The Texas Commission on Environmental Quality (TCEQ or commission) adopts an amendment to §116.114. Section 116.114 is adopted *without change* to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6056) and will not be republished.

The amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill (HB) 3732, passed by the 80th Legislature (2007), requires that the commission adopt rules relating to permitting of Advanced Clean Energy Projects (ACEP). House Bill 3732 and the associated rule changes are intended to provide an incentive for the development of advanced, clean power projects in Texas. The legislation established new Texas Health and Safety Code (THSC), §382.0566, Advanced Clean Energy Project Permitting Procedure, which specifies certain deadlines for TCEQ's air permit review for qualifying projects and directs TCEQ to incorporate those deadlines into commission rules. The deadlines are intended to ensure that permit applications for ACEP are processed in an expedited manner.

House Bill 3732 established a definition of ACEP under THSC, §382.003, Definitions. Under this definition, an ACEP must meet the following criteria: 1) an application for a permit is filed on or after January 1, 2008, and before January 1, 2020; 2) the project involves the use of coal, biomass, petroleum coke, solid waste, or fuel cells using hydrogen derived from such fuels, in the generation of electricity, or the creation of liquid fuels outside of the existing fuel production infrastructure while co-generating

electricity; 3) the project is capable of achieving on an annual basis a 99 percent or greater reduction of sulfur dioxide emissions, a 95 percent or greater reduction in mercury emissions, and a nitrogen oxides emission rate of 0.05 pounds or less per million British thermal units; and 4) the project renders carbon dioxide capable of capture, sequestration, or abatement if any carbon dioxide is produced.

As required by THSC, §382.0566, the adopted rule specifies that the executive director shall complete the technical review of an ACEP permit application no later than nine months after the application is declared to be administratively complete, and shall issue a final order issuing or denying the permit no later than nine months after the application is declared to be technically complete. The rule allows an extension of up to three months if the number of pending applications will prevent the commission from meeting the specified deadlines without creating an extraordinary burden on the resources of the commission. The rule does not exempt ACEP permit applications from applicable requirements relating to contested case hearings.

SECTION DISCUSSION

§116.114. Application Review Schedule.

The commission is amending §116.114 to implement provisions of HB 3732 and THSC, §382.0566. The amendment revises §116.114(a) to add deadlines associated with the review of ACEP permit applications. These new deadlines only apply to the processing of permit applications for ACEP as defined in THSC, §382.003(1-a). However, the processing of ACEP permit applications remains subject to existing applicable requirements and deadlines specified elsewhere in §116.114, in cases where those

requirements or deadlines are more stringent. ACEP permit applications remain subject to applicable requirements relating to contested case hearings.

Section 116.114(a)(3)(A) states that the executive director shall complete the technical review of an ACEP permit application no later than nine months after the application is declared to be administratively complete. Section 116.114(a)(3)(B) states that the commission shall issue a final order issuing or denying the permit no later than nine months after the application is declared to be technically complete. The rule allows an extension of up to three months if the number of pending applications will prevent the commission from meeting the specified deadlines without creating an extraordinary burden on the resources of the commission.

Existing §116.114(a)(3), relating to refunds of permit fees, is renumbered as §116.114(a)(4).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule.” Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(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, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state. The rulemaking is not a major environmental rule because it is procedural

in nature. The rule does not prescribe control requirements or any other requirements that would normally be associated with a commission environmental rulemaking. House Bill 3732 and THSC, §382.0566, address processing ACEP applications in an expedited manner. The amendment to §116.114 merely implements the deadlines for TCEQ's review of ACEP applications. Further, the rule does not add any requirements that would 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.

In addition, a regulatory impact analysis is not required because the rule does not meet any of the four applicability criteria for requiring a regulatory impact analysis of a major environmental rule as defined in the Texas Government Code. Section 2001.0225 applies only to a major environmental rule, 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. This rulemaking does not exceed a standard set by federal law, and the adopted requirements are consistent with applicable federal standards. In addition, the adopted rule does not exceed an express requirement of state law and is not adopted solely under the general powers of the agency, but is specifically authorized by the provisions cited in the STATUTORY AUTHORITY section of this preamble. Finally, this rulemaking does not exceed a requirement of a delegation agreement or contract to implement a state and federal program.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the adopted rule is subject to Texas Government Code, Chapter 2007. The primary purpose of the rulemaking is to implement deadlines created by HB 3732 and THSC, §382.0566, relating to TCEQ's air permit review for ACEP applications so that the applications are processed in an expedited manner. This amendment does not affect private 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. Promulgation and enforcement of this rule is neither a statutory nor a constitutional taking because it does not affect private real property. Therefore, this rule does not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action 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 the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the CMP, 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 regulations of the Coastal Coordination Council and determined that the amendment is consistent with CMP goals and policies because the rulemaking is a procedural rule that will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive

