

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §§116.130 - 116.134, 116.136, and 116.137.

The repeal of §116.130 - 116.134, 116.136, and 116.137 is adopted *without changes* to the proposal as published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 4950), with a correction on July 22, 2016 (41 TexReg 5458), and will not be republished.

The commission will submit the repeal of §§116.130 - 116.134, 116.136, and 116.137 to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

### **Background and Summary of the Factual Basis for the Adopted Rules**

Sections 116.130 - 116.134, 116.136, and 116.137 were adopted August 27, 1993 (18 TexReg 5746) as public notification and comment procedures for New Source Review air permit applications in a rulemaking action that restructured the existing air quality permit program rules for the Texas Air Control Board. Except for §116.136, these rules were repealed and readopted by the Texas Natural Resource Conservation Commission (TNRCC, predecessor of the TCEQ) on June 17, 1998, and re-submitted to the EPA. With the exception of §116.130(c) (regarding hazardous air pollutants which are not part of the SIP), these rules were approved into the SIP, as published in the September 18, 2002, issue of the *Federal Register* (67 FR 58709).

In 1999, the 76th Texas Legislature enacted House Bill (HB) 801, which revised public participation in environmental permitting. TCEQ adopted rules to implement HB 801 (and other bills) that consolidated the public participation rules across the agency as published in the September 24, 1999, issue of the *Texas Register* (24 TexReg 8190). That rulemaking included rules in 30 TAC Chapter 39 (Public Notice), Subchapters H (Applicability and General Provisions) and K (Public Notice of Air Quality Permit Applications), that apply to certain air quality permit applications declared administratively complete on or after September 1, 1999. TCEQ submitted portions of the rulemaking to implement HB 801 to the EPA as revisions to the SIP. The public participation rules in Chapter 116 that were superseded by the rules adopted to implement HB 801 were not repealed at that time because the rules applied to pending applications that were declared administratively complete before September 1, 1999.

In 2010, TCEQ conducted a rulemaking, published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198), that clarified the public participation requirements for air quality applications. TCEQ's adoption notice included discussions addressing EPA's concerns about TCEQ's SIP submittal of the 1999 rules to implement HB 801, as well as several TCEQ public participation rulemakings for air quality permit applications adopted from 1999 - 2010, and the final set of rules submitted as SIP revisions in 2010. EPA's approvals of the 2010 submittal were published in the January 6, 2014, issue of the *Federal Register* (79 FR 551); the March 30, 2015, issue of the

*Federal Register* (80 FR 16573); and the October 6, 2015, issue of the *Federal Register* (80 FR 60295). In addition, EPA has approved subsequent changes to public participation rules adopted by the commission in 2014, as published in the November 20, 2014, issue of the *Federal Register* (79 FR 66626). At the time of this adoption, no public participation rules remain pending EPA review. Inclusion in the SIP ensures the public participation requirements are federally enforceable.

No applications for which §§116.130 - 116.134, 116.136, and 116.137 are applicable remain pending with the commission. Repealing the obsolete rules and revising the SIP by removing §§116.130 - 116.134, 116.136, and 116.137 will eliminate any possible confusion as to what the applicable public participation requirements are in the SIP. The public's opportunity to participate in the air permitting process will not change nor be affected in any way as a result of this repeal.

*Federal Clean Air Act §110(l)*

All revisions to the SIP are subject to EPA's finding that the revision will not interfere with any applicable requirement concerning attainment and reasonable further progress of the National Ambient Air Quality Standards, or any other requirement of the Federal Clean Air Act, 42 United States Code (USC), §7410(l). This statute has been interpreted to be whether the revision will "make air quality worse" (*Kentucky Resources Council, Inc. v. EPA*, 467 F.3d 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 (5th Cir.)). Because procedural rules have no direct nexus with air quality, and because the current applicable public participation rules are approved as part of the Texas SIP, EPA should find that there is no backsliding from the current SIP and that this SIP revision complies with 42 USC, §7410(l).

### **Section by Section Discussion**

The commission adopts the repeal of §116.130 (Applicability); §116.131 (Public Notification Requirements); §116.132 (Public Notice Format); §116.133 (Sign Posting Requirements); §116.134 (Notification of Affected Agencies); §116.136 (Public Comment Procedures); and §116.137 (Notification of Final Action by the Commission), because the rules were superseded and are obsolete. These rules apply to air permitting applications that were administratively complete before September 1, 1999. No pending applications meet that criterion.

### **Final Regulatory Impact Determination**

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity,

competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted repeal of §§116.130 - 116.134, 116.136, and 116.137 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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. Rather, this rulemaking repeals obsolete rules and proposes that EPA remove them from the SIP to ensure there is no confusion regarding the applicable rules for public participation for air quality permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general authority of the commission. The adopted repeal of §§116.130 - 116.134, 116.136, and 116.137 does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but is authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the

regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission received no comments.

### **Takings Impact Assessment**

The commission evaluated the adopted rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The repeal of §§116.130 - 116.134, 116.136, and 116.137 is procedural in nature and will not burden private real property. The adopted rulemaking does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The adopted rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

### **Consistency with the Coastal Management Program**

The commission reviewed the rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program and will, therefore,

require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission received no comments.

#### **Effect on Sites Subject to the Federal Operating Permits Program**

All of the requirements in Chapter 116 are applicable requirements under 30 TAC Chapter 122 (Federal Operating Permits Program). However, the repealed sections are procedural rules applicants must follow to be issued a New Source Review permit for applications administratively complete prior to September 1, 1999, and would not have been directly referenced in Title V permits. Therefore, no effect on sites subject to the Federal Operating Permits program is expected because the commission adopted the repeal of these rules.

#### **Public Comment**

The commission held a public hearing on August 2, 2016. The comment period closed on August 8, 2016. The commission received no comments.

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**  
**DIVISION 3: PUBLIC NOTIFICATION AND COMMENT PROCEDURES**  
**§§116.130 - 116.134, 116.136, 116.137**

**Statutory Authority**

The repeal is adopted under Texas Water Code, §5.103, Rules and §5.105, General Policy; Texas Health and Safety Code (THSC), §382.002, Policy and Purpose; THSC, §382.003, Definitions; THSC, §382.011, General Powers and Duties; THSC, §382.012, State Air Control Plan; THSC, §382.017, Rules; THSC, §382.051, Permitting Authority of Commission; Rules; THSC, §382.0511, Permit Consolidation and Amendment; THSC, §382.0518, Preconstruction Permit; THSC, §382.055, Review and Renewal of Preconstruction Permit; THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing; THSC, §382.058, Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption; and 42 United States Code (USC), §7401, *et seq.*

The adopted repeal implements TWC, §5.103 and §5.105; THSC, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0518, 382.055, 382.056, and 382.058; and 42 USC, §7401, *et seq.*

**§116.130. Applicability.**

**§116.131. Public Notification Requirements.**

**§116.132. Public Notice Format.**

**§116.133. Sign Posting Requirements.**

**§116.134. Notification of Affected Agencies.**

**§116.136. Public Comment Procedures.**

**§116.137. Notification of Final Action by the Commission.**