

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §50.113 *with change* to the proposed text as published in the November 25, 2005, issue of the *Texas Register* (30 TexReg 7810).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 2201, passed by the 79th Legislature, 2005, directs the commission to establish by rule, streamlined permitting procedures for FutureGen projects. FutureGen refers to a combination of technologies for carbon sequestration, carbon dioxide enhanced oil recovery, electric generation, and hydrogen production. FutureGen is a technology demonstration project that is a partnership between industry participants and the United States Department of Energy. In HB 2201, the legislature concluded in its findings that this technology demonstration project could result in major economic, social, and environmental benefits for Texas, and that streamlining the permitting process for FutureGen projects would serve the public's interest by improving the state's ability to compete for federal funding for FutureGen projects. A specific requirement of HB 2201 is that FutureGen permit applications shall not be subject to a contested case hearing. Under the adopted rule, the eligible permit applications for FutureGen projects will be subject to the same permitting and public participation processes that would otherwise apply to applications for most types of commission permits, except for contested case hearings.

The purpose of the adopted amendment to Chapter 50 is to implement the requirements of HB 2201 with respect to a streamlined permitting process for applications required to authorize a component of the FutureGen project. Because HB 2201 eliminates contested case hearings on applications for permits required to authorize a component of the FutureGen project, the amendment to §50.113 allows the

commission to act on an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project without holding a contested case hearing.

Corresponding rulemakings are published in this issue of the *Texas Register* that include changes to 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; 30 TAC Chapter 91, Alternative Public Notice and Public Participation Requirements for Specific Designated Facilities; 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification; and 30 TAC Chapter 331, Underground Injection Control.

SECTION DISCUSSION

§50.113, Applicability and Action on Application.

The adopted amendment adds new subsection (d)(7), which states that the commission may act on an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30, Definitions, without holding a contested case hearing. Concurrently, adopted new Chapter 91 provides the streamlined permitting process for applications for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project. In response to comments, the commission has established a sunset date of January 1, 2018, for this streamlined permitting process, so that applications submitted after that date would no longer be excluded from contested case hearings.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rule does not meet the definition of a “major environmental rule.” Under Texas Government Code, §2001.0225, “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 adopted rule is intended to establish procedural requirements for authorizing certain types of projects required for the FutureGen project without holding a contested case hearing. The adopted rule is only a procedural rule for processing applications for permits for the FutureGen project and is not specifically intended to protect the environment or to reduce risks to human health. The adopted rule is intended to provide an alternative mechanism for public participation and does not alter the underlying technical review requirements. Therefore, because this rulemaking will not 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 rulemaking does not fit the Texas Government Code, §2001.0225, definition of “major environmental rule.”

Furthermore, the adopted rule does not meet any of the four applicable requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule adopted by an agency, 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.

In this case, the adopted rule does not meet any of these applicability requirements. First, the rule is consistent with, and does not exceed, the standards set by federal law. Second, the rule does not exceed an express requirement of state law; instead, the rule implements HB 2201. Third, the rule does not exceed an express 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. Fourth, the commission does not adopt the rule solely under the general powers of the agency, but rather under the authority of Texas Health and Safety Code (THSC), §382.0565, as added by HB 2201, which directs the commission to implement reasonably streamlined processes for issuing permits required to construct a component of a FutureGen project, as authorized by federal law; Texas Water Code (TWC), §5.558, as amended by HB 2201, which directs the commission to implement reasonably streamlined processes for issuing permits required to construct a component of a FutureGen project, as authorized by federal law; and TWC, §27.022, as added by HB 2201, which establishes the commission's jurisdiction over the injection of carbon dioxide produced by a clean coal project to the extent authorized by federal law.

Because the adopted rule does not constitute a major environmental rule, a regulatory impact analysis is not required.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an assessment of whether this rulemaking would constitute a takings under Texas Government Code, Chapter 2007. The adopted rule is intended to establish a streamlined process for authorizing certain types of projects required for the FutureGen project. The adopted rule is only a procedural rule establishing a system to administer the program for permitting FutureGen projects and is not specifically intended to protect the environment or to reduce risks to human health. The rule is intended to provide an alternative mechanism for public participation and does not alter the underlying technical review requirements. Promulgation and enforcement of 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. Consequently, the adopted rule does not meet the definition of a takings under Texas Government Code, §2007.002(5). Therefore, the rule will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking 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, concerning Consistency with 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), relating to 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 rulemaking for

consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the rulemaking 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)). The adopted rule includes procedural mechanisms to authorize new sources of air contaminants; however, the rule does not create any new types of authorizations for new sources of air contaminants. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking complies with 40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

A FutureGen project may or may not be subject to the federal operating permits program depending on the quantity and type of its emissions and location. If subject, facilities will be required to meet all requirements of the Federal Operating Permits Program.

