

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: January 20, 2012

Thru: Bridget Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

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

Docket No.: 2011-0997-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 116, Control of Air Pollution by Permits for New Construction or
Modification
HB 2694 (4.27 & 4.30): MACT Permit Procedures
Rule Project No. 2011-029-116-AI

Background and reason for the rulemaking:

House Bill, §4.27 (HB 2694 or Sunset), 82nd Legislature, 2011 created new Texas Health and Safety Code (THSC), §382.059, which establishes new procedures for requesting contested case hearings on permit amendments for electric generating facilities under Federal Clean Air Act (FCAA), §112. The new section provides specific time periods for TCEQ to draft permit amendments and for parties to request hearings on the drafted amendment (30 days from draft permit issuance). The scope of the hearing is limited to whether the choice of technology approved in the draft permit is the maximum achievable control technology (MACT) required under FCAA, §112. The new statute also limits the time from issuance of a draft permit to a final decision on the permit to 120 days.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do: The Air Permits Division (APD) recommends new §116.128, which will parallel the language of the statute. The rule will require the executive director to issue draft permit amendments no later than 45 days from receipt of a complete application. The new section also requires that a contested case hearing be requested no later than 30 days from the issuance of a draft permit and that the commission issue a final decision on the amendment no later than 120 days from the issuance of the draft permit. The result of these time restrictions is a compression of the time to request and conduct a contested case hearing, as well as permit issuance.

The rule would allow a direct referral for a contested case hearing by the executive director or the applicant. Under the rule, the commission may conduct the hearing and not refer the application to State Office of Administrative Hearings (SOAH).

The rule would allow collateral increases of emissions associated with any change in control equipment. Increases in excess of prevention of significant deterioration (PSD) or nonattainment (NA) thresholds will require review under Chapter 116 and additional

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public notice information. This information would be included with the notice for the amendment under adopted new §116.128.

Under HB 2694, §4.30, the commission must adopt implementation rules by March 1, 2012.

B.) Scope required by federal regulations or state statutes: The rule implements a state statute. Portions of the rule are proposed as a revision to the SIP because new emissions are also subject to new source review (NSR) permitting requirements.

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

Statutory authority:

Texas Water Code (TWC), §5.102, concerning General Powers; §5.103, concerning Rules; §5.105, concerning General Policy; §5.115, concerning Persons Affected in Commission Hearings; Notice of Application; §5.116, concerning Hearings; Recess; §5.118, concerning Power to Administer Oaths; §5.122, concerning delegation of Uncontested matters to Executive Director; §5.1733, concerning Electronic Posting of Information; §5.311, concerning Delegation of Responsibility; and §5.557, concerning Direct Referral to Contested Case Hearing.

THSC, §382.017, concerning Rules; §382.002, concerning Policy and Purpose; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties; §382.012, concerning State Air Control Plan; §382.016, concerning Monitoring Requirements; Examination of Records; §382.029, concerning Hearing Powers; §382.0291, concerning Public Hearing Procedures; §382.030, concerning Delegation of Hearing Powers; §382.031, concerning Notice of Hearings; §382.032, concerning Appeal of Commission Action; §382.040, concerning Document; Public Property; §382.041, concerning Confidential Information; §382.0512, concerning Modification of Existing Facility; §382.051, concerning Permitting Authority of Commission; Rules; §382.0513, concerning Permit Conditions; §382.0514, concerning Sampling, Monitoring, and Certification; §382.0515, concerning Application for Permit; §382.0518, concerning Preconstruction Permit; §382.056, concerning Notice of Intent to Obtain Permit or Permit Review: Hearing; §382.0561, concerning Federal Operating Permit; Hearing; §382.0562, concerning Notice of Decision; §382.061, concerning delegation of Powers and Duties; §382.062, concerning Application, Permit, and Inspection Fees; and §382.059, concerning Hearing and Decision on Permit Amendment Application of Certain Electric Generating Facilities.

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Effect on the:

A.) Regulated community: The recommended rule would apply to petroleum coke, fuel oil and coal-fired electric generating facilities that seek a permit amendment to meet the MACT requirements. Those applications will be subject to an expedited permit review process, including the opportunity for a contested case hearing. It will be necessary for applicants for permit amendments under this statute and rule to participate in pre-application coordination with APD to agree on application completeness, public notice content, and schedule in order to comply with the accelerated schedule for public comment, contested case hearings and permit issuance. Natural gas fired electric generating facilities are not affected by either the United States Environmental Protection Agency's (EPA) proposed Utility MACT standard or this adopted rule. However, until EPA adopts this MACT standard, the scope of applicability of new §116.128 cannot be finally determined. In addition, EPA could adopt other MACT standards under FCAA, §112 that could require permit amendment applications that are subject to this new section.