effect on commission actions subject to the CMP; and promulgation and enforcement of the amendment will not violate or exceed any standards identified in the applicable CMP goals and policies. The adopted rule ensures that air permit applications for ACEP are reviewed by the TCEQ in an expedited manner. The adopted rule does not affect the technical criteria that are used to evaluate such permit applications and does not change applicable public participation requirements for the permit application. The adopted rule does not affect the type of emission control technology required by the permit and does not affect the authorized emission rates from permitted facilities. 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

The amendment relates to time frames and deadlines associated with the review of new source review permit applications. The adopted rule affects all sites equally and has no specific effect on sites subject to the Federal Operating Permits Program.

PUBLIC COMMENT

The proposed revisions were published in the September 7, 2007, issue of the *Texas Register*. A public hearing for this rulemaking was held on September 24, 2007, and the comment period closed on September 26, 2007. The commission received comments on the proposed rule from the City of Dallas, the City of Houston, the Clean Coal Technology Foundation of Texas (CCTFT), Jackson Walker L.L.P. on behalf of the Gulf Coast Lignite Coalition, the TCEQ Office of Public Interest Counsel (OPIC), the Texas Mining and Reclamation Association (TMRA), and the EPA Region 6.

RESPONSE TO COMMENTS

The Cities of Dallas and Houston indicated general support for HB 3732, but expressed concern that the emission specifications in the definition of ACEP, particularly the NO_X emission rate of 0.05 lb/MM BTU, may not be representative of the cleanest energy production possible. The City of Dallas and the City of Houston commented that several existing power plants meet or exceed the NO_X criteria, and recommended that any project certified under this program result in NO_X emissions below 0.05 lb/MM BTU.

The emission specifications in the definition of ACEP were established by HB 3732 and incorporated into THSC, §382.003, Definitions. Commission rules implementing HB 3732 must be consistent with the statutory definition of ACEP and the associated emission specifications. The commission is not changing the rule in response to this comment.

The Cities of Dallas and Houston expressed general concern about the air quality impacts associated with coal power plants.

The commission is required to adopt rules to implement HB 3732 and THSC, §382.0566. The commission does not have the authority to reject projects that meet the eligibility requirements of the legislation and associated statutes, regardless of the type of fuel used. The commission is not changing the rule in response to this comment.

CCTFT, TMRA, and Jackson Walker, L.L.P. expressed support for the rules as proposed.

The commission appreciates the support.

OPIC recommended requiring that the executive director directly refer all ACEP permit applications to the State Office of Administrative Hearings (SOAH). OPIC commented that this direct referral of all ACEP permit applications would be the most efficient method of ensuring that the public has the greatest amount of time to participate in the hearing process. CCTFT, TMRA, and Jackson Walker L.L.P. commented that the rule should not provide for the mandatory direct referral of ACEP permit applications to SOAH. Jackson Walker L.L.P. incorporated the comments submitted by CCTFT into its comments, and TMRA supported the comments submitted by CCTFT. CCTFT commented that neither the language nor the intent of HB 3732 provide a basis for such a direct referral to SOAH. CCTFT commented that such a direct referral would not be fully consistent with the public notice and participation process established by HB 801. CCTFT also commented that the authors of HB 3732 gave ample consideration to the timelines contained in the legislation. CCTFT stated that the introduced version of the bill required that the permit be issued or denied within 12 months of the date the executive director determined the application was administratively complete, and did not provide for any extension. CCTFT stated that the bill was later modified to extend the overall permitting timeline by six months, and include a provision for an additional three-month extension, which is in the adopted version. CCTFT commented that these changes to the bill were made after consultation with TCEQ staff and stakeholders from environmental groups to address their concerns that the initial timeline was too

short. CCTFT expressed confidence that the commission would be capable of processing ACEP permit applications within the 18-month timeline.

