

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §§91.10, 91.20, 91.30, 91.100, 91.110, and 91.120.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

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 these proposed rules, 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. Other portions of HB 2201 reflected in the proposed rules define relevant terms, establish an emissions profile, and clarify jurisdiction issues between TCEQ and the Railroad Commission of Texas. Much of the content of the proposed rules originates from new Texas Health and Safety Code (THSC), §382.0565, Clean Coal Project Permitting Procedure, and new Texas Water Code (TWC), §5.558 and §27.022, which were created by HB 2201.

Proposed Chapter 91 establishes procedural requirements only. Chapter 91 provides the streamlined processes for issuing permits, registrations, licenses, or other types of authorization under the commission's jurisdiction required to construct, operate, or authorize a component of the FutureGen project. Applications subject to the streamlined permitting process are still subject to the same technical requirements that apply to the type of authorization sought. The commission is required to adopt rules implementing the provisions of HB 2201 not later than September 1, 2006.

The proposed Chapter 91 does not include an expiration date or sunset date, but the commission specifically requests comment on whether an expiration date or sunset date is necessary.

Corresponding rulemakings are published in this issue of the *Texas Register* that include changes to 30 TAC Chapter 50, Action on Applications and Other Authorizations; 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification; and 30 TAC Chapter 331, Underground Injection Control.

SECTION BY SECTION DISCUSSION

SUBCHAPTER A: PURPOSE AND APPLICABILITY

§91.10, Purpose

The commission proposes this new section to state the purpose of this new chapter. The chapter is intended to establish streamlined permitting processes for the commission to issue permits,

registrations, licenses, or other types of authorization required to construct, operate, or authorize a component of the FutureGen project.

§91.20, Applicability

The commission proposes this new section to specify the applicability of Chapter 91. Proposed subsection (a) provides that the chapter applies procedural requirements for authorizations required to construct, operate, or authorize a component of the FutureGen project as defined under §91.30, Definitions, including applications for permits, registrations, licenses, or other types of authorization. Proposed subsection (b) explains that the applications subject to the Chapter 91 procedures are subject to the technical requirements that apply to the type of authorization sought. Proposed subsection (c) provides that the chapter does not apply to an application for a permit to construct or modify a new or existing coal-fired electric generating facility that will use pulverized or supercritical pulverized coal based on TWC, §5.558(d). Proposed subsection (d) is intended to encompass, under Chapter 91, any type of application under the commission's jurisdiction that may be required for authorizing a component of the FutureGen project whether or not the type of authorization is specifically identified in the chapter. Proposed subsection (e) provides that if the executive director determines that an application is not subject to the requirements of the chapter, the application will be subject to procedural requirements that would otherwise apply to the type of authorization sought. Proposed subsection (f) provides that an applicant may appeal a determination by the executive director that Chapter 91 does not apply to a particular application by filing a motion under §50.139, Motion to Overturn Executive Director's Decision.

§91.30, Definitions

The commission proposes definitions for several terms used in the chapter, including a definition for clean coal project, coal, FutureGen project, component of the FutureGen project, and FutureGen project profile. The definitions for these terms originate from TWC, §5.001 and other provisions of HB 2201.

§91.100, Contested Case Hearings

The commission proposes this new section to state that 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, is not subject to a contested case hearing. This implements the requirement of TWC, §5.558(c).

§91.110, Public Notice

The commission proposes this new section to require the same public notice procedures that would otherwise apply to a particular application, for most types of commission permits, except to modify the text of the notice to indicate that the application is not subject to a contested case hearing. Proposed subsection (a) provides that 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, is subject to the applicable notice requirements under Chapter 39 or other rule under this title for the type of authorization sought, except as provided in this section. Proposed subsection (b) provides that the text of the notice must include the following statements: “The application is for authorization of a component of the FutureGen project and is not subject to a contested case hearing.

The commission may hold a public meeting, an informal conference, or form an advisory committee to gather the opinions and advice of interested persons on the application when there is a significant degree of public interest.” Proposed subsection (c) provides that the text of the notice must not include a description of procedures for requesting a contested case hearing or the deadline for requesting a contested case hearing.

§91.120, Public Participation

The commission proposes this new section that would state, except for contested case hearings, an application subject to the streamlined process in Chapter 91 is subject to the same public participation requirements, such as public notice, public meeting opportunities, and public commenting, that would otherwise apply to the application, for most types of commission applications. In addition, the commission may conduct public meetings, informal conferences, or advisory committees to gather the opinions and advice of interested persons on an application. Proposed subsection (a) provides that the commission may hold public meetings, informal conferences, or advisory committees to gather the opinions and advice of interested persons on an application subject to this chapter when there is a significant degree of public interest. This implements the requirement of TWC, §5.558(b). Proposed subsection (b) provides that except as provided in §91.100, which provides that these applications are not subject to a contested case hearing, an application under this chapter is also subject to the public meeting and public comment processing requirements in Chapter 55 or elsewhere under this title applicable to the type of authorization sought.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed new sections are in effect, no fiscal implications are anticipated for the agency or other units of state or local government. Any entities wishing to be permitted under the proposed rules may experience some cost savings due to a streamlined permitting process.

