to Requirements for Specified Sources).

(b) Application information for electing EGFs.

(1) In addition to the information required in this section, EGFP applications regarding electing EGFs shall contain the following information:

(A) documentation of the emissions from the 1997 Emissions Scorecard from the EPA Acid Rain Program, or if that information is not available, the actual emissions from that electing EGF for calendar year 1997;

(B) documentation of fuel consumption, fuel heating values, and heat input in millions of British thermal units (MMBtu) for calendar year 1997;

(C) identification of the electing EGFs to be included.

(2) Emissions of air contaminants from electing EGFs other than NO<sub>x</sub>, and if applicable, SO<sub>2</sub> and PM, already authorized by Chapter 116 of this title (relating to Control of Air

Pollution by Permits for New Construction or Modification), will not be authorized under this subchapter.

(c) The owner or operator of a grandfathered or electing EGF must submit an application for a permit under this subchapter on or before September 1, 2000.

(d) All applications for an EGFP shall be submitted under the seal of a Texas licensed professional engineer if required by §116.110(e) of this title (relating to Applicability).

**§116.912. Electing Electric Generating Facilities.**

An electing electric generating facility (EGF) may opt out of the requirements of this subchapter under the following conditions.

(1) The electing EGF must notify the commission of its intent to opt out prior to the beginning of the next control period. The decision to opt out of the requirements of this subchapter will become effective at the beginning of the control period that follows notification to the commission.

(2) The electing EGF may not opt out during a control period.

(3) Once the electing EGF has opted out, all of the following apply:

(A) all allowances for the electing EGF will be voided by the commission and may not be banked for subsequent use;

(B) no allowances will be allocated for subsequent control periods;

(C) the electing EGF may not participate in the emissions banking and trading of allowances at any future date;

(D) the owner or operator shall request an alteration to the existing New Source Review permit to remove the conditions referencing the electric generating facility permit.

**§116.913. General and Special Conditions.**

(a) The following general conditions shall be applicable to every electric generating facility permit (EGFP) unless otherwise specified in the permit.

(1) A permit issued under this subchapter authorizes the following:

(A) nitrogen oxides (NO<sub>x</sub>) emissions from all grandfathered and electing electric generating facilities (EGF);

(B) sulfur dioxides (SO<sub>2</sub>) emissions from coal-fired grandfathered and electing EGFs.

(C) particulate matter through opacity limitations as specified in §111.111 of this title (relating to Requirements for Specified Sources) for coal-fired grandfathered and electing EGFs.

(2) An EGFP may permit emissions of all other air contaminants from grandfathered EGFs, provided the requirements of Chapter 116, Subchapter H of this title (relating to Voluntary Emissions Reduction Permits) are met.

(3) Grandfathered facilities as defined in §116.10 of this title (relating to General Definitions) at sites with grandfathered or electing EGFs and permitted under Chapter 116, Subchapter H of this title may be consolidated with a permit issued under this subchapter.

(4) The grandfathered or electing EGF must comply with Chapter 101, Subchapter H, Division 2 of this title (relating to Emissions Banking and Trading of Allowances) including the requirement to maintain allowances in a compliance account. Allowances may be transferred in accordance with §101.335 of this title (relating to Allowance Banking).

(5) Mass emission monitoring and reporting shall be conducted in accordance with §116.914 of this title (relating to Emissions Monitoring and Reporting Requirements).

(6) On June 1 after every control period, a grandfathered or electing EGF subject to this subchapter shall hold a quantity of allowances for emissions of NO<sub>x</sub> and, where applicable, SO<sub>2</sub>, in its compliance account that is equal to or greater than the total emissions of that air contaminant emitted during the prior control period.

(7) Owners or operators shall submit a report of the amount of emissions of each allocated air contaminant, from the prior control period to the Air Permits Division consistent with the requirements of §101.336(b) of this title (relating to Emission Monitoring, Compliance Demonstration, and Reporting).

(8) Coal-fired grandfathered and electing EGFs must meet the opacity limitations of §111.111 of this title (relating to Requirements for Specified Sources).

(b) Special conditions may be included in the EGFP.

**§116.914. Emissions Monitoring and Reporting Requirements.**

(a) Grandfathered or electing electric generating facilities (EGF) subject to 40 Code of Federal Regulations Part 75, effective June 25, 1999 (40 CFR Part 75) shall do the following.

(1) For grandfathered or electing EGFs subject to the requirements of 40 CFR Part 75, concerning Continuous Emission Monitoring, all monitoring systems must comply with the initial performance testing and periodic calibration, accuracy testing, and quality assurance/quality control testing specified in 40 CFR Part 75.

(2) For grandfathered and electing EGFs subject to 40 CFR Part 75, a certified monitoring system under 40 CFR Part 75 shall be used to demonstrate compliance with this subchapter.

