

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §116.128 *with change* to the proposed text as published in the October 21, 2011, issue of the *Texas Register* (36 TexReg 7128).

Section 116.128(a), (b), (c)(1)(A)(i)(I) - (IX) and (XII) - (XIII), (c)(1)(B) - (F), (c)(2) - (4), (f), and (h) will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP). Section 116.128(c)(1)(A)(i)(X) - (XI), (d), (e), and (g) will not be submitted to the EPA.

Background and Summary of the Factual Basis for the Adopted Rule

House Bill (HB) 2694, 82nd Legislature, 2011, created new Texas Health and Safety Code (THSC), §382.059, Hearing and Decision on Permit Amendment Application of Certain Electric Generating Facilities, which establishes public notice and contested case hearing (CCH) requirements specifically for permit amendment applications necessary to comply with a maximum achievable control technology (MACT) standard promulgated under Federal Clean Air Act (FCAA), §112. This new rule establishes public notice, comment, and CCH deadlines and procedures for permit amendment applications for electric generating facilities (EGFs) to comply with a MACT standard established by EPA under FCAA, §112. This rule action will implement HB 2694, §4.27 and §4.30. It provides an option for permit amendment application processing with statutorily established deadlines for preparation of a draft permit and a decision on the

application by the commission, which is not a feature of the commission's existing public participation process established by HB 801, 77th Legislature, 2001. THSC, §382.059 provides specific time periods for TCEQ to draft a permit amendment, for persons to request a CCH on the draft amendment, and for the commission to act on the permit application. The scope of any hearing granted under THSC, §382.059 is limited to whether the control technology in the executive director's draft permit is the MACT to meet a standard promulgated under FCAA, §112.

On May 3, 2011, the EPA proposed, in 85 *Federal Register* 24976, a new MACT standard. The final rule was signed on December 21, 2011 for submittal to the *Federal Register* and applies to petroleum coke, fuel oil, and coal fired electric generating units (the EPA Utility MACT). The new Utility MACT will be effective 60 days after publication in the *Federal Register*. In Texas, the EPA Utility MACT is expected to affect a very small group of existing EGFs within the power generation sector, since there currently are a maximum of 20 permitted and operating petroleum coke, fuel oil, and coal fired electric generating sites, with approximately 41 combustion units, statewide that could potentially be affected by new §116.128. Natural gas-fired EGFs are not affected by either EPA's Utility MACT standard or this rule. In addition, EPA could adopt other MACT standards under FCAA, §112 that could require permit amendment applications that are subject to this new section.

Section 116.128 applies only to permit amendment applications submitted solely to allow an EGF to reduce emissions and comply with a requirement imposed by FCAA, §112 (42 United States Code (USC), §7412) to use applicable MACT. The applications shall be limited to changes in method of control for an existing electric utility steam generating unit, as defined in 40 Code of Federal Regulations (CFR) §63.42, for the purpose of achieving a MACT standard promulgated by EPA under FCAA, §112. The applications may request authorization for collateral increases in emissions that result from installation of this control technology. Amendment applications are subject to the requirements of Chapter 116, Subchapter B, Divisions 1, 4, 5, and 6, Permit Application, Permit Fees, Nonattainment Review Permits, and Prevention of Significant Deterioration Review, respectively, except that the public notice, public participation, and CCH requirements of this new rule will apply rather than the requirements in 30 TAC Chapters 39, 50, and 55, Public Notice, Action on Applications and Other Authorizations, and Requests for Reconsideration and Contested Case Hearings; Public Comment, respectively, except as otherwise specified. Although the adopted rule contains text that is similar to the commission's rules for public participation in those chapters, this rule is designed to include all required notice and CCH requirements to comply with the new statute.

Before certain changes are made to the EGF, including changes in control technology, a permit amendment is required, and the application is subject to review for best available

control technology, and protection of the public's health and physical property (See THSC, §382.0518(a) and (b), and 30 TAC §116.116(b)). The requirement to obtain a permit amendment is included in the approved Texas SIP.

Any other changes in the method of control of emissions, the character of the emissions, or an increase in the emission rate of any air contaminant, including any concurrent projects undertaken by the owner or operator of EGFs not related to reducing emissions to comply with the requirements of MACT, must be submitted in a separate amendment application and that application will not be processed under §116.128.

The new statute requires the commission to provide an opportunity for a public hearing and the submission of public comment on the application in the manner provided by THSC, §382.0561. This section of the Texas Clean Air Act specifies the public notice and participation requirements for federal operating (Title V) permits by cross-references to the public notice section for new source review (NSR) permits found in THSC, §382.056. Therefore, applications filed under this new section are subject to specific requirements regarding newspaper publication, sign posting, and alternate language notice. This is implemented in subsection (c)(1). These requirements are consistent with the notice requirements in Chapter 39 that the commission has adopted as a proposed revision to the SIP for other amendment applications. The new statute also provides that the commission send notice of a decision on an application for a permit

amendment under this section in the manner provided by THSC, §382.0562, which is the section in the Texas Clean Air Act regarding notice of decisions on federal operating permits. This statutory requirement is implemented in subsection (f).

A request for a CCH must be submitted within 30 days after the issuance of the draft permit. This period begins upon the publication of the notice of the draft permit. The commission must then evaluate any hearing requests, potentially hold a CCH, and ultimately issue a final order on the issuance of the permit no later than 120 days after the draft permit is issued. The deadline in this statute for issuance of the order is the only one for any air quality permit applications that are subject to CCH. The 120-day limit is shorter than the typical length of CCHs, including post-hearing procedures, under the current rules for all other applications subject to CCH. Therefore, this rulemaking requires modification of some agency procedures to implement these statutory requirements.

The adopted rule provides that the commission may hold a hearing or refer the matter to the State Office of Administrative Hearings (SOAH). The sole issue for any hearing is whether the choice of technology approved in the draft permit is the MACT required under FCAA, §112 (42 USC, §7412).

The new rule, except subsections (c)(1)(A)(i)(X) - (XI), (d), (e), and (g) will be submitted

to the EPA as a revision to the Texas SIP, which already includes certain requirements for amendment applications. The amendment application that is subject to this rule is one that could result in changes to a minor or a major NSR permit. Therefore, the commission will submit the identified portions of the rule as a revision to the SIP to ensure that any permit changes would meet the requirements of the current SIP as well as the public notice and participation rules that the commission adopted and submitted to EPA as part of the SIP in 2010. While the amendment application is specific in scope and the public participation portions of the rule implement the strict deadlines in the statute, the commission's position is that this rule does not allow for any backsliding from the approved Texas SIP and is therefore compliant with FCAA, §110(l).

Section Discussion

Subsection (a) establishes the applicability of the new section to permit amendment applications to allow existing EGFs to reduce emissions and comply with a requirement imposed by FCAA, §112. The applications shall be limited to changes in method of control for an existing electric utility steam generating unit, as defined in 40 CFR §63.42, for the purpose of achieving a MACT standard promulgated by EPA under FCAA, §112. The applications may include a request for authorization for collateral increases in emissions that result from installation of this control technology.

Amendment applications are subject to the requirements of Chapter 116, Subchapter B, Divisions 1, 4, 5, and 6. Applications that are subject to the requirements of Divisions 5

or 6 are subject to additional public notice requirements, as discussed later as part of the explanation of subsection (c)(1)(F).

Applications for permit amendments will be submitted under §116.111, General Application. If the collateral increases, calculated in accordance with existing commission rules, exceed federal major source thresholds, the application will be subject to the requirements of Chapter 116, Subchapter B, Divisions 5 or 6.

