

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§116.1011, 116.1040, 116.1041, and 116.1050 and new §116.1042. Sections 116.1011, 116.1040, and 116.1042 are adopted *with changes* to the proposed text as published in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3500). Sections 116.1041 and 116.1050 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of this rulemaking is to implement legislation relating to public notice and hearing requirements. Senate Bill (SB) 688 (an act relating to requirements for public notice and hearing on applications for certain permits that may have environmental impact), 77th Legislature, 2001, amended Texas Clean Air Act (TCAA), Chapter 382, Subchapter C, by amending §382.05194, Multiple Plant Permit, and by adding §382.05197, Multiple Plant Permit: Notice and Hearing. The adopted amendments and new section address the amendments to TCAA, Chapter 382, Subchapter C. The adoption also contains grammatical revisions, cross-reference corrections, and changes which conform the rule language to *Texas Register* and agency formatting requirements.

SECTION BY SECTION DISCUSSION

Section 116.1011, Multiple Plant Permit Application, is amended to reflect new statutory requirements under TCAA, §382.05197 for a multiple plant permit (MPP) applicant to publish notice of intent to obtain the permit. Subsection (a)(5) is deleted because information necessary to calculate the cost of public notice would no longer be needed by the executive director as part of the MPP application, since the rules now require the applicant, rather than the commission, to publish notice of intent to obtain the

permit. Minor changes adopted under §116.1011 include substituting the term “executive director” for the “commission” to more accurately reflect agency duties and responsibilities; and changing the specific application references from “Form PI-1M Multiple Plant Permit Application” and “Form PI-1M” to “application form” or “form” to allow for ongoing improvements in commission application documents and flexibility under subsection (a). In a change from proposal, the acronym “MPP” was used in place of “multiple plant permit” in subsection (b) for consistency.

Section 116.1040, Multiple Plant Permit Public Notice and Public Participation, is amended to reflect the new statutory language under TCAA, §382.05197 by changing the title of this rule and by adding new language under subsections (a) - (c). The amended title of the rule reflects the inclusion of provisions to address new public participation procedures in the statute. New TCAA, §382.05197(c) provides that public participation for an MPP application filed before September 1, 2001, will occur in the same manner as provided by TCAA, §382.0561, concerning Federal Operating Permit; and §382.0562, concerning Notice of Decision. These sections allow for notice and comment hearings instead of contested case hearings under Texas Government Code, Chapter 2001, and require the executive director to send notice of final action to persons who comment during the comment period or during a hearing. Because the commission has developed public notice and participation requirements implementing similar language in TCAA, §382.05191 for voluntary emission reduction permits (VERP) and electric generating facility permits, the adopted requirements of §§116.1040 - 116.1042 are based on the sections in 30 TAC Chapter 116, Subchapters H and I, that implement the requirements of TCAA, §382.0561 and §382.0562. In addition, the commission’s review of TCAA, §382.05194 and §382.05197 indicates that the new public notice and public participation requirements that substitute for

otherwise applicable requirements under Texas Government Code, Chapter 2001, are only available for applications filed before September 1, 2001, for the initial issuance, amendment, or revocation of an MPP under §382.05194(e). As a general matter, the requirements in 30 TAC Chapter 50, relating to Action on Applications and Other Authorizations, and specifically the requirements in Subchapter G, relating to Action by the Executive Director, apply to all MPP applications regardless of the filing date for the applications.

The new language adopted under §116.1040(a) requires that applications for an MPP filed on or after September 1, 2001 are subject to the same procedural requirements of 30 TAC Chapters 39, 50, 55, and 80 that apply to applications processed under Chapter 116, Subchapter B, relating to New Source Review Permits, except that any required newspaper notice shall be published in accordance with proposed subsection (b)(1)(A).

New §116.1040(b) is based on language in §116.1041(c), and provides that the public notice and public participation process in TCAA, §382.05197, is only available for applications filed before September 1, 2001, for initial issuance, amendment, or revocation of an MPP. The new language adopted under paragraph (1) requires the applicant for an MPP application filed before September 1, 2001, to follow the same public notice requirements applicable to initial issuance VERPs and electric generating facility permits that are specified in §39.403(d), except as provided by §116.1040. New subparagraph (A) requires an applicant for initial issuance of an MPP to publish notice of intent to obtain the permit in accordance with the applicable requirements in §39.603, except that: the notice of a proposed MPP for existing facilities must be published in one or more state-wide or regional newspapers that provide

reasonable notice throughout the state; or if the MPP for existing facilities will be effective for only part of the state, the notice must be published in a newspaper of general circulation in the area to be affected. For consistency with the statute, adopted subparagraph (B) clarifies that the notice required under §39.603 will include a statement that the persons identified in paragraph (2) of this subsection are entitled to request a notice and comment hearing from the commission. The new requirements adopted under subparagraph (C) allow the executive director to authorize an applicant for an MPP for an existing facility that constitutes or is part of a small business stationary source as defined in TCAA, §382.0365(h)(2), to provide notice using an alternative means if the executive director finds that the proposed method will result in equal or better communication with the public, considering the effectiveness of the notice in reaching potentially affected persons, the cost, and the consistency with federal requirements.