PUBLIC COMMENT

A public hearing for this rulemaking was held on December 20, 2005, in Austin, and the comment period closed on December 27, 2005. The commission received comments from the United States Environmental Protection Agency, Environmental Defense, the FutureGen Texas Advisory Board, the Center for Energy and Economic Development, and the Clean Coal Technology Foundation of Texas. These commenters addressed the FutureGen rulemaking in general, but did not specifically comment on

the amendments to this chapter. The commission also received comments from the Sierra Club Houston Regional Group (HSC).

RESPONSE TO COMMENTS

HSC expressed general opposition to the proposed rules, which would allow a permit to be issued for a FutureGen project without providing the public with an opportunity to request and receive a contested case hearing.

The adopted rules implement HB 2201, passed by the 79th Texas Legislature. Sections 3 and 7 of HB 2201 amend portions of the THSC and TWC to provide that permit applications for facilities that are a component of the FutureGen project are not subject to contested case hearings. The commission is required by HB 2201 to adopt rules to implement the statutory changes specified by HB 2201. Under the adopted rules, the public retains the ability to participate in the permitting process by submitting written comments during the comment period, and/or by requesting a notice and comment hearing on the permit. The commission is not changing the rule in response to this comment.

The Center for Energy and Economic Development commented that there was no need for a sunset provision in the rules, because the FutureGen initiative represented a one-of-a-kind project. HSC commented that an expiration date, no later than 2010, should be included in the rules. Environmental Defense commented that an expiration date of January 1, 2015, would be appropriate.

The commission is changing the rule in response to these comments and is establishing a sunset date of January 1, 2018. Applications or other requests for authorization submitted after this date would not be excluded from contested case hearings. This change will ensure that the streamlined permitting processes of Chapters 91 and 116 are only used for their intended purpose of providing an incentive for the FutureGen project construction.

SUBCHAPTER F: ACTION BY THE COMMISSION
§50.113

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, concerning Rules, and TWC, §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 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 amendment 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; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §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; THSC, §382.0518, concerning preconstruction permits; THSC, §382.056, concerning notice of intent to obtain permit or permit review and hearing; THSC, §382.0565, concerning clean coal project permitting procedure; and TWC, §5.558, concerning clean coal project permitting.

The adopted amendment implements TWC, §5.558(c) and THSC, §382.0565(d).

§50.113. Applicability and Action on Application.

(a) **Applicability.** This subchapter applies to applications that are declared administratively complete on or after September 1, 1999. Applications that are declared administratively complete

before September 1, 1999, are subject to Subchapter B of this chapter (relating to Action by the Commission).

(b) This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law.

(c) After the deadline for filing a request for reconsideration or contested case hearing under §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing), the commission may act on an application without holding a contested case hearing or acting on a request for reconsideration, if:

(1) no timely request for reconsideration or hearing has been received;

(2) all timely requests for reconsideration or hearing have been withdrawn, or have been denied by the commission;

(3) a judge has remanded the application because of settlement; or

(4) for applications under Texas Water Code, Chapters 26 and 27 and Texas Health and Safety Code, Chapters 361 and 382, the commission finds that there are no issues that:

(A) involve a disputed question of fact;

(B) were raised during the public comment period; and

(C) are relevant and material to the decision on the application.

(d) Without holding a contested case hearing, the commission may act on:

(1) an application for any air permit amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted;

(2) an application for any initial issuance of an air permit for a voluntary emission reduction or electric generating facility;

(3) an application for a hazardous waste permit renewal under §305.631(a)(8) of this title (relating to Renewal);

(4) an application for a wastewater discharge permit renewal or amendment under Texas Water Code, §26.028(d), unless the commission determines that an applicant's compliance history as determined under Chapter 60 of this title (relating to Compliance History) raises issues regarding the applicant's ability to comply with a material term of its permit;

(5) an application for a Class I injection well permit used only for the disposal of desalination brine under Texas Water Code, §27.021, concerning Permit for Disposal of Brine From Desalination Operations in Class I Wells;

(6) an application for pre-injection unit registration under §331.17 of this title (relating to Pre-Injection Units Registration);

(7) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018; and

(8) other types of applications where a contested case hearing request has been filed but no opportunity for hearing is provided by law.