Subsection (b) places a requirement on the executive director to produce a draft permit no later than 45 days after the receipt of an application for an amendment under subsection (a). The rule has been changed from proposal to state that this 45-day period will begin once a permit application has been determined to be administratively and technically complete. The commission received comments that this action is not consistent with past commission practice of initiating schedules on draft permit production once an application is judged to be only administratively complete. The commission has determined that some aspects of its current practices for permit application processes must be changed to ensure that the intent of the legislature is implemented concerning compressed schedules. The commission has further determined that ensuring this intent requires that the rule be changed to state that an application should be both administratively and technically complete before it can be considered received. Specifically, as a matter of practical implementation and to allow

as much time as possible for contested case procedures, including procedures required by SOAH, the commission has determined that the time for issuance of a draft permit must be less than 45 days. The commission will retain the 45-day requirement in the rule to be consistent with the statute but will implement practices for permit review that require that a draft permit be issued within a shorter than typical time period. To meet this schedule, permit applications should be administratively and technically complete when submitted to the commission.

As provided in subsection (d), the publication of a notice of the issuance of a draft permit for public review and comment will begin a 30-day period for parties to request a CCH. The issuance and publication of the draft permit also begins a 120-day period for the commission to issue a final order issuing or denying the permit. This gives the commission a total of 165 days from receipt of a complete application to a decision on permit issuance following any CCH.

Therefore, applicants should be prepared to submit public notification to the appropriate publications and to comply with other notification requirements when they submit their amendment application. The commission encourages applicants to contact the executive director prior to submitting an application to ensure that they are prepared to move promptly to public notification.

Subsection (c) establishes public participation requirements and specifies that the requirements of Chapters 39 and 55 will not apply to applications processed under this section, except as specifically provided in this subsection.

Paragraph (1) specifies requirements for applicants. They will be required to publish notice of a draft permit and preliminary decision in a newspaper of general circulation in the municipality in which the existing EGF is located.

The notice text requirements are listed in subsection (c)(1)(A)(i)(I) - (XIII) and will include: the permit application number; the applicant's name, address, and telephone number and a description of the manner in which a person may contact the applicant or permit holder for further information; a description of the location or the proposed location of the EGF; and a description of the choice of technology in the draft permit.

The notice will also include the location and availability of the complete permit application, the draft permit, and all other relevant supporting materials in the public files of the agency.

The notice must further describe the public comment procedures, including the duration of the public notice comment period, procedures to request a CCH, and a statement, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice, that a person who may be affected by the emission of air

pollutants from the EGF is entitled to request a CCH. The notice will include the time and location of any scheduled public meeting and the time and location of any scheduled CCH that will be held if any requests for a CCH are received.

The notice must include a statement that a person who may be affected by emissions from the EGF associated with changes in control technology that is the subject of an application under this section is entitled to request a CCH. The notice must also include a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit, and the name, address, and phone number of the commission office to be contacted for further information. In addition to these notice requirements, subsection (c)(1)(A)(ii) requires applicants to publish additional notice that meets the requirements of §39.603(c)(2), Newspaper Notice, commonly referred to as a "display notice." For both of these publications, subsection (c)(1)(B) requires applicants to comply with the requirements of §39.405(h)(1) - (6) and (8) - (11), General Notice Provisions, regarding alternative language newspaper notice. Subsection (c)(1)(C) requires applicants to comply with the sign-posting requirements of §39.604, Sign Posting, as modified by this rule, which includes alternative language sign posting whenever alternative language newspaper notice is required by §39.405(h).

Subsection (c)(1)(C) and (D) also includes specific requirements for filing copies of the

published notice with the commission as required by §39.605(1), Notice to Affected Agencies, and providing verifications of the sign posting requirements. In addition, subsection (c)(1)(E) requires applicants to provide a copy of the application available for review and copying at a public place in the county in which the facility is located beginning on the first day of newspaper publication of the notice. If a CCH is requested, the application and a copy of the draft permit must remain available until the commission has taken action on the application or the commission refers issues to SOAH.

Subsection (c)(1)(F) establishes additional public notice requirements if collateral emission increases are subject to Chapter 116, Subchapter B, Divisions 5 or 6. The newspaper notice shall contain the following additional information: the degree of increment consumption expected from the source or modification; a statement that the state's air quality analysis is available for comment; the deadline to request a public meeting and that the executive director will hold a meeting at the request of any interested person; a statement that the draft permit and preliminary decision, preliminary determination summary, and air quality analysis are available electronically; locations where the permit can be accessed; a statement that the executive director will respond to all comments; and a brief description of how the public can participate in the final permit decision. The additional requirements for the applicant also include providing notifications to certain persons, and placement of the

application in a location with internet access. Additional requirements for the executive director include holding a meeting if requested by an interested person and placing certain documents on the commission's Web page.

Subsection (c)(2) requires the executive director to make available a copy of the complete permit application and draft permit at the commission's central office and at the commission's regional office for the region in which the EGF is located.

Subsection (c)(3) requires that, for applications subject to Prevention of Significant Deterioration (PSD) review or nonattainment new source review (NNSR) permitting requirements, the executive director must file certain documents with the TCEQ Office of the Chief Clerk (OCC).

Subsection (c)(4) establishes the public comment procedures. Subsection (c)(4)(A) sets out the applicable requirements for public meetings, including specific requirements in clause (iii) for any applications that trigger PSD or nonattainment permitting requirements. Subsection (c)(4)(B) establishes a public comment period of 30 days following the last newspaper publication of the notice. Any objections to a condition of the draft permit must raise all arguments during this period. The executive director will respond to comments as required by §55.156(b), Public Comment Processing. The commission has changed rule language to remove references to the Office of Public

Assistance and change the reference to the OCC to reflect the current organization of the TCEQ.

Subsection (d) establishes procedures for CCHs under this proposed section. The requirements of Chapters 50 and 55 will not apply except as specifically required by this section. Consistent with the requirements of the THSC, §382.059, paragraph (1) limits the subject of any CCH to only legitimate issues of material fact regarding whether the choice of technology approved in the draft permit is MACT, and would limit the period for requesting a CCH to 30 days from the issuance of a draft permit, which is calculated from the date of first publication of the notice. This 30-day period differs from the general comment period found in subsection (c)(4). Accordingly, the period for raising legitimate issues of material fact and requesting a CCH may end before the comment period ends.

Paragraph (2) allows the applicant or the executive director to request that the application be sent directly to SOAH.

Paragraph (3) establishes specific procedures for processing hearing requests. Because of the accelerated schedule of CCH requests and final decision on a draft permit, it will be necessary for OCC to coordinate with SOAH to obtain a date and location for a CCH. The commission adopts rule language allowing TCEQ to retain jurisdiction over a draft

permit following coordination between OCC and SOAH to set a preliminary CCH date.

If any hearing requests are received, the OCC of the commission shall schedule the hearing request for a commission meeting and notify the applicant, all timely commenters and requestors, the executive director, and the commission's Public Interest Counsel. The paragraph authorizes the Office of General Counsel to establish a briefing schedule and requires that briefs and replies be filed with the OCC and served to the executive director, the Public Interest Counsel, the applicant, and any hearing requestors. The commission has changed rule language to remove references to the Office of Public Assistance and change the reference to the OCC to reflect the current organization of the TCEQ.

Paragraph (4)(A) states that commission consideration of public comment, the executive director's response, or a request for a CCH does not constitute a CCH.

Paragraphs (4)(B) and (C) provide that after evaluation of a request for a CCH, the commission may determine that the request does not meet the requirements of this section and act on the application. If the request meets the requirements of this section the commission may hold a hearing or refer the matter to SOAH on the issue of whether the choice of technology approved in the draft permit is the MACT required under FCAA, §112. The commission may also refer one or more hearing requests to SOAH for a determination of whether the requestor is an affected person entitled to a CCH. If the

request raises only disputed issues of law or policy, the commission may make a decision on the issues and act on the application.

Paragraph (4)(D) requires the commission or Administrative Law Judge (ALJ) to consider the factors in §55.203 and §55.205, Determination of Affected Person, and Request by Group or Association, respectively.

Paragraph (4)(E) states that requests for a CCH will be granted if the request is made by the executive director, the applicant, or an affected person if the request raises legitimate issues of material fact as stated in the rule, is timely filed with the OCC, and is pursuant to a right to hearing authorized by law, and complies with §55.201(d)(1) - (3) and (5), Requests for Reconsideration and Contested Case Hearing.