For consistency with the statute, adopted paragraph (2) provides that any person who may be affected by emissions from a facility that is included in an MPP application under subsection (b) or a member of the legislature may request a notice and comment hearing on the MPP application within 30 days after publication of notice under §39.418, concerning Notice of Receipt of Application and Intent to Obtain Permit. In accordance with TCAA, §382.05197(c) and §382.0561, new paragraph (3) clarifies that a hearing relating to an MPP under subsection (b) will follow the procedures for a notice and comment hearing according to the amendments in §116.1041. New paragraph (4) provides that the executive director's response to public comments and notice of decision relating to a permit application under subsection (b) will be conducted under the procedures of new §116.1042. New paragraph (5) provides that persons affected by a decision of the executive director to issue or deny an MPP application under

subsection (b) will be entitled to file a motion to overturn the decision under §50.139, relating to Motion to Overturn Executive Director's Decision, and may seek judicial review under TCAA, §382.032, Appeal of Commission Action. A clarifying change from proposal was made under paragraph (5) by deleting the term "as appropriate."

Adopted new §116.1040(c) specifies publication requirements for MPP renewals. Consistent with the statutory requirement in TCAA, §382.05197, new subsection (c) requires the state-wide or regional publication of any required newspaper notice when an applicant submits an application for renewal of an MPP. An MPP may potentially apply to facilities located in different areas of the state and the commission considers state-wide or regional publication an appropriate requirement for both initial issuance and renewal of an MPP. The commission is authorized to require this publication in new TCAA, §382.05197 and §382.056. The deletion of the rule language under §116.1040 reflects the deletion of the previously existing statutory language under TCAA, §382.05194(d).

Section 116.1041, Multiple Plant Permit Public Comment Procedures, is amended to reflect the new statutory language under TCAA, §382.05197(c) and (d), consistent with existing requirements for initial issuance of VERPs and electric generating facility permits to provide notice and comment hearings under TCAA, §382.0561 and §382.0562. The amended title of the rule reflects the inclusion of provisions to address new notice and comment hearing procedures in the statute. Adopted language in subsection (a) clarifies that the notice and comment hearing requirements in §116.1041 apply only to applications filed before September 1, 2001, for the initial issuance, amendment, or revocation of an MPP. New requirements adopted under subsection (b) allow the executive director to decide whether

to hold a hearing based on the reasonableness of a request. The executive director is not required to hold a hearing if the basis of the request by a person who may be affected by emissions from a facility that is included in an MPP application is determined to be unreasonable. If a hearing is requested by a person who may be affected by emissions from an MPP facility, and that request is reasonable, the executive director will hold a hearing. Adopted new language in subsection (c) specifies that an applicant must provide newspaper notice of a hearing on a draft permit 30 days before the hearing in compliance with specific publication and notice content requirements. Adopted subsection (d) provides procedures for submitting hearing comments, and subsections (e) - (i) describe more specific procedures relating to the hearing record (including hearing recordings, written transcripts, and written comments), requirements relating to comments and supporting materials, and changes to the draft permit. New subsection (j) provides that the executive director will respond to comments as provided in §116.1042.

The deletion of the rule language under §116.1041(a) and (b) reflects the deletion of the previously existing language under TCAA, §382.05194(e) and (f), respectively. Previously existing subsection (c) is deleted because equivalent language is included in new §116.1040(b) consistent with TCAA, §382.05194(e).

New adopted §116.1042, Notice of Final Action, incorporates requirements in TCAA, §382.05197(c) and (d), and is consistent with existing procedures for initial issuance of VERPs and electric generating facility permits to provide notice of final decisions on applications under TCAA, §382.0561 and §382.0562. Subsection (a) specifies requirements for notice of final action for applications filed before September 1, 2001 for the initial issuance, amendment, or revocation of an MPP; and provides what

must be included with the notice and who will receive the notice. Subsection (b) specifies what must be included in the notice of final action, including a statement about the opportunity to seek review under §50.139, relating to Motion to Overturn Executive Director's Decision, and to seek judicial review under TCAA, §382.032. In a change from proposal to make the rule internally consistent with §116.1040(b)(5), the proposed phrase concerning petitioning for a rehearing has been replaced with the phrase relating to motion to overturn. A clarifying change from proposal was made under paragraph (3) by deleting the term "as appropriate."