The proposed rules implement HB 2201. HB 2201 directs the agency 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. The legislature determined that this technology demonstration project could result in major economic, social, and environmental benefits for Texas, and determined that streamlining the permitting process for FutureGen projects would serve the public interest by improving the state's ability to compete for federal funding for FutureGen projects.

At this time, there have been no permits issued by the agency for FutureGen projects. It is anticipated that there may be one entity in the state that may apply for such a permit in the future. As the proposed rules would eliminate the contested case hearing process for specific projects and not impose any new requirements for the agency, there may be minor cost savings to TCEQ and the State Office of Administrative Hearings due to the reduction in the number of contested case hearings.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years that the proposed new rules are in effect, the public benefit anticipated from the changes due to the proposed rules will be compliance with state law and improving the state's ability to compete for federal funding for FutureGen projects.

These projects are anticipated to result in the development of cleaner sources of power to meet energy demands.

The proposed rules may result in some reduced costs for eligible industry projects, but in general any cost savings are not expected to be significant.

The proposed rules are expected to only apply to one project at the current time. The project involves a variety of equipment used for power generation, hydrogen production, and carbon dioxide sequestration. This equipment may include bulk fuel handling equipment, gasifiers, reactors, separators, turbines, sulfur recovery units, and emission control equipment. Industry projects eligible for the proposed rules would no longer be subject to a contested case hearing. Instead, these projects would be subject to a notice and comment hearing process.

The elimination of contested case hearings may reduce travel costs for applicants, and may result in reduced administrative or professional costs that would have been incurred by the applicant to prepare for a contested case hearing.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rulemaking. Small or micro-businesses are not expected to apply for permits for FutureGen projects, but if they do, they would experience the same cost savings as large businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do 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 proposed rules are intended to establish a streamlined process for authorizing certain types of projects required for the FutureGen project. The proposed rules are only procedural rules establishing a system to administer the program for permitting FutureGen projects and are not specifically intended to protect the environment or to reduce risks to human health. The proposed rules are intended to provide an alternative mechanism for public participation and do 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 proposed rulemaking 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 proposed rules do not meet any of these applicability requirements. First, the proposed rules are consistent with, and do not exceed, the standards set by federal law. Second, the proposed rules do not exceed an express requirement of state law, instead these rules implement HB 2201.

Third, the rules do 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 propose these rules solely under the general powers of the agency, but rather under the authority of THSC, §382,0565, as added by HB 2201, which directs the commission to by rule implement reasonably streamlined processes for issuing permits required to

construct a component of a FutureGen project, as authorized by federal law; TWC, §5.558, as amended by HB 2201, which directs the commission to by rule 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 this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required. The commission invites public comment regarding this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

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

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 action 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 proposed revisions include procedural mechanisms to authorize new sources of air contaminants; however, the proposed revisions do 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. The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on December 20, 2005, at 10:00 a.m. in Building B, Room 201A, at the TCEQ's complex, located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing. Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Joyce Spencer, Office of Legal Services, at (512) 239-5017. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-053-091-PR. The proposed rules may be viewed on the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.

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Comments must be received by 5:00 p.m., December 27, 2005. For further information, please contact Michael Wilhoit, Air Permits Division, at (512) 239-1222.

SUBCHAPTER A: PURPOSE AND APPLICABILITY

§§91.10, 91.20, 91.30

STATUTORY AUTHORITY

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

The proposed new sections implement TWC, §5.558(c) and THSC, §382.0565(d).

§91.10. Purpose.

The purpose of this subchapter is to establish streamlined processes under Texas Water Code, §5.558, for the commission to issue permits, registrations, licenses, or other types of authorization

under the commission's jurisdiction required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions).

§91.20. Applicability.

(a) This subchapter applies to procedural requirements for authorizations required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), including applications for permits, registrations, licenses, or other types of authorization under the following:

(1) Chapter 295 (relating to Water Rights, Procedural);

(2) Chapter 297 (relating to Water Rights, Substantive);

(3) Chapter 305 (relating to Consolidated Permits);

(4) Chapter 312 (relating to Sludge Use, Disposal, and Transportation);

(5) Chapter 329 (relating to Drilled or Mine Shafts);

(6) Chapter 330 (relating to Municipal Solid Waste);

(7) Chapter 331 (relating to Underground Injection Control);

(8) Chapter 335 (relating to Industrial Solid Waste and Municipal Solid Waste); and

(9) Chapter 336 (relating to Radioactive Substance Rules).