Existing rules at 30 TAC §55.210, Direct Referrals, already allow the executive director (or the permit applicant) to directly refer a permit application to SOAH where appropriate. House Bill 3732 did not specify any changes to existing rules or practices concerning direct referrals. Therefore, it does not appear necessary to address direct referrals in this rulemaking. The commission is not changing the rule in response to these comments.

OPIC recommended that the executive director require publication of a dual Notice of Application and Preliminary Decision (NAPD) and Notice of Contested Case Hearing within one week of determining that the application is technically complete. OPIC commented that the hearing should take place no later than 30 days from the date of publication of the NAPD.

The recommended change is not necessary, as the rule will not include the mandatory direct referral of ACEP permit applications to SOAH. In cases where a hearing request is received, the NAPD and Notice of Contested Case Hearing will be published according to the processes and deadlines specified in existing rules. The date of any hearing must be at least 30 days after publication of the newspaper hearing notice in order to comply with the provisions of 30 TAC §39.603(e).

OPIC recommended that the rule require the Administrative Law Judge(s) to issue a proposal for decision (PFD) on HB 3732 applications within one month, rather than the customary two months, from

the close of the record. OPIC stated that this would allow all parties more time to fully develop the record through discovery, the hearing on the merits, and closing briefing. OPIC also recommended that the rules require that SOAH issue the PFD no later than six weeks before the date when a final order from the commission is due.

Although the commission acknowledges that it would generally be desirable for the PFD to be issued more quickly for HB 3732 applications, the commission does not consider it appropriate to set formal deadlines for SOAH's process within Chapter 116. No changes were made in response to this comment.

The EPA indicated general support for the proposed amendment concerning the deadlines for ACEP permit applications.

The commission appreciates the support.

The EPA commented that, although the term ACEP is defined in the Texas Health and Safety Code, it would be helpful to include a definition of ACEP in the proposed rules.

The commission agrees that it would generally be preferable to include relevant definitions in commission rules. However, the commission did not propose to open the applicable definitions section of Chapter 116. The general practice is to include definitions applicable to Chapter 116 in Subchapter A. Therefore, the commission is not changing the rule in response to this comment.

The EPA commented that the current Texas SIP includes §116.114 as adopted by TCEQ on June 17, 1998, which was approved by the EPA on September 18, 2002. The EPA stated that subsequent revisions to §116.114 were submitted to the EPA as part of the October 25, 1999, and September 25, 2003, SIP submittals. The EPA commented that the proposed revision to §116.114 cannot be processed until the TCEQ has addressed the EPA's concerns with the October 25, 1999, SIP revision.

Commission staff is reviewing the EPA's concerns with the October 25, 1999, SIP revision as expressed in the EPA's August 14, 2006, letter. While this amendment adds language to §116.114 concerning the review of ACEP permit applications, this amendment does not change the existing rule language that was submitted to the EPA in previous SIP revisions. The commission is not changing the rule in response to this comment.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 1: PERMIT APPLICATION

§116.114

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's 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, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amended section is also adopted under §382.051, concerning Permitting Authority of Commission; Rules, that authorizes the commission to issue permits and adopt rules necessary for permits issued under THSC, Chapter 382; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0515, concerning Application for Permit, which authorizes the commission to require a permit application with plans and

specifications necessary for the commission to determine if the facility will comply with applicable state and federal regulations and the intent of the TCAA; §382.0517, concerning Determination of Administrative Completion of Application, which authorizes the commission to determine when an application is administratively complete; and §382.0518, concerning Preconstruction Permit, which requires persons planning the construction or modification of a facility to obtain a permit from the commission. The amended section is also adopted under House Bill 3732, passed by the 80th Legislature (2007) and THSC, §382.0566, Advanced Clean Energy Project Permitting Procedure, which specify certain deadlines for TCEQ's air permit review for ACEP applications.

The amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.0515, 382.0517, 382.0518, 382.0566, and House Bill 3732, passed by the 80th Legislature (2007).

§116.114. Application Review Schedule.

(a) Review schedule. The executive director shall review permit applications in accordance with the following.

(1) Notice of completion or deficiency. The executive director shall mail written notification informing the applicant that the application is complete or that it is deficient within 90 days of receipt of the application for a new permit, or amendment to a permit or special permit.