Section 116.1050, Multiple Plant Permit Application Fee, is amended to delete language concerning additional public notice costs and language concerning initiation of the public notice by the commission, since the proposal requires the applicant, rather than the commission, to publish notice.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in

nature and revises procedures concerning public notice and hearings, the rulemaking does not meet the definition of a “major environmental rule.”

In addition, even if the rules are major environmental rules, a draft regulatory impact analysis is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law, and does not exceed an express requirement of state law because it is authorized by the following state statutes:

Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal state agency procedures; as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the adoption is in direct response to SB 688, and does not exceed the requirements of this bill.

This adoption does not 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.

This adoption does not adopt a rule solely under the general powers of the agency, but rather under specific state laws (i.e., Texas Government Code, §2001.004; and TCAA, §382.05197). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed a preliminary analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for public notice and hearings. As added by SB 688, TCAA, §382.05197: 1) requires an applicant for an MPP filed before September 1, 2001, to publish notice of intent to obtain the permit as required by TCAA, §382.056, with certain exceptions; 2) allows the executive director to authorize an applicant for an MPP for an existing facility that constitutes or is part of a small business stationary source to provide notice using an alternative means if the executive director makes certain findings; 3) requires the executive director to provide an opportunity for a public hearing and the submission of public comment and send notice of a decision on an application for an MPP filed before September 1, 2001, in the same manner as provided under TCAA, §382.0561 and §382.0562; and 4) allows a person affected by a decision of the executive director to issue or deny an MPP filed before September 1, 2001, to move for rehearing and entitles the person to judicial review under TCAA, §382.032. The rules substantially advance these stated purposes by providing specific procedural requirements in response to legislative changes.

Promulgation and enforcement of the rules will not burden private real property. The rules do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, the rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*) and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. The rulemaking actions concern only the procedural rules of the commission, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 *et seq.*).

PUBLIC COMMENT

A public hearing on the proposal was scheduled to be held in Austin on May 21, 2002. No public comment was offered at the scheduled hearing, so a hearing was not held. Furthermore, no commenters submitted written comments during the comment period which closed at 5:00 p.m., May 28, 2002.

SUBCHAPTER J: MULTIPLE PLANT PERMITS

§§116.1011, 116.1040, 116.1041, 116.1042, 116.1050

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TCAA, §382.05192, which requires review and renewal of MPPs to be conducted under §382.055; TCAA, §382.05194, which authorizes the commission to issue MPPs; TCAA, §382.05197, which specifies the notice and hearing procedures for certain MPPs; TCAA, §382.055, which specifies permit review and renewal requirements; and TCAA, §382.056, which specifies notice and hearing requirements for certain air permits.

§116.1011. Multiple Plant Permit Application.

(a) An application for a multiple plant permit (MPP) must include a completed application form. The application form must be signed by an authorized representative of the applicant. The form specifies additional support information which must be provided before the application is deemed complete. In order to be granted an MPP, the owner or operator of the existing facilities shall submit the following information to the executive director:

(1) information to demonstrate compliance with applicable conditions of §116.711 of this title (relating to Flexible Permit Application);

(2) for grandfathered facilities, as defined in §116.10(6) of this title (relating to General Definitions) for which an MPP application is filed prior to September 1, 2001, the information required by §116.811(3) of this title (relating to Voluntary Emission Reduction Permit Application) solely for the purpose of determining the aggregate emission rate of air contaminants to be authorized under the permit;

(3) for permitted facilities, the relevant permit; and

(4) relevant information, indicating that the emissions from the facilities will not contravene the intent of the TCAA, including protection of the public's health and physical property.

(b) Grandfathered facilities which do not apply for an MPP prior to September 1, 2001 must first obtain a permit under Subchapter B of this chapter (relating to New Source Review Permits) before they are eligible to be included in an MPP.

§116.1040. Multiple Plant Permit Public Notice and Public Participation.

(a) An application for a multiple plant permit (MPP) that is filed on or after September 1, 2001, is subject to the same procedural requirements of Chapters 39, 50, 55, and 80 of this title (relating to Public Notice; Action on Applications and Other Authorizations; Requests for Reconsideration and Contested Case Hearings, Public Comment; and Contested Case Hearings) that apply to applications processed under Subchapter B of this chapter (relating to New Source Review Permits), except that any required newspaper notice shall be published in accordance with subsection (b)(1)(A) of this section.

(b) Applications for MPP initial issuance, amendment, or revocation that are filed before September 1, 2001, are not subject to Texas Government Code, Chapter 2001, and are subject to the notice and hearing process of TCAA, §382.05197, as provided in this subsection.