Paragraph (4)(F) states that a decision on a request for a CCH is not binding on the issue of designation of parties. Paragraph (4)(F) allows a person whose request for a CCH is denied to seek to be admitted as a party should a CCH be granted based on other requests.

Paragraph (4)(G) allows the filing of motions for rehearing if all requests for a CCH are denied. Paragraph (4)(G) also states that the commission's decision to deny is final and appealable.

Paragraph (4)(H) provides that if all parties requesting hearing on an issue withdraw their request for a CCH in writing, the scope of the hearing no longer includes the issue except as authorized under THSC, §382.059.

Paragraph (5) authorizes the ALJ to establish a procedural schedule for discovery, hearing date, and pre- and post-hearing briefings. In addition, subparagraph (B) requires the ALJ to issue a proposal for decision within 80 days after the executive director issues the draft permit, or as specified by the commission, to meet the requirements of THSC, §382.059 and this new rule.

Subsection (e) states that the pleading requirements of §80.257, Pleadings Following Proposal for Decision, will not apply for applications under this section. The section establishes expedited deadlines for filing exceptions and replies in order to meet the timelines prescribed in THSC, §382.059. This subsection allows the general counsel to change filing deadlines for pleadings on his own motion or at the request of a party.

Subsection (f) requires the commission to send notice of a decision on the amendment application no later than 120 days after the issuance of a draft permit. The notice shall go to the applicant and all persons who commented during the comment period and will include responses to comments received during the comment period.

Subsection (g) allows a person affected by a decision of the commission to issue or deny a permit amendment to file a motion for rehearing under 30 TAC §80.272, Motion for Rehearing. The subsection also states that the commission's decision to deny is final and appealable.

Subsection (h) states that this section will expire on the sixth anniversary of the date that the EPA adopts the standard for EGFs pursuant to FCAA, §112, unless a stay of the rule is granted.

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, 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 specific intent of the rule is to implement HB 2694, §4.27 and §4.30 which adds new THSC, §382.059. This rule would apply only to permit amendment applications submitted solely to allow an EGF to comply with a requirement imposed by FCAA, §112 (42 USC, §7412) to use applicable MACT. The applications shall be limited to changes in method of control for an existing EGF but may request authorization for collateral increases in emissions that result from installation of this control technology. The rule would compress the amount of time for affected parties to request a CCH on the permit amendment to no later than 30 days after the executive director issues a draft permit. The period in which the commission must issue or deny the permit amendment would be no later than 120 days from the issuance of a draft permit.

The rule is not anticipated to add any significant additional costs to affected individuals or businesses beyond what is expected to be required for compliance with the Utility MACT on 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 rule implements the statutorily prescribed schedule for requesting a CCH and for a decision to be rendered on information presented at any CCH relating to issuance of an amended permit. The rule does not add an opportunity for a CCH that did not already exist under THSC, §382.056.

Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rule implements requirements of HB 2694, 82nd Legislature, 2011.

The rule was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble.

Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking under Texas Government Code, §2007.043. The primary purpose of this rulemaking is to implement HB 2694, §4.27 and §4.30. This rule applies only to applications for a permit amendment allowing existing EGFs to reduce emissions and comply with a requirement under FCAA, §112. The rule will not create any additional burden on private real property. The rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or

the Texas Constitution. The rule also will not affect private real 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. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action 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 commission rules in 30 TAC Chapter 281, Subchapter B, Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3), Actions Subject to Consistency with the Goals and Policies of the Texas Coastal Management Program (CMP), and 31 TAC §505.11(b)(2), Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas

(31 TAC §501.12(l), Goals). This rule will implement legislation related to emission reductions at EGFs. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32, Policies for Emission of Air Pollutants). Therefore, in accordance with 31 TAC §505.22(e), Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program, the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 116 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, include any changes made using the amended Chapter 116 requirements into their operating permit.

Public Comment

The commission held a public hearing on this proposal in Austin on November 17, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The following persons submitted comments during the public comment period which closed on November 21, 2011: Luminant Power (Luminant); Association of Electric Companies of Texas on behalf of AEP, Entergy Services, Inc.,

Luminant, NRG Energy, and Xcel Energy (AECT); Jackson Walker L.L.P. on behalf of the Gulf Coast Lignite Association (GCLC); NRG Energy, Inc. (NRG); EPA; Lowerre, Frederick, Perales, Allmon & Rockwell on behalf of the Lone Star Chapter of the Sierra Club; Public Citizen, Sustainable Energy and Economic Development Coalition (Environmental Groups); Lone Star Chapter of the Sierra Club (Sierra); Public Citizen, Sustainable Energy and Economic Development Coalition (SEED); and the Office of Public Interest Counsel of the Texas Commission on Environmental Quality (OPIC).

Response to Comments

Luminant commented that all of the state's coal fired power plants will be subject to federal MACT requirements. Because these plants supply a significant amount of the state's energy, the installation of pollution controls to meet MACT should not be delayed. Conserving time in the TCEQ permitting process allows installation during facility shutdowns when seasonal demand for power is low. Luminant notes that the current CCH process can take more than a year to complete and easily consume half of the time to comply with federal MACT requirements. Luminant states that it intends to use all available authorization methods to meet MACT deadlines including permits by rule and standard permits, but in cases where collateral emissions result from control installation, a permit amendment may be the only alternative. GCLC supports these comments and added that the proposed rule increases environmental protection by allowing installation of MACT at quicker pace and that it exceeds federal requirements

for public participation.

Luminant, GCLC, and NRG state that the proposed rule is a practical solution to a challenging implementation schedule, preserves the public's right to participate, and support the rule as proposed.

AECT recognizes the limited time to implement federal MACT supports the streamlined deadlines in the proposed rule and the protection of the public's ability to participate in the process. AECT states the proposed rule is consistent with the new statute created by the 82nd Legislature, 2011, in THSC, §382.059.

The commission appreciates the comments from the regulated community regarding the need for appropriate authorization and control of emissions, and timely compliance with the Utility MACT and other requirements.

AECT states that §116.128(b) reflects the language of THSC, §382.059 by requiring the issuance of a draft permit "no later than the 45th day after the date the application is received." The proposal preamble instead refers to "45 days after a permit application has been determined to be administratively and technically complete," which could add unintended delay. AECT requests the preamble language be made consistent with §116.128(b). GCLC added that the preamble language indicates that the application will

be considered "received" only after it is judged administratively and technically complete. This is in conflict with TCEQ's longstanding practice of considering an application "received" after it is judged administratively complete. This will ensure that the timely decision-making process sought by the legislature is faithfully implemented.

The commission has changed the rule in response to this comment. The commission must act quickly on any application received under this section in order to conform to the significantly compressed schedule for the issuance of a draft permit, public comment, possible CCH and decision on an application. The statement in the preamble indicates the need for an applicant to coordinate with the commission's permitting staff prior to the formal submittal of an amendment application to ensure that all actions on that application may occur immediately. If the review of a deficient application must be delayed while the clock for the issuance of a draft permit is running, then the schedule required under this section could become unworkable. In short, the commission has determined that some aspects of its current practices for permit application processes must be changed to ensure that the intent of the legislature is implemented. The commission has further determined that ensuring this intent requires that the rule be changed to require that an application be both administratively and technically complete. The commission notes that this change in

practice is limited to applications processed under §116.128.

AECT and GCLC request that the word "increased" be added to §116.128(c)(1)(A)(i)(VII) so that it reads, "A statement that a person who may be affected by the increased emissions of air pollutants from the EGF ...".

The commission has changed the rule in response to this comment. The proposed wording can apply not only to emission increases in previously emitted contaminants but also to the collateral emission of new contaminants associated with the installation of control technology. Further, the proposed language is intended primarily to establish the eligibility of persons to request a CCH based primarily on proximity to the facility, and on an increase of any particular air contaminant.

