

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §55.201 *with change* to the proposed text as published in the November 25, 2005, issue of the *Texas Register* (30 TexReg 7813).

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 55 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 §55.201 adds applications for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as a type of application for which there is no right to a contested case hearing under commission rule.

Corresponding rulemakings are published in this issue of the *Texas Register* that include changes to 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 50, Action on Applications and Other Authorizations; 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

§55.201, Requests for Reconsideration or Contested Case Hearing.

The adopted amendment adds subsection (i)(8) stating that there is no right to a contested case hearing 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. The 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 not 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 establishes 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 adopted 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 adopted 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 adopted 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 revision includes procedural mechanisms to authorize new sources of air contaminants; however, the adopted revision 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 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 the 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: REQUESTS FOR RECONSIDERATION
OR CONTESTED CASE HEARING
§55.201**

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).

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

- (1) the commission;
- (2) the executive director;
- (3) the applicant; and
- (4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, and may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

(e) Any person may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, and the public interest counsel, who was provided notice as required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program); or

(C) amendment, modification, or renewal of an air 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. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(a)(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

(6) 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;

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

(8) 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

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