(b) Applications for permits, registrations, licenses, or other types of authorization required to construct, operate, or authorize a component of the FutureGen project as defined under §91.30 of this title are subject to the technical requirements under the commission program, rule, or statute that the application is sought.

(c) This subchapter does not apply to an application for a permit to construct or modify a new or existing coal-fired electric generating facility that will use pulverized or supercritical pulverized coal.

(d) The executive director may apply the requirements of this subchapter to any application not otherwise specified in this subchapter for which the executive director determines constitutes a bona fide component of the FutureGen project.

(e) If the executive director determines that an application is not subject to the applicability of this subchapter, the application will be subject to the permitting and public participation process that would otherwise apply to the type of authorization sought.

(f) An applicant may appeal a determination by the executive director under subsection (e) of this section, by filing a motion under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

(g) Applications for authorization submitted under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) shall be subject to the public notice and participation procedures stated in Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities), and any applicable rules in Chapters 39 and 55 of this title (relating to Public Notice, and Requests for Reconsideration and Contested Case Hearings; Public Comment).

§91.30. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) **Clean coal project**--The installation of one or more components of the coal-based integrated sequestration and hydrogen research project to be built in partnership with the United States Department of Energy, commonly referred to as the FutureGen project. The term includes the construction or modification of a facility for electric generation, industrial production, or the production of steam as a by-product of coal gasification to the extent that the facility installs one or more components of the FutureGen project.

(2) Coal--All forms of coal, including lignite.

(3) FutureGen project--A common reference to the coal-based integrated sequestration and hydrogen project to be built in partnership with the United States Department of Energy.

(4) Component of the FutureGen project--A process, technology, or piece of equipment that:

(A) is designed to employ coal gasification technology to generate electricity, hydrogen, or steam in a manner that meets the FutureGen project profile;

(B) is designed to employ fuel cells to generate electricity in a manner that meets the FutureGen project profile;

(C) is designed to employ a hydrogen-fueled turbine to generate electricity where the hydrogen is derived from coal in a manner that meets the FutureGen project profile;

(D) is designed to demonstrate the efficacy at an electric generation or industrial production facility of a carbon dioxide capture technology in a manner that meets the FutureGen project profile;

(E) is designed to sequester a portion of the carbon dioxide captured from an electric generation or industrial production facility in a manner that meets the FutureGen project profile in conjunction with appropriate remediation plans and appropriate techniques for reservoir characterization, injection control, and monitoring;

(F) is designed to sequester carbon dioxide as part of enhanced oil recovery in a manner that meets the FutureGen project profile in conjunction with appropriate techniques for reservoir characterization, injection control, and monitoring;

(G) qualifies for federal funds designated for the FutureGen project;

(H) is required to perform the sampling, analysis, or research necessary to submit a proposal to the United States Department of Energy for the FutureGen project; or

(I) is required in a final United States Department of Energy request for proposals for the FutureGen project or is described in a final United States Department of Energy request for proposals as a desirable element to be considered in the awarding of the project.

(5) FutureGen project profile--A standard or standards relevant to a component of the FutureGen project, as provided in a final or amended United States Department of Energy request for proposals or contract.

SUBCHAPTER B: PUBLIC NOTICE AND PUBLIC PARTICIPATION

§§91.100, 91.110, 91.120

STATUTORY AUTHORITY

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

The proposed new sections implement TWC, §5.558(c) and THSC, §382.0565(d).

§91.100. Contested Case Hearings.

With the exception of any other provision in this title, 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) is not subject to a contested case hearing.

§91.110. Public Notice.

(a) 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) is subject to the applicable notice requirements under Chapter 39 of this title (relating to Public Notice) or other rule under this title for the type of authorization sought, except as provided in this section.

(b) The text of the notice must include the following statements: “The application is for authorization of a component of the FutureGen project and is not subject to a contested case hearing. The commission may hold a public meeting, an informal conference, or form an advisory committee to gather the opinions and advice of interested persons on the application when there is a significant degree of public interest.”

(c) The text of the notice must not include a description of procedures for requesting a contested case hearing or the deadline for requesting a contested case hearing.

§91.120. Public Participation.

(a) The commission may hold public meetings, informal conferences, or advisory committees to gather the opinions and advice of interested persons on an application subject to this chapter when there is a significant degree of public interest.

(b) Except as provided in §91.100 of this title (relating to Contested Case Hearings), an application under this chapter is also subject to the public meeting and public comment processing requirements of Chapter 55 of this title (relating to Public Notice and Requests for Reconsideration and Contested Case Hearings; Public Comment) or elsewhere under this title that is applicable to the type of authorization sought.