AECT and GCLC state that proposed §116.128(c)(1)(D) refers to the sign posting requirements of §39.604(b), which refers to "Notice of Receipt of Application and Intent to Obtain Permit," but there will be no such notice under the proposed rule. Instead the notice will be for a "Notice of Draft Permit and Preliminary Decision," and §116.128(c)(1)(D) should be revised.

The commission has changed the rule in response to this comment to

require language for signs consistent with this new section. Amendments sought under this section are subject only to a single public notice because of the accelerated schedule, and use of the term "Notice of Draft Permit and Preliminary Decision" is more consistent with the modified procedures of new §116.128. The use of the term is also consistent with language in §116.128(c)(1)(A)(i).

AECT states that proposed §116.128(d)(1) refers to "first" publication of notice. Since there will be only one notice under the proposed rule, the word "first" should be deleted. GCLC added that a similar reference to "last newspaper publication" in §116.128(c)(4)(B)(i) indicates that there will be a second notice and should be deleted.

AECT is correct that only a single notice will be provided for amendments under this section. The commission is not changing §116.128(d)(1) to delete the reference to "first." When alternate language publication is required, then use of the word "first" is relevant. In addition, the statute provides that comments be submitted within 30 days of the issuance of the draft permit. The commission is also not changing the rule in §116.128(c)(4)(B)(i). The use of the term "last newspaper publication" refers to the schedule individual newspapers follow in publication of the applicant-supplied notice and not to a second notice.

AECT and GCLC state that to be consistent with the reference in proposed §116.128(d)(1) to §55.201(d)(1) - (3) and (5), they believe that proposed §116.128(d)(4)(E)(ii)(IV) should be revised to contain the same reference rather than §55.201(d), which indicates that §55.201(d)(4) also applies.

The commenters are correct; §55.201(d)(4) refers to "all relevant and material disputed issues of fact" and "number and scope of issues to be referred to hearing." These conditions do not apply to hearings considered under this new section where the issues of fact are limited to MACT equivalency. The reference to §55.201(d) in §116.128(d)(4)(E)(ii)(IV) should be clear that §55.201(d)(4) does not apply, and the commission has changed the rule accordingly.

EPA states that the intent of the rulemaking is unclear and asks that the commission clarify in the rule and preamble whether the §116.128 permit amendment will include all increases and decreases associated with the installation of control equipment or whether it includes only the collateral emission increases associated with the installation.

The intent of this rule is to expedite the installation of controls required by the Utility MACT. Any permit amendment sought under this new section

will contain all increases and decreases in any contaminant resulting from the control technology, and may include collateral increases in other contaminants.

EPA states that if the permit will include all increases and decreases, the commission will need to include a justification of how the proposed section satisfies the Utility MACT and Title V permitting and public notice, since Title V is the traditional vehicle for MACT compliance. Further, EPA requests justification as to why the commission is seeking Title I SIP approval for a Title V program.

The commission understands that EPA does not approve rules which are designed to implement MACT requirements as part of the SIP. As EPA is aware, the commission has included requirements for the control of hazardous air pollutants in its rules for its NSR permitting program. This is because the Texas Clean Air Act requires authorization for new facilities, a change in the method of control of or in the character of emissions from facilities, which is also required by the EPA's NSR program. Therefore, any collateral emissions resulting from the installation of controls to meet the Utility MACT are subject to the SIP which requires that the emissions be reviewed for compliance with best available control technology and impacts to public health and welfare before authorization by a permit amendment.

Section 116.128(c)(1)(F) contains public notice requirements for collateral emission increases that meet or exceed PSD or NNSR thresholds including the opportunity for a public meeting. EPA retains the option of approving or disapproving the portions of §116.128 submitted as a SIP revision.

Regardless of whether an EGF has collateral emissions or needs a permit amendment to comply with the Utility MACT, the basic requirement to comply with the MACT will apply to all EGFs. Because Title V is a separate permitting program, this portion of the comment is beyond the scope of this rulemaking. That said, the Utility MACT will be an applicable requirement for Title V permitting and thus be subject to the appropriate Title V notice requirements and permit processing procedures.

EPA states that permits by rule and standard permits are not available for collateral emission increases that are subject to PSD or NNSR. EPA also notes that it has not approved the use of the pollution control project standard permits and its use would not be federally enforceable. EPA further states that if the commission intends to provide an opportunity for source owners to demonstrate compliance with the Utility MACT through a permit by rule or standard permit, they encourage development a source category specific to the MACT.

The commission acknowledges the limitations on the use of permits by rule and standard permits and has included specific provisions in §116.128(c)(1)(F) that specify actions required of the applicant when collateral emissions are subject to PSD review or NNSR that do not include the use of a standard permit. The commission disagrees that the current non-rule pollution control standard permit is not federally enforceable because this permit was adopted by the commission under a SIP-approved standard permit program. The commission's pollution control project standard permit was written to cover a wide range of applications, and the commission has determined that a category-specific authorization for pollution control projects is not needed within its NSR program. Finally, EPA has failed to offer any legal citation for its basis that a standard permit must be limited to a source category and thus its argument that such limitation in permitting is without a basis to require the commission to adopt such a limited scope standard permit.

EPA states that proposed §116.128 includes provisions for CCHs that are not required under the FCCA and should not be submitted for SIP inclusion. Including these provisions is in contrast to the position taken with the July 2010 submissions of Chapters 39 and 55. EPA requests that the commission not submit CCH requirements that go beyond the scope of the July 2010 submission. As an alternative, provide an

explanation why CCH provisions are necessary for SIP inclusion for the proposed new §116.128.

The commission agrees that certain parts of the contested case process, including some parts of this rule, are not required by the FCAA nor the Texas SIP. The commission recognizes that not all of the rule would likely be adopted as a revision, but did not exclude any parts of the rule from public comment on that subject to ensure that the structure and text of the adopted rule would clearly identify the portions that the commission understands should be submitted, or not, to EPA as a revision to the Texas SIP. To maintain consistency with the SIP submission in July 2010, the commission will not include §116.128(c)(1)(A)(i)(X) - (XI), (d), (e), and (g) in its SIP submission for this new section.

EPA commented that it reserves the right to address CCHs under the Title V program at a later date, and that it cannot provide comments at this time as to whether the proposed contested case provisions adequately address judicial review requirements under Title V.

The commission notes the comment, and also that EPA specifically commented that §116.128(g), regarding appeal of a commission decision on

a permit application under this new section, should not be submitted as a revision to the SIP.

EPA states that permit amendment applications that include collateral emission increases which are subject to PSD or NNSR are not subject to the public participation requirements of Chapters 39 and 55. EPA notes that the commission provided an analysis of how these chapters met federal public notice requirements in the July 2010 SIP submission which is absent from the current proposal. The commission must provide information to demonstrate how the new permit amendment and public notice provisions of this proposal is not a non-approvable relaxation of the SIP or pending SIP submittal of Chapters 39 and 55. EPA also notes that any future changes to Chapter 39 and 55 public notice provisions must also be made to the Utility MACT provisions and submitted as revisions to the Texas SIP to maintain consistency. Luminant, GCLC, and AECT state that the rule provides for full notice and comment consistent with federal air permitting procedures, with Luminant citing to 40 CFR §52.21(q) and 40 CFR Part 124.

The new permit amendment provisions are not a relaxation of the SIP because the rule requires compliance with Chapter 116, Subchapter B, Divisions 1, and 4 - 6, which contain the substantive requirements for permit issuance.

There is no relaxation of either the approved SIP or the rules in Chapters 39 and 55 submitted as revisions to the SIP in 2010. First, the approved SIP provides that the executive director determines which amendment applications go to notice. The public participation requirements of §116.128, when compared to the approved SIP, clearly are more stringent and precise with regard to notice for the permit amendment applications and thus strengthen the SIP.

Second, the commission's adoption in 2010 of new, amended and repealed rules for public participation for air quality permit applications resulted in changes that strengthen the SIP. Permit amendment applications are now subject to clearly articulated criteria that determine which applications are subject to public participation requirements (See the adoption published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198, 5256, and 5330) for further discussion about those changes).