(A) If the application is deficient, the notification must state:

(i) the additional information required; and

(ii) the intent of the executive director to void the application if information for a complete application is not submitted.

(B) Additional information may be requested within 60 days of receipt of the information provided in response to the deficiency notification.

(2) Preliminary decision to approve or disapprove the application. The executive director shall conduct a technical review and send written notice to the applicant of the preliminary decision to approve or not approve the application within 180 days from receipt of a completed permit application or 150 days from receipt of a completed permit amendment. If the applicant has provided Notice of Receipt of Application and Intent to Obtain Permit public notification as required by the executive director under Chapter 39 of this title (relating to Public Notice), one of the following shall apply:

(A) if comments are received on the proposed facility and replied to by the executive director in accordance with §39.420 of this title (relating to Transmittal of the Executive

Director's Response to Comments and Decision) and §55.156 of this title (relating to Public Comment Processing); and

(B) if no requests for public hearing or public meeting on the proposed facility have been received or the application is otherwise exempt under §39.419(e) of this title (relating to Notice of Application and Preliminary Decision), the executive director shall send a copy of the Preliminary Decision to the applicant; or

(C) if Notice of Application and Preliminary Decision is required under §39.419(d) of this title (relating to Notice of Application and Preliminary Decision), the executive director shall authorize this notice and send copies to the applicant and all other persons are required under §39.602 of this title (relating to Mailed Notice).

(3) Review schedule for Advanced Clean Energy Projects. In addition to the applicable requirements and deadlines specified in subsections (a) - (c) of this section, the following deadlines apply to permit applications for advanced clean energy projects as defined in Texas Health and Safety Code, §382.003, Definitions:

(A) As authorized by federal law, not later than nine months after the executive director declares an application for a permit under this chapter for an advanced clean energy project to

be administratively complete, the executive director shall complete its technical review of the application.

(B) The commission shall issue a final order issuing or denying the permit not later than nine months after the executive director declares the application technically complete. The commission may extend this deadline up to three months if it determines that the number of complex pending applications for permits under this chapter will prevent the commission from meeting this deadline without creating an extraordinary burden on the resources of the commission.

(4) Refund of permit fee.

(A) If the time limits provided in this section to process an application are exceeded, the applicant may appeal in writing to the executive director for a refund of the permit fee.

(B) The permit fee shall be reimbursed if it is determined by the executive director that the specified period was exceeded without good cause, as provided in Texas Civil Statutes, Article 6252-13b.1, §3.

(b) Voiding of deficient application.

(1) An applicant shall make a good faith effort to submit, in a timely manner, adequate information which demonstrates that the requirements for obtaining a permit or permit amendment are met in response to any deficiency notification issued by the executive director under the provisions of this section, or Chapter 39 of this title (relating to Public Notice).

(2) If an applicant fails to make such good faith effort after two written notices of deficiency, the executive director shall void the application and notify the applicant of the voidance and the remaining deficiencies in the voided application. If a new application is submitted within six months of the voidance, it shall meet the requirements of §116.111 of this title (relating to General Application) but will be exempt from the requirements of §116.140 of this title (relating to Applicability).

(c) Notification of executive director's decision.

(1) Notification to applicant. The executive director or the chief clerk shall send to the applicant the decision to approve or not approve the application if:

(A) no timely requests for reconsideration, contested case hearing, or public meeting on the proposed facility have been received; or

(B) if hearing requests have been received and withdrawn before the executive director's Preliminary Decision; or

(C) the application is for any 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; and

(D) the applicant has satisfied all public notification requirements of Chapter 39 of this title.

(2) Notification to commenters. Except for initial issuance of voluntary emission reduction permits and electric generating facility permits, persons submitting written comments under Chapter 39 of this title shall be sent the executive director's final action and given an explanation of the opportunity to file a motion under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) at the same time that the applicant is notified. If the number of interested persons who have requested notification makes it impracticable for the commission to notify those persons by mail, the commission shall notify those persons by publication using the method prescribed by §382.031(a) of the Texas Health and Safety Code.

(3) Time limits. The executive director shall send notification of final action within:

(A) one year after receipt of a complete prevention of significant deterioration or nonattainment permit application, or a complete permit application for an action under Subchapter C of this chapter;

(B) 180 days of receipt of a completed permit or permit renewal application; or

(C) 150 days of receipt of a permit amendment or special permit amendment application.