(A) If the grandfathered or electing EGF has a flow monitor certified under 40 CFR Part 75, nitrogen oxides (NO<sub>x</sub>) emissions in pounds per hour shall be determined using a NO<sub>x</sub> continuous emission monitoring system (CEMS) and the flow monitor.

(B) If the grandfathered or electing EGF does not have a certified flow monitor, but does have a NO<sub>x</sub> CEMS, NO<sub>x</sub> emissions in pounds per hour shall be determined by multiplying pounds of NO<sub>x</sub> per million British thermal units (lbs/MMBtu) times heat input in MMBtu per hour (MMBtu/hr). The procedures in 40 CFR Part 75, Appendix F, concerning Conversion

Procedures, Section 3, shall be used to convert the measured concentration of NO<sub>x</sub> and a diluent (carbon dioxide (CO<sub>2</sub>) or oxygen (O<sub>2</sub>)) into an emission rate in lbs/MMBtu. The procedures in 40 CFR Part 75, Appendix F, Section 5, shall be used to determine the hourly heat input in MMBtu/hr. These two values (lbs/MMBtu and MMBtu/hr) shall be multiplied together to determine NO<sub>x</sub> emissions in lbs/hr.

(C) The procedures in 40 CFR Part 75, Appendix E, concerning Optional NO<sub>x</sub> Emissions Estimation Protocol for Gas-fired Peaking Units and Oil-fired Peaking Units, may be used to estimate the NO<sub>x</sub> emission rate.

(b) Grandfathered or electing EGFs not subject to 40 CFR Part 75 shall comply with:

(1) the initial performance testing and periodic calibration, accuracy testing, and quality assurance/quality control testing specified in 40 CFR Part 75; or

(2) those same requirements in 40 CFR Part 60, concerning New Source Performance Standards (40 CFR Part 60). Actual emissions must be determined by multiplying the CEMs data by an adjustment factor of 1.1 for all grandfathered and electing EGFs not using a 40 CFR Part 75 monitoring system if the CEMs exceeds 10% relative accuracy.

(3) in lieu of the monitoring required by paragraph (b)(1) or (2) of this subsection, the electric generating facility permit (EGFP) may authorize alternative monitoring to calculate mass emissions under this section. The applicant must submit the following for review of an alternative monitoring proposal:

(A) a description of the monitoring approach to be used;

(B) a description of the major components of the monitoring system, including the manufacturer, serial number of the component, the measurement span of the component, and documentation to demonstrate that the measurement span of each component is appropriate to measure all of the expected values;

(C) an estimate of the accuracy of the system and documentation to demonstrate how the estimate of accuracy was determined;

(D) a description of the tests that will be used for initial certification, initial quality assurance, periodic quality assurance, and relative accuracy; and

(E) additional information may be requested before approving a request for alternative monitoring. Alternative monitoring shall be incorporated into the EGFP.

(4) emissions in pounds per hour shall be determined using the NO<sub>x</sub> CEMS and one of the following methods.

(A) The owner or operator may elect to comply with subsection (a)(2)(A) or

(B) of this section.

(B) The grandfathered or electing EGF may use a flow monitor certified under 40 CFR Part 60 to determine emissions in pounds per hour.

(C) NO<sub>x</sub> emissions in pounds per hour may be determined by multiplying the lbs/MMBtu times the heat input in MMBtu/hr. The procedures in 40 CFR Part 60, Appendix A, Method 19 shall be used to convert the measured concentration of NO<sub>x</sub> and a diluent (CO<sub>2</sub> or O<sub>2</sub>) into emission rates in lbs/MMBtu. The procedures in 40 CFR Part 75, Section 5, Appendix F shall be used to determine the hourly heat input in MMBtu/hr. These two values (lbs/MMBtu and MMBtu/hr) shall be multiplied together to determine NO<sub>x</sub> emissions in lbs/hr;

(5) for grandfathered and electing EGFs with a heat input of less than 100 MMBtu/hr and for peaking units emissions in pounds per hour, may be determined using the procedures in Appendix E of 40 CFR Part 75 to estimate the emission rate.

(c) The following requirements apply to all grandfathered and electing EGFs.

(1) During a period when valid data is not being recorded by monitoring devices approved for use to demonstrate compliance with this subchapter, missing or invalid data shall be replaced with representative default data in accordance with the provisions of 40 CFR Part 75, Subpart D, concerning Missing Data Substitution Procedures.

(2) Data collected from monitoring of grandfathered and electing EGFs shall be used to calculate the actual emissions over a control period. The information in this report shall be submitted by June 30 of each year and may be submitted with the report required under §101.336(b) of this title (relating to Emission Monitoring, Compliance Demonstration, and Reporting). At a minimum, the report shall contain the following information:

(A) a description of the monitoring protocol;

(B) a completed Form AR-1, Emissions Monitoring Data Form;

(C) other information as necessary to validate the actual emissions during the prior control period, including, but not limited to, periodic calibration results and maintenance logs.

