

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §116.114.

If adopted, the proposed 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 PROPOSED 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 proposed 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 proposed 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 proposed rule does not exempt ACEP permit applications from applicable requirements relating to contested case hearings.

The commission specifically invites comment on whether or not the executive director should directly refer all ACEP air permit applications to the State Office of Administrative Hearings in order to ensure that hearings and permit issuance or denial can be completed within the deadlines specified in THSC, §382.0566.

SECTION DISCUSSION

§116.114. Application Review Schedule.

The commission proposes to amend §116.114 to implement provisions of HB 3732 and THSC, §382.0566. The proposed amendment would revise §116.114(a) to add deadlines associated with the

review of ACEP permit applications. These new deadlines would 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 would also be subject to existing applicable requirements and deadlines specified elsewhere in §116.114, in cases where those requirements or deadlines are more stringent than the proposed amendment. ACEP permit applications remain subject to applicable requirements relating to contested case hearings.

Proposed §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. Proposed §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 proposed 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 proposed to be renumbered as §116.114(a)(4).

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed

rule. The proposed rule implements legislative mandates regarding the agency's review of air permit applications for ACEP and streamline the process so that the agency could issue the permit within shorter legislated time frames. These shorter time frames will require the agency to prioritize ACEP permit applications and allocate existing staff resources to meet required deadlines. The State Office of Administrative Hearings may also be required to schedule ACEP permit hearings sooner in order to help the agency meet rule deadlines. The actual number and timing of ACEP permit applications TCEQ will receive is not known, but the volume is expected to be light (less than 3 per year). The effects most likely will not vary greatly over the next five years.

The proposed rule is required by HB 3732, passed by the 80th Legislature, Regular Session, which set the deadlines and directed TCEQ to adopt corresponding rules no later than January 1, 2008. The intent of HB 3732 and the associated rules is to provide an incentive to encourage the development of certain types of electric power projects that meet stringent emission limits. The proposed rule would establish deadlines for the agency's review of air permit applications for ACEP, in order to ensure that those permits are issued in an expedited manner. The rule would require that the executive director complete the technical review of an ACEP permit application within nine months of determining the application is administratively complete. The rule also requires the commission to issue a final order issuing or denying the permit within nine months of the date the executive director determines the application is technically complete. The commission has discretion to extend this deadline by up to three months, if meeting the deadline would create an extraordinary burden on commission resources.

It is possible that local governments may elect to initiate advanced clean energy projects, and could benefit from the shorter permit deadlines. The number of government entities who will elect to begin advanced clean energy projects is not known, but is expected to be less than three per year. The shorter permit deadlines in the proposed rule may allow government-owned or government-operated utilities to achieve a somewhat faster return on their investment in new power projects. Quantifying this benefit is very difficult, as it would depend heavily on circumstances unique to each individual project.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and the encouragement of permit applicants to use low-emission technology more stringent than otherwise required in electric power projects. Use of this technology is expected to result in cleaner air and greater protection of public health and safety.

The number of facilities or businesses that may elect to initiate ACEP projects is unknown, but is most likely less than three new units per year. The type of facilities that would benefit from the rule are new electric generating units that use coal, biomass, petroleum coke, solid waste, or fuel cells to make electricity, and meet the low-emission profile specified in HB 3732. The shorter permit deadlines in the proposed rule may allow a large business that owns or operates utilities to achieve a somewhat faster return on their investment in new power projects. Quantifying this benefit is very difficult, as it would depend heavily on circumstances unique to each individual project.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Small or micro-businesses are not likely to initiate large, advanced electric utility projects, and the expedited permit process for ACEPs is not expected to have an impact on them.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed 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 proposed 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 draft 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 proposed requirements are consistent with applicable federal standards. In addition, this proposal 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.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the proposed 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 proposed 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 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 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 proposed rule ensures that air permit applications for ACEP are reviewed by the TCEQ in an expedited manner. The proposed rule would not affect the technical criteria that are used to evaluate such permit applications and would not change applicable public participation requirements for the permit application. The proposed rule would not affect the type of emission control technology required by the permit and would not affect the authorized emission rates from permitted facilities.

The commission solicits comments on the consistency of the proposed rulemaking with the CMP during the public comment period.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

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

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on September 24, 2007, at 2:00 p.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle, in Building F, Room 2210. 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.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services, at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Kristin Smith, 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. Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>. All comments should reference Rule Project Number 2007-023-116-PR. The comment period closes

September 26, 2007. For further information, please contact Michael Wilhoit, Air Permits Division, (512) 239-1222.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 1: PERMIT APPLICATION

§116.114

STATUTORY AUTHORITY

The amendment is proposed 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 propose 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 proposed 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 proposed 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 proposed 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 proposed 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) [(3)] 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.