The commission agrees that the notice provisions applicable to applications which include collateral increases are not identical to the public participation rules in Chapters 39 and 55 which were submitted to EPA as revisions to the SIP in July 2010. However, when comparing new §116.128 and the public participation rules in Chapters 39 and 55, they each have

common notice requirements for permit amendment applicants, which are as follows: newspaper publication of notice of draft permit, with similar notice text requirements; alternate language notice requirements, for both newspaper publication and sign posting, if certain conditions are present; placement of the application and draft permit in a public location for inspection and copying; posting of signs at the plant site; and compliance with certain notice requirements for major NSR permit applications. In addition, the commission provides an opportunity for interested persons to submit comments and the commission's executive director prepares a response to comments. Finally, the commission provides an opportunity for interested persons to request a public meeting or CCH on the application.

There are three basic differences in public participation requirements for permit amendment applications filed under new §116.128 as compared to the rules in Chapters 39 and 55. However, none of those differences are required by federal rules. First, applicants under §116.128 are not required to publish notice of an administratively complete application, designated in §39.418 as Notice of Receipt of Application and Intent to Obtain Permit (NORI), also commonly referred to as first notice. This is because the NORI requirement derives from THSC, §382.056, which does not apply to

applications filed under THSC, §382.059.

Second, any emission increases, including collateral emission increases, are subject to notice regardless of the amount of the increase. This is due to the fact that the insignificant thresholds for exclusion from notice in THSC, §39.402 do not apply. This is because THSC, §382.0518(h) does not apply to applications filed under THSC, §382.059.

Third, while the SIP includes a requirement for CCHs, neither the approved SIP, nor the rules pending SIP review, include or require that the scope of a CCH include any specific issues. Further, neither the FCAA nor EPA's rules for major or minor permitting include a requirement for the opportunity to request a CCH. Although a CCH for any collateral emissions associated with applications filed under new §116.128 can be requested, any issues beyond compliance with the standard adopted under FCAA, §112 cannot be the subject of a hearing. This does not render the opportunity to request a hearing meaningless because a hearing can be held on the issue for which the statute was adopted, which is prompt approval of control equipment to comply with the Utility MACT standard. The full application is subject to comment and comments are responded to by the executive director.

The first and third of these differences provide some limits on public participation, while the second difference is expands public participation beyond that included in the rules pending SIP review. However, none of these differences constitute backsliding because there are no federal rule requirements for notice of application or for CCH on minor or major NSR permit applications. Therefore, this rule meets and still exceeds minimum federal rule requirements for notice. For minor NSR permits, the federal rules require newspaper notice of draft permit in the affected area, a 30-day comment period on the draft permit, and certain requirements for notification to other agencies. These requirements are included in §116.128. For major NSR permit applications, there are additional federal notice requirements, and the commission has included those in this new rule, specifically in §116.128(c)(1)(F) and (4)(A)(iii).

As the EPA recognizes, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the national ambient air quality standards, and for reasonable further progress and any other requirement of the FCAA. States have significant discretion to tailor minor NSR requirements that are consistent with the requirements of 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans), and may also provide a rationale for why the rules

are at least as stringent as the 40 CFR Part 51 requirements where the revisions are different from 40 CFR Part 51. Both the substantive and procedural elements of this rule are at least as stringent as the permit amendment notice, review and issuance requirements in the commission's SIP-approved minor NSR permitting program. Further, the rules are at least as stringent as federal rules for PSD and NNSR permitting with regard to both substantive and procedural requirements as discussed in this preamble. When conducting an analysis of whether rule amendments submitted as part of the SIP can be approved, the analysis under FCAA, §110(I), 42 USC, §7410 has been interpreted to be whether the revision will "make air quality worse" (*Kentucky Resources Council, Inc. v. EPA*, 467 F3d 986 (6th Cir. 2006), cited with approval in *Galveston-Houston Association for Smog Prevention (GHASP) v. U.S. EPA*, 289 Fed. Appx. 745, 2008 WL 3471872 (C.A. 5)). This would apply to the rules adopted by the commission for major and minor NSR public participation requirements, such as those included in new §116.128. Certainly, the difference in procedural requirements from the approved SIP and the commission's current rules cannot be found to make air quality worse, and as such §116.128 is approvable as part of the Texas SIP.

Finally, the commission understands that if changes to public participation

rules are made for permit amendment applications that SIP consistency must be considered in that process.

EPA states that the commission acknowledges that EPA could adopt other MACT standards under FCAA, §112 that could require permit amendment applications under the proposed new section. EPA recommends that the scope of new §116.128 be limited to the Utility MACT.

The new statute, THSC, §382.059(g), limits the scope to permit amendments to achieve emission reductions at EGFs under FCAA, §112 and the commission has addressed this in §116.128(a). In addition, the legislature has expressed its intent as to the scope through the title selected for new THSC, §382.059, which is "Hearing and Decision on Permit Amendment Application of Certain Electric Generating Facilities." The commission notes that this permit amendment is an option for permit applicants who can also apply for permit amendments under existing permitting rules.

OPIC states that the compressed hearing schedule would not allow an adequate hearing if emissions trigger PSD or NNSR and recommends that any application with these emission increases be put in a separate application subject to a full public comment and

CCH process. The bifurcated application would allow compliance with HB 2694 and account for emissions that are by definition significant. OPIC also expressed concern about the limitation of topics for a CCH stating that it is inappropriate to limit topics to MACT if collateral emissions trigger PSD or NNSR. OPIC states that, if legitimate issues of fact on emissions causing PSD or NNSR are raised, a hearing could still be denied if MACT is not addressed. OPIC also states that any collateral emissions which trigger PSD or NNSR are normally subject to the full HB 801 public comment and contested case process. OPIC finds that such emissions are not collateral and are not properly permitted under the proposed new section.

Environmental Groups stated that the statutory language in THSC, §382.059(d) does not limit the issues in a CCH to questions of MACT equivalency, and this limitation is at odds with EPA procedural requirements which require an opportunity for public comments on draft NSR permits and amendments.

Environmental Groups and SEED further state that the Utility MACT does not force a particular technology into a permit but proposes to set limits on emissions of hazardous air pollutants. Limiting comments to the topic of technology equivalency would thwart the purpose of public comment. Since the statute may be read to allow comments on a greater range of topics, it should be, in order not to render the statute trivial and the rule should reflect this absence of limitation.

The commission has not changed the rule in response to these comments.

The commission disagrees with the commenters and interprets the restriction in THSC, §382.059(d) as a limitation on the subject of a CCH to whether a control technology meets the MACT. This interpretation is consistent with the intent of the legislation which was to expedite the installation of control technology. This interpretation does not render the statute trivial, rather it serves the purpose of the statute by reducing the amount of time required for installation of control technology. Similarly, the bifurcation of an application under this section would defeat the intent of the legislation by delaying installation of Utility MACT controls until the separate application concerning collateral emissions has been through any CCH process.

OPIIC's characterization that emissions which trigger PSD or NNSR are not collateral raises two distinct issues. The choice of control equipment selected by the applicant for MACT compliance may, but not always, result in collateral emissions. The quantity of those emissions may or may not be in an amount that triggers PSD or NNSR permitting. If the amount is significant, i.e., in a quantity that does require major NSR permitting, then the appropriate review under Chapter 116, Subchapter B, Divisions 5 and 6

will be conducted. This review includes health effects, appropriate control technology and effect of the increased emissions on national ambient air quality standards. The commission is aware that collateral emissions of this magnitude are indeed significant and expects applicants to have evaluated these emissions thoroughly and represented the results in their amendment application. The commission will not consider an application technically complete if an evaluation is deficient and will not accept it, and will not consider time restrictions on draft permit issuance, CCH requests, and final decision on the application to have begun. While issues related to emissions requiring PSD review or NNSR cannot be considered in a CCH under this section, the emissions are subject to separate public notice requirements which meet the minimum federal notice requirements as well as state law. These notice requirements include newspaper publication of the opportunity for a public meeting, the executive director's preliminary decision, and a statement that the executive director will respond to all comments related to the emissions and a statement of the electronic availability of the air quality analysis of the emissions and draft permit.