(1) An applicant for an MPP shall comply with the same public notice requirements that apply to initial issuance of voluntary emission reduction permits and initial issuance of electric generating facility permits as specified in §39.403(d) of this title (relating to Applicability), except as provided by this section.

(A) An applicant for an MPP shall publish notice of intent to obtain the permit as required under §39.603 of this title (relating to Newspaper Notice), except that:

(i) the notice of a proposed MPP for existing facilities shall be published in one or more state-wide or regional newspapers that provide reasonable notice throughout the state; or

(ii) if the MPP for existing facilities will be effective for only part of the state, the notice shall be published in a newspaper of general circulation in the area to be affected.

(B) The notice shall include a statement that the persons identified in paragraph (2) of this subsection are entitled to request a notice and comment hearing from the commission.

(C) The executive director may authorize an applicant for an MPP for an existing facility that constitutes or is part of a small business stationary source as defined in TCAA, §382.0365(h)(2) to provide notice using an alternative means if the executive director finds that the proposed method will result in equal or better communication with the public, considering the effectiveness of the notice in reaching potentially affected persons, the cost, and the consistency with federal requirements.

(2) Any person who may be affected by emissions from a facility that is included in an MPP application under this subsection, or a member of the legislature from the general area in which the facility is located, may request the executive director to hold a notice and comment hearing on the MPP application. The public comment period shall end 30 days after the publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title (relating to Notice of

Receipt of Application and Intent to Obtain Permit). Any notice and comment hearing request must be made in writing during the 30-day public comment period.

(3) Any hearing for an MPP application under this subsection shall be conducted under the procedures in §116.1041 of this title (relating to Multiple Plant Permit Notice and Comment Hearings).

(4) The executive director's response to public comments and the notice of decision on whether to issue or deny an MPP application under this subsection will be conducted under the procedures in §116.1042 of this title (relating to Notice of Final Action).

(5) A person affected by a decision to issue or deny an MPP application under this subsection may seek review under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision), and may seek judicial review under TCAA, §382.032, relating to Appeal of Commission Action.

(c) For applications for renewal of an MPP, any required newspaper notice shall be published in accordance with subsection (b)(1)(A) of this section.

§116.1041. Multiple Plant Permit Notice and Comment Hearings.

(a) The notice and comment hearing requirements apply only to an application filed before September 1, 2001, for a multiple plant permit (MPP) initial issuance, amendment, or revocation.

(b) The executive director shall decide whether to hold a hearing. The executive director is not required to hold a hearing if it determines that the basis of the request by a person who may be affected by emissions from a facility that is included in an MPP application is unreasonable. If a hearing is requested by a person who may be affected by emissions from a facility that is included in an MPP application, and that request is reasonable, the executive director will hold a hearing.

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

- (1) the time, place, and nature of the hearing;
- (2) a brief description of the purpose of the hearing; and

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

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

(1) The executive director may set reasonable time limits for oral statements, and may require the submission of statements in writing.

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

(3) At the hearing, the executive director may extend the period for submitting written comments beyond the close of the hearing.

(e) The agency will make an audio recording or written transcript of the hearing available to the public.

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

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

- (1) already part of the administrative record in the same proceedings;
- (2) federal or state statutes, regulations, and rules;
- (3) EPA documents of general applicability; or
- (4) other generally available reference materials.

(h) The executive director will keep a record of all comments received and issues raised in the hearing. This record will be available to the public.

(i) The draft permit may be changed based on comments relating to whether the draft permit complies with the requirements of this subchapter.

(j) The executive director will respond to comments consistent with §116.1042 of this title (relating to Notice of Final Action).

§116.1042. Notice of Final Action.

(a) After the public comment period or the conclusion of any notice and comment hearing, notice will be sent by first class mail of the final action on the application for initial issuance, amendment, or revocation of a multiple plant permit that was filed before September 1, 2001. The notice will include the information required by §39.420(a)(1) - (2) of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision) and will be sent to any person who commented during the public comment period or at the hearing, and to the recipients specified in §39.420(b)(1) - (3) and (5) - (6) of this title.

(b) The notice must include the following:

- (1) the response to any comments submitted during the public comment period;
- (2) identification of any change in the conditions of the draft permit and the reasons for the change; and
- (3) a statement that any person affected by the decision of the executive director may seek review under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision), and may seek judicial review under TCAA, §382.032, Appeal of Commission Action.

§116.1050. Multiple Plant Permit Application Fee.

Any person who applies for a multiple plant permit (MPP) shall remit, at the time of application for such permit, a fee of \$450.

(1) Fees will not be charged for MPP alterations, changes of ownership, or changes of location of permitted facilities.

(2) Fees must be paid at the time an application for a permit is submitted. No fees will be refunded after a deficient application has been voided.