**§116.916. Permits for Grandfathered and Electing Electric Generating Facilities in El Paso County.**

Grandfathered and electing electric generating facilities in El Paso County are not required to meet nitrogen oxides allowance requirements if the commission or EPA determines that reductions in nitrogen oxides emissions in the El Paso Region otherwise required by this subchapter would result in increased ambient ozone levels in El Paso County.

**§116.920. Public Participation for Initial Issuance.**

(a) An applicant for an electric generating facility permit (EGFP) shall publish notice of intent to obtain the permit in accordance with Chapter 39 of this title (relating to Public Notice).

(b) Public notice for an EGFP may be combined with the public notice for a voluntary emission reduction permit, under Chapter 116, Subchapter H of this title (relating to Voluntary Emission Reduction Permits).

(c) Any person who may be affected by emissions from a grandfathered or electing EGF may request the commission to hold a notice and comment hearing on the EGFP application. The public comment period shall end 30 days after the publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title (relating to Notice of Receipt of Application and Intent to

Obtain Permit). Any hearing request must be made in writing during the 30-day public comment period.

(d) Any hearing regarding initial issuance of an EGFP shall be conducted under the procedures in §116.921 of this title (relating to Notice and Comment Hearings for Initial Issuance) and not under the APA.

(e) Responses to public comments and the notice of the commission's decision to issue or deny an EGFP shall be conducted under the procedures in §116.922 of this title (relating to Notice of Final Action).

(f) A person affected by a decision to issue or deny an EGFP may move for rehearing under the appropriate procedure in Chapter 50 of this title (relating to Action on Applications and Other Authorizations) and may seek judicial review under TCAA, §382.032 (relating to Appeal of Commission Action).

**§116.921. Notice and Comment Hearings for Initial Issuance.**

(a) The notice and comment hearing requirements apply only to the initial issuance of a electric generating facility permit (EGFP).

(b) The commission shall decide whether to hold a hearing. The commission is not required to hold a hearing if the basis of the request by a person who may be affected by emissions from a grandfathered or electing electric generating facility (EGF) is determined to be unreasonable. If a hearing is requested by a person who may be affected by emissions from a grandfathered or electing EGF, and that request is reasonable, the commission shall hold a hearing.

(c) At the applicant's expense, notice of a hearing on a draft EGFP must be published in the public notice section of one issue of a newspaper of general circulation in the municipality in which the grandfathered or electing EGF is located, or in the municipality nearest to the location of the grandfathered or electing EGF. The notice must be published at least 30 days before the date set for the hearing. The notice must include the following:

(1) the time, place, and nature of the hearing;

(2) a brief description of the purpose of the hearing; and

(3) the name and phone number of the commission office to be contacted to verify that a hearing will be held.

(d) Any person, including the applicant, may submit oral or written statements and data concerning the draft EGFP.

(1) Reasonable time limits may be set for oral statements, and the submission of statements in writing may be required.

(2) The period for submitting written comments is automatically extended to the close of any hearing.

(3) At the hearing, the period for submitting written comments may be extended beyond the close of the hearing.

(e) A tape recording or written transcript of the hearing must be made available to the public.

(f) Any person, including the applicant, who believes that any condition of the draft EGFP is inappropriate or that the preliminary decision to issue or deny the permit is inappropriate, shall raise all issues and submit all arguments supporting that position by the end of the public comment period.

(g) Any supporting materials for comments submitted under subsection (f) of this section must be included in full and may not be incorporated by reference, unless the materials are one of the following:

(1) already part of the administrative record in the same proceedings;

(2) state or federal statutes and regulations;

(3) EPA documents of general applicability; or

(4) other generally available reference materials.

(h) The commission shall keep a record of all comments received and issues raised in the hearing. This record is available to the public.

(i) The draft EGFP may be changed based on comments pertaining to whether the permit provides for compliance with the requirements of this subchapter.

(j) The commission shall respond to comments consistent with §116.922 of this title (relating to Notice of Final Action).

**§116.922. Notice of Final Action.**

(a) After the public comment period or the conclusion of any notice and comment hearing, the commission shall send notice by first-class mail of the final action on the application to any person who commented during the public comment period or at the hearing, and to the applicant.

(b) The notice must include the following:

(1) the response to any comments submitted during the public comment period;

(2) identification of any change in the conditions of the draft electric generating facility permit and the reasons for the change;

(3) a statement that any person affected by the decision of the commission may petition for rehearing under the appropriate procedure in Chapter 50 of this title (relating to Action on Applications and Other Authorizations) and may seek judicial review under TCAA, §382.032 (relating to Appeal of Commission Action).

**§116.930. Modifications.**

The owner or operator planning a modification of a facility permitted under this subchapter must comply with Subchapter B of this chapter (relating to New Source Review Permits) before work is begun on the construction of the modification.

**§116.931. Renewal.**

Electric generating facility permits shall be renewed in accordance with Chapter 116,  
Subchapter D of this title (relating to Permit Renewals).