Under this new section, the technical evaluation of an application is separate from the subject of CCH requests, which by statute, are limited to the issue of whether the control technology meets MACT. Consistent with

the authorizing statute, the new section limits the subject of CCHs to MACT equivalency, but does not limit the commission's final decision on a draft permit, which will be made in accordance with applicable law. The commission remains receptive to any comment that will ensure that accurate and protective permits are issued.

The commission agrees that MACT does not force a particular technology into a permit, but any technology chosen by an applicant must produce reductions such that a MACT standard is met.

The commission agrees with OPIC that a CCH can be denied based solely on legitimate issues of fact related to PSD or NNSR.

Public Citizen states that limiting the topic of the hearing to a question of MACT equivalency will not allow a full examination of the entire suite of emission controls and their effect on mercury reduction. SEED adds that any collateral emissions must also be a topic of CCHs. Environmental Groups stated that the proposed limitation on the issues that may be tried in a hearing is an interpretation of the statute that is unnecessarily narrow.

The commission agrees that the entire collection of control technologies

can have an effect on the technology specifically designed for the control of mercury. A hearing can include the issues of whether the representations by the applicant properly describe how the control technology will be installed and operated, and its predicted effectiveness. However, if the overall result of the application of the selected technology is that the standard for mercury and other hazardous air pollutants is met, then the MACT is satisfied. The commission interprets that statute to clearly limit the scope of the hearing to whether the selected control technology will satisfy the MACT.

Sierra states that the rule explicitly directs the SOAH ALJ to establish a procedural schedule for CCHs and that §116.128(d)(4)(C) infers that the SOAH proceeding is subject to the Texas Administrative Procedure Act (APA). Sierra notes that neither of these requirements is stated in the proposed rule for hearings the commission may conduct, creating the inference that the commission may follow an unspecified standard. This inference should be removed from the rule and any standards for a commission hearing, other than those of the APA, should be specified in the rule.

The commission has not changed the rule in response to these comments. Any CCHs conducted by the commission directly rather than by a SOAH ALJ will be held under the authority provided to the commission in TWC,

Chapter 5, THSC, Chapter 382, and the relevant portions of the APA, found in Texas Government Code, Chapter 2001.

SEED and Public Citizen state that the rule should allow sufficient time for discovery on pre-filed testimony from the applicant. In order for this discovery to be meaningful, the public must be able to determine the issues that relate directly to those questions to which the CCH is restricted. The rule does not allow sufficient time to develop more specific and targeted discovery. The rule needs to allow full discovery.

The commission has not changed the rule in response to these comments. The commission acknowledges that the time for discovery will be very short and therefore must be conducted in a targeted, precise manner with cooperation by all parties for the discovery to be meaningful. Persons who think they may want to request to be named a party in a CCH will need to thoroughly review the application and draft permit as quickly as possible, and be informed on the subject matter to develop meaningful discovery requests. This is necessary due to the compressed schedule and so that any CCH will serve to develop a thorough administrative record for the commission's consideration in determining whether to issue the permit and what conditions should be included in the permit.

SEED states that it is not acceptable to have increases in other pollutants as a result of decreasing mercury.

The commission has not changed the rule in response to this comment. Collateral increases in air contaminants are a common result from the control of another contaminant. The respective increases and decreases are subject to an air quality analysis to determine the overall benefit to air quality, and to ensure that no adverse impacts are expected from the collateral emissions. Reduction of any hazardous air pollutant is likely to result in an overall benefit despite increases in other non-toxic air contaminants.

SEED states their support for the earliest possible installation of mercury controls on the 42 coal-fired power plants in Texas. SEED stated the serious health risks from mercury and stated that the electric utility industry has lobbied against public health rules for decades. SEED stated that mercury causes permanent brain damage and damage to the circulatory system, liver, and kidneys. SEED, Public Citizen, and Sierra all submitted comments emphasizing the toxicity of mercury. They cited studies linking mercury to rates of brain damage, autism, and the tendency of mercury to become concentrated in portions of the food chain. Sierra noted that the largest emitter of mercury is the Big Brown plant in northeast Texas.

The commission acknowledges the commenters' concerns about level of mercury in the environment, but has not changed the rule in response to these comments. The commission has determined that the requirements of this rule will expedite the installation of control technology and protect overall air quality.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 1: PERMIT APPLICATION

§116.128

Statutory Authority

The new rule is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new rule is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring and monitoring the emission of air contaminants and for maintaining records; §382.029,

concerning Hearing Powers, which authorizes the commission to call and hold hearings; §382.0291, concerning Public Hearing Procedures, which prescribes procedures for the commission's hearings; §382.030, concerning Delegation of Hearing Powers, which authorizes the commission to delegate the authority to hold hearings; §382.031, concerning Notice of Hearings, which prescribes the requirements for notice of commission hearings; §382.032, concerning Appeal of Commission Action, which authorizes affected persons to appeal a ruling, order or decision of the commission; §382.040, concerning Document; Public Property, which provides that information, documents, and data collected by the commission are state property; §382.041, concerning Confidential Information, which provides procedures for information submitted as confidential; §382.0512, concerning Modification of Existing Facility, which prescribes the commission's consideration of whether a proposed change at a facility is a modification; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; and §382.0514, concerning Sampling, Monitoring, and Certification. The new rule is also adopted under THSC, §382.0515, concerning Application for Permit, which prescribes requirements for permit applications; §382.0518, concerning Preconstruction Permit, which requires a permit from the commission prior to construction or modification of a facility; §382.056, concerning

Notice of Intent to Obtain Permit or Permit Review: Hearing, which requires applicants for a permit or modification to publish public notice; §382.0561, concerning Federal Operating Permit; Hearing, which establishes public hearing procedures on federal operating permits; §382.0562, concerning Notice of Decision, which requires that the commission send notice of final action on a federal operating permit to an applicant and commenters; §382.061, concerning delegation of Powers and Duties, which allows the commission to delegate powers and duties to the executive director concerning permits except for the adoption of rule; §382.062, concerning Application, Permit, and Inspection Fees, which authorizes the commission to collect fees for permit applications; and §382.059, concerning Hearing and Decision on Permit Amendment Application of Certain Electric Generating Facilities, which regulates the request for contested case hearings on permit amendments for electric generating facilities under Federal Clean Air Act, §112.

The new rule is also adopted under TWC, §5.013, concerning Commission and Staff Responsibility Policy, which requires the commission to separate the responsibilities of the commission and its staff; §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines an affected person for purposes of administrative hearings; §5.116, concerning Hearings; Recess, which authorizes the commission to recess any hearing from time to time and place to place; §5.118, concerning Power to Administer Oaths, which authorizes the commission, chief clerk, or

hearing examiner to administer oaths; §5.122, concerning delegation of Uncontested matters to Executive Director, which authorizes the commission to delegate authority to act on permits to the executive director; §5.1733, concerning Electronic Posting of Information, which requires the commission to post public information on its website; §5.311, concerning Delegation of Responsibility, which authorizes the commission to delegate the responsibility to conduct hearings to the State Office of Administrative Hearings (SOAH); and §5.557, concerning Direct Referral to Contested Case Hearing, which allows the commission to refer contested case hearing directly to SOAH. In addition, the new rule is adopted under 42 United States Code, §7401, *et seq.*

The new rule implements all of these statutes except TWC, §§5.102, 5.103, and 5.105, and THSC, §382.017. The new rule also implements House Bill 2694, §4.27 and §4.30, 82nd Legislature, 2011.

§116.128. Amendment Application, Public Notice and Contested Case Hearing Procedures for Certain Electric Generating Facilities.