B.) Public: The rule would reduce the period in which a contested case hearing can be requested to 30 days after the issuance of a draft permit and narrows the scope of the contested case hearing to whether the applicant's proposed control technology is MACT.

C.) Agency programs: The Office of the Chief Clerk, Office of Public Assistance, and APD will have to modify internal procedures to comply with the accelerated notice and hearing schedule. No new personnel are required.

The expedited schedule for issuing a draft permit and contested case hearings will require that applicants submit a complete initial application. The issuance of a draft permit begins the 30-day period to request a contested case hearing and the 120-day period for the commission to issue a decision on the permit application. APD has included recommended rule language that would link the issuance of a draft permit with its publication. This will allow the commission to better control when these statutory periods begin and allow maximum time for contested case hearing procedures. APD will encourage applicants to coordinate with the permit engineer prior to the submittal of an application.

Stakeholder meetings:

No stakeholder meetings were held. Standard notice of this action and an opportunity for public comment were provided.

Public Comment

The executive director received comments from: 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 (Environmental

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Groups); Public Citizen, and Sustainable Energy and Economic Development Coalition (SEED); Public Citizen; SEED; and the Office of Public Interest Council of the Texas Commission on Environmental Quality (OPIC).

OPIC states that the compressed hearing schedule would not allow an adequate hearing if emissions trigger PSD or NA thresholds and recommends that any application with these emission increases be put in a separate application subject to a full public comment and contested case hearing process. OPIC also expressed concern about the limitation of topics for a contested case hearing stating that it is inappropriate to limit topics to MACT if collateral emissions trigger PSD or NA review. Sierra made similar comments.

The executive director interprets the restriction in THSC, §382.059(d) as a limitation on the subject of a contested case hearing to equivalency of a technology to MACT. This interpretation is consistent with the intent of the legislation which was to expedite the installation of technology to control hazardous air pollutants from electric generating units and serves the purpose of the statute by reducing the amount of time required for installation of controls. A separate 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 contested case hearing process.

Collateral emissions that result in PSD review or NA review are subject to review which includes health effects and effect of the increased emissions on national ambient air quality standards. The executive director is aware that collateral emissions of this magnitude are significant. Therefore, the executive director expects applicants to have evaluated these emissions thoroughly and represented the results in their amendment application. The executive director will not consider an application technically complete if an evaluation is deficient and will not accept it. While emissions requiring PSD review or NA review are not subject to a contested case hearing under this section, the emissions are subject to separate public notice requirements.

The power companies supported the proposal. The environmental groups emphasized the need to control mercury.

Significant Changes from Proposal: The staff recommends the proposed rule be modified to state that amendment applications must be administratively and technically complete before they may be considered accepted. This rule change is consistent with changes in procedures that are necessary to meet the compressed schedule for draft permit issuance. Certain portions of the new section will be not be submitted as state implementation plan amendments in order to maintain consistency with previous submittals.

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Potential controversial concerns and legislative interest remaining after proposal and public comment: The reduced period for requesting a contested case hearing and the restriction of disputed issues may cause public concern.

Does this rulemaking affect any current policies or require development of new policies? Yes. The accelerated notice and hearing schedule will require pre-application coordination between applicants and APD. SOAH must be notified if APD receives an application under this rule to ensure that contested case hearing requests are processed and acted within the time periods specified in the statute and rule. In order to meet the legislated schedule, any public comment period on the draft permit will run concurrently with the 30- day period to request a contested case hearing.

The process for contested case hearings including discovery, pre-hearing, exceptions, replies, and agenda posting will be compressed into a period of five to six weeks. Maintenance of the schedule may also require that hearings be conducted on the same day as the commission agenda where the permit amendment is posted for action.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking? HB, §4.30 requires the commission to adopt rules implementing the new THSC, §382.059 by March 1, 2012.

Key points in the adoption rulemaking schedule:

***Texas Register* proposal publication date:** October 21, 2011

Anticipated *Texas Register* publication date: February 24, 2012

Anticipated effective date: March 2, 2012

Six-month *Texas Register* filing deadline: April 21, 2012

Agency contacts:

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Michael Parrish, Texas Register Coordinator, 239-2548

Attachments

HB 2694, §4.27 and §4.30

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