

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** September 16, 2011

**Thru:** Melissa Chao, Acting 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 Proposed Rulemaking  
Chapter 116, Control of Air Pollution by Permits for New Construction or  
Modification  
Hearing Procedure for Electric Generating Facilities  
Rule Project No. 2011-029-116-AI

### **Background and reason for the rulemaking:**

Section 4.27 of House Bill 2694 (HB 2694 or Sunset), 82nd Legislature, 2011 created a 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 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 required under section 112 of the FCAA. 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 a new section 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 restriction is a compression of the time to conduct a contested case hearing.

The proposed rule will allow a direct referral for a contested case hearing from the executive director or the applicant. The proposed rule the commission may conduct the hearing and not refer the application to SOAH

The proposed rule will 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 proposed new § 116.128.

Under section 4.30 of HB 2694, 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. Where needed for clarity, APD recommends including rule language that states public notice procedures. This language is consistent with statutory requirements existing prior to the adoption of HB 2694.

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

**Statutory authority:**

The rule is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy and under Texas Health and Safety Code (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.

The rule is also proposed under TWC §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.

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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 and would result in an expedited permit review process, including the opportunity for a contested case hearing. Applicants for amendments under this statute and rule will be required to conduct pre-application coordination with APD to agree on application completeness, public notice content, and schedule in order to comply with the accelerated schedule for contested case hearings. Natural gas fired electric generating facilities are not affected by either EPA's proposed Utility MACT standard or this proposed rule. However, until EPA adopts this MACT standard, the scope of applicability of proposed 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 contestable point to whether a 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:**

None planned

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

**Will 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

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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 5 to 6 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?** Section 4.30 of HB requires the commission to adopt rules implementing the new §382.059 by March 1, 2012.

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** October 5, 2011

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

**Public hearing date:** November 17, 2011

**Public comment period:** October 21 - November 21, 2011

**Anticipated adoption date:** February 8, 2012

**Agency contacts:**

Beecher Cameron, Rule Project Manager, 239-1495, Air Permits Division

Janis Hudson, Staff Attorney, 239-0466

Michael Parrish, Texas Register Coordinator, 239-2548

**Attachments**

HB 2694, Sections 4.27 and 4.30

cc: Chief Clerk, 2 copies  
Executive Director's Office  
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Anne Idsal  
Curtis Seaton  
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