(a) Applicability. This section applies to permit amendment applications submitted solely to allow an owner or operator of an electric generating facility (EGF) to reduce emissions and comply with a requirement imposed by the Federal Clean Air Act, §112 (42 United States Code (USC), §7412) to use applicable maximum achievable

control technology (MACT). The applications shall be limited to changes in method of control for an existing electric utility steam generating unit, as defined in 40 Code of Federal Regulations (CFR) §63.42, for the purpose of achieving a MACT standard promulgated by the United States Environmental Protection Agency (EPA) under Federal Clean Air Act, §112. The application may request authorization for collateral increases in emissions that result from installation of this control technology. Amendment applications submitted under this section are subject to the requirements of Subchapter B, Divisions 1, 4, 5, and 6 of this chapter (relating to Permit Application, Permit Fees, Nonattainment Review Permits, and Prevention of Significant Deterioration Review, respectively).

(b) Issuance of Draft Permit. Not later than the 45th day after the date the application is received and the executive director determines it is both administratively and technically complete, the executive director shall issue a draft permit.

(c) Notice and Public Participation. The public participation requirements of Chapters 39 and 55 of this title (relating to Public Notice, and Requests for Reconsideration and Contested Case Hearings; Public Comment, respectively) shall not apply, except as specifically required by this section.

(1) The applicant shall comply with the following notice requirements:

(A) The applicant shall publish notice as follows:

(i) The executive director shall direct the applicant to publish a notice of draft permit and preliminary decision, at the applicant's expense, in the public notice section of one issue of a newspaper of general circulation in the municipality in which the EGF is located, or in the municipality nearest to the location of the EGF. Applicants shall use notice text provided and approved by the agency. The executive director may approve changes to notice text prior to notice being given. The notice shall contain the following information:

(I) the permit application number;

(II) the applicant's name, address, and telephone number and a description of the manner in which a person may contact the applicant or permit holder for further information;

(III) a brief description of the location or the proposed location of the EGF and the nature of the proposed activity;

(IV) a description of the choice of technology in the draft permit;

(V) the location, at a public place in the county in which the EGF is located, at which the following are available for review and copying:

(-a-) the complete permit application;

(-b-) the draft permit; and

(-c-) all other relevant supporting materials in the public files of the agency;

(VI) a description of the comment procedures, including the duration of the public notice comment period and procedures to request a contested case hearing printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(VII) a statement that a person who may be affected by the **increased** emission of air pollutants from the EGF associated with the changes in control technology that are the subject to the permit application or a member of the legislature in the general area is entitled to request a contested case hearing printed in a

font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(VIII) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit;

(IX) the date, time, and location of any scheduled public meeting, and a brief description of the nature and purpose of the meeting;

(X) if applicable, a statement that any contested case hearing will be based on legitimate issues of material fact regarding whether the choice of control technology in the draft permit is the MACT required under the Federal Clean Air Act, §112 (42 USC, §7412);

(XI) the date, time, and location of any scheduled contested case hearing that will be held if any requests for contested case hearing are received;

(XII) the name, address, and phone number of the commission office to be contacted for further information; and

(XIII) any additional information required by the executive director or needed to satisfy federal public notice requirements.

(ii) Another notice that meets the requirements of §39.603(c)(2) of this title (relating to Newspaper Notice).

(B) The applicant is required to comply with the requirements of §39.405(h)(1) - (6) and (8) - (11) of this title (relating to General Notice Provisions) regarding alternative language newspaper notice.

(C) The applicant must file a copy of each published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of each published notice which shows the date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is ten calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. The applicant shall furnish a copy of the notices and affidavits required by this section in the same manner as §39.605(1) of this title (relating to Notice to Affected Agencies).

(D) At the applicant's expense, the applicant shall comply with the sign posting requirements of §39.604 of this title (relating to Sign-Posting), except that the text of the sign shall refer to "Notice of Draft Permit and Preliminary Decision." The applicant shall furnish a copy of sign posting verification, within ten business days after the end of the comment period to the chief clerk and the executive director.

(E) The applicant shall make a copy of the technically complete application and the executive director's draft permit available for review and copying at a public place in the county in which the EGF is located beginning on the first day of newspaper publication of the notice required to be published by subparagraphs (A) and (B) of this paragraph and remain available for the comment period. If the application is submitted with confidential information marked as confidential by the applicant, the applicant shall indicate in the public file that there is additional information in a confidential file. If a contested case hearing is requested, the application shall remain available until the commission has taken action on the application or the commission refers issues to the State Office of Administrative Hearings (SOAH).

(F) If the collateral increases in emissions are also subject to the requirements of Subchapter B, Divisions 5 or 6 of this chapter, the applicant shall comply with the additional public notice requirements:

(i) the notice required by subparagraph (A)(i) of this paragraph shall include the following text:

(I) as applicable, the degree of increment consumption that is expected from the source or modification;

(II) a statement that the state's air quality analysis is available for comment;

(III) the deadline to request a public meeting;

(IV) a statement that the executive director will hold a public meeting at the request of any interested person;

(V) a statement that the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis are available electronically on the commission's Web site at the time of publication of the notice of draft permit;

(VI) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(VII) the location, at a public place in the county with internet access in which the EGF facility is located, at which a copy of the complete application and the executive director's draft permit and preliminary decision are available for review and copying;

(VIII) a statement that the executive director will respond to all comments regarding applications that are subject to the requirements of Subchapter B, Divisions 5 or 6 of this chapter; and

(IX) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting or a contested case hearing, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. Where applicable, the notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or if there is substantial public interest in the proposed activity when requested by any interested person;

(ii) a copy of the notices and affidavit shall be furnished to the chief executives of the city and county where the EGF is located, and any State or

Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the source or modification; and

(iii) a copy of the complete application and the executive director's draft permit and preliminary decision shall be available for review and copying at a public place in the county with internet access in which the EGF is located.

(2) The executive director shall make available for public inspection the draft permit and the complete application throughout the comment period during business hours at the commission's central office and at the commission's regional office for the region in which the EGF is located.

(3) After technical review is complete for applications subject to the requirements of Subchapter B, Divisions 5 or 6 of this chapter, the executive director shall file the executive director's draft permit and preliminary decision, the preliminary determination summary and air quality analysis, with the chief clerk. The chief clerk shall make available by electronic means on the commission's Web site the executive director's draft permit and preliminary decision, the executive director's response to public comments, and as applicable, preliminary determination summary and air quality analysis.

(4) The public comment procedures are as follows.

(A) Public Meetings. The following shall apply to any public meeting held regarding the applications subject to the requirements of this section:

(i) A public meeting is intended for the taking of public comment and is not a contested case under the Texas Administrative Procedure Act.

(ii) At any time, the executive director or Office of the Chief Clerk ~~Public Assistance~~ may hold public meetings. The executive director or Office of the Chief Clerk ~~Public Assistance~~ shall hold a public meeting if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held.

(iii) For applications subject to the requirements of Prevention of Significant Deterioration or Nonattainment Permits subject to Subchapter B of this chapter (relating to New Source Review Permits), if an interested person requests a public meeting regarding the executive director's draft permit or air quality analysis, a public meeting in response to a request under this paragraph will be held after notice of application and the executive director's preliminary decision is published.

The commission may hold a public meeting and accept oral or written public comment concerning the application.

(iv) The applicant shall attend any public meeting held by the executive director or Office of the Chief Clerk Public Assistance.

(v) A tape recording or written transcript of the public meeting shall be made available to the public.

(B) Public Comment. The public comment submittal and processing procedures are as follows:

(i) Comments regarding the application must be filed with the chief clerk within the time period specified in the notice. The public comment period will be for 30 days following the last newspaper publication of notice of draft permit and extended to the close of any public meeting.

(ii) The executive director will respond to comments as required by §55.156(b) of this title (relating to Public Comment Processing).

(iii) After the executive director files the response to comments, the chief clerk shall mail (or otherwise transmit) the executive director's response to public comments to the applicant, any person who submitted comments during the public comment period, any person who requested to be on the mailing list for the permit action, any person who timely filed a request for a contested case hearing, the Office of Public Interest Counsel, and the Office of the Chief Clerk Public Assistance.

(iv) Any person, including the applicant, who believes that any condition of the draft permit is inappropriate or that the preliminary decision of the executive director to issue or deny a permit is inappropriate must raise all reasonably ascertainable arguments supporting that position by the end of the public comment period.

(v) The commission shall consider all comments received during the public comment period and at the public meeting in determining whether to issue the permit and what conditions should be included if a permit is issued.

(d) Hearing on Control Technology. The requirements of Chapters 50 and 55 of this title shall not apply, except as specifically required by this section.

(1) Not later than the 30th day after the first publication of notice of issuance of the draft permit under subsection (b) of this section, persons may submit to the commission any legitimate issues of material fact regarding whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112 (42 USC, §7412) and may request a contested case hearing before the commission. A request for a contested case hearing by an affected person must be in writing and must be filed with the chief clerk. The hearing request must comply with the requirements of §55.201(d)(1) - (3), (2), (3), and (5) of this title (relating to Requests for Reconsideration or Contested Case Hearing).

(2) After the executive director issues the draft permit, the applicant or the executive director may file a request with the chief clerk that the application be sent directly to SOAH for a hearing on the application. The chief clerk shall refer the application directly to SOAH for a contested case hearing that is limited to the issue of whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112. Notwithstanding the provisions of §80.126 of this title (relating to Public Comment in Direct Referrals) regarding responses to and presenting evidence on each issue raised in public comment, the scope of any hearing held under this rule shall be limited to the choice of technology approved in the draft permit and shall not include any other issues that were raised in public comment.

(3) Hearing request processing:

(A) If a hearing request is received, the chief clerk shall promptly coordinate with SOAH to establish a contested case hearing date and location in preparation for applications that may be referred to SOAH. Notwithstanding any other section of this title, the commission shall retain jurisdiction over the application until referral to SOAH pursuant to Chapter 55 of this title or Chapter 80 of this title (relating Contested Case Hearings).

(B) If one or more hearing requests are received, the chief clerk shall schedule the hearing request for a commission meeting consistent with the requirements of this section after the final deadline to submit requests for contested case hearing expires.

(C) Immediately after scheduling the hearing request for a commission meeting, the chief clerk shall mail notice to the applicant, executive director, the Office of Public Interest Counsel, and all timely commenters and requestors. The notice shall explain how to participate in the commission decision, describe alternative dispute resolution under commission rules, and explain the relevant requirements of this section.

(D) The Office of General Counsel may establish a briefing schedule for the issues raised in a hearing request. Any briefs and replies shall be filed with the Office of the Chief Clerk chief clerk, and served on the same day to the executive director, the Office of Public Interest Counsel, ~~the director of the Office of Public Assistance, the applicant, and any requestors.~~

(E) Responses to hearing requests must specifically address:

(i) whether the requestor is an affected person;

(ii) whether the disputed issues involve questions of fact or of law;

(iii) whether the issues were raised during the appropriate time period; and

(iv) whether the issues are legitimate issues of material fact regarding whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112.

(4) Commission consideration of hearing requests is as follows:

(A) Commission consideration of the following items is not itself a contested case subject to the Texas Administrative Procedure Act:

(i) public comment;

(ii) executive director's response to comment; or

(iii) request for contested case hearing.

(B) The commission will evaluate requests for contested case hearing and may:

(i) determine that a hearing request does not meet the requirements of this section, and act on the application; or

(ii) determine that a hearing request meets the requirements of this section and:

(I) hold a hearing on the issue of whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112;

(II) direct the chief clerk to refer application to the SOAH for a hearing on the issue of whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112; or

(III) if the request raises only disputed issues of law or policy, make a decision on the issues and act on the application; or

(iii) refer one or more hearing requests to SOAH for a determination of whether the requestor is an affected person entitled to a contested case hearing.

(C) If the commission refers the hearing request to SOAH it shall be processed as a contested case under the Texas Administrative Procedure Act. If the commission or SOAH determines that a requestor is an affected person, SOAH may proceed with a contested case hearing on the issue of whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112.

(D) In determining whether a person is an affected person, the commission or Administrative Law Judge shall consider the factors in §55.203 and §55.205 of this title (relating to Determination of Affected Person, and Request by Group or Association, respectively).

(E) A request for a contested case hearing shall be granted if the request is:

(i) made by the applicant or the executive director; or

(ii) made by an affected person if the request:

(I) identifies any legitimate issues of material fact regarding whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112;

(II) is timely filed with the chief clerk;

(III) is pursuant to a right to hearing authorized by law; and

(IV) complies with the requirements of §55.201(d)(1) - (3) and (5) §55.201(d) of this title.

(F) If a request for a contested case hearing is granted, a decision on a contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under §80.109 of this title (relating to Designation of Parties) or the issues referred to SOAH under this section. A person whose request for contested case hearing is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's request for contested case hearing.

(G) If all requests for contested case hearing are denied, §80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed no more than 20 days after the date the person or attorney of record is notified of the commission's final decision or order. A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail. If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing, and Decision Final and Appealable, respectively) the commission's decision is final and appealable under Texas Health and Safety Code, §382.032, or under the Texas Administrative Procedure Act.

(H) If all hearing requestors whose requests for a contested case hearing were granted with regard to an issue, withdraw in writing their hearing requests with regard to the issue before issuance of the notice of the contested case hearing, the scope of the hearing no longer includes that issue except as authorized under Texas Health and Safety Code, §382.059.

(5) Procedural schedules:

(A) Upon convening a hearing pursuant to the procedural rules in Chapter 80 of this title and of SOAH, 1 TAC Chapter 155 (relating to Rules of Procedure), the Administrative Law Judge shall establish a procedural schedule, which shall provide for, as appropriate, discovery, hearing date, and pre- and post-hearing briefings, to comply with the provisions of Texas Health and Safety Code, §382.059 and this section.

(B) The Administrative Law Judge shall issue a proposal for decision within 80 days after the executive director issues the draft permit, or as specified by the commission, to meet the requirements of Texas Health and Safety Code, §382.059 and this section.

(e) Pleadings Following Proposal for Decision. The pleading requirements of §80.257 of this title (relating to Pleadings Following Proposal for Decision) shall not apply to applications filed under this section.

(1) Pleading schedule. Unless right of review has been waived, any party may file exceptions within five business days after the date of issuance of the proposal for decision. Any replies to exceptions shall be filed within eight business days after the date of issuance of the proposal for decision.

(2) Change of filing deadlines. On his own motion or at the request of a party, the general counsel may change the deadlines to file pleadings following the proposal for decision. A party requesting a change must file a written request with the chief clerk, and must serve a copy on the general counsel, the judge, and the other parties. The request must explain that the party requesting the change has contacted the other parties, and whether the request is opposed by any party. The request must include proposed dates and must indicate whether the judge and the parties agree on the proposed dates.

(f) Notice of Decision. No later than 120 days from the date of issuance of a draft permit the commission shall make a final decision on a permit amendment application under this section. The commission shall send notice of a decision on an application for

a permit amendment by first-class mail to the applicant and all persons who commented during the public comment period or at the public meeting. The notice shall include a response to any comment submitted during the public comment period and shall identify any change in the conditions of the draft permit and the reasons for the change. The notice shall include the following text:

(1) state that any person affected by the decision of the commission may appeal the decision;

(2) state the date by which the appeal must be filed; and

(3) explain the appeal process.

(g) A person affected by a decision of the commission to issue or deny a permit amendment may file a motion for rehearing under §80.272 of this title. If the motion is denied under §80.272 and §80.273 of this title, the commission's decision is final and appealable under Texas Health and Safety Code, §382.032, or under the Texas Administrative Procedure Act.

(h) Expiration. This section expires on the sixth anniversary of the date the EPA administrator adopts standards for existing EGFs under the Federal Clean Air Act, §112,

unless a stay of the rule is granted.