

The Texas Commission on Environmental Quality (TCEQ or commission) adopts an amendment to §116.315 *without changes* to the proposed text as published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9533) 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

The commission has adopted revisions to Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, §116.315, Permit Renewal Submittal, as a result of passage of Senate Bill 1673 (SB 1673), 80th Legislature, 2007. This legislation amended Texas Health and Safety Code (THSC), §382.055, Review and Renewal of Preconstruction Permit. SB 1673 allows the commission to process a renewal application at the same time as an amendment for a preconstruction permit, provided the amendment application is filed not more than three years before the date the permit is scheduled to expire and is subject to notice requirements under THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing. In order for the commission to process a renewal application concurrently with such an amendment application, the applicant must not object. The changes to THSC, §382.055 became effective May 9, 2007. Guidance documents will be updated to clarify that the notice must be clear that the actions include both the renewal and amendment and that both fees must be paid, even if the actions are processed concurrently.

SECTION DISCUSSION

§116.315. Permit Renewal Submittal.

The commission adopts the modification of this section to account for applications that can be submitted earlier than 18 months prior to the expiration of the permit. The commission adopts the addition of a description of the SB 1673 prerequisites for processing a renewal application concurrently with an amendment application. The commission also adopts the deletion of a reference to the May 1, 2004, effective date, as it is no longer needed.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the amendment does not meet the definition of a "major environmental rule" as defined in that statute. According to Texas Government Code, §2001.0225(g)(3), a "major environmental rule" is a rule which is specifically intended 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 intent of this rulemaking is to implement SB 1673, passed during the 80th Legislature, 2007. This legislation allows the commission to process a renewal application at the same time as an amendment provided the amendment application is filed not more than three years before the date the permit is scheduled to expire, is subject to notice requirements under THSC, §382.056, and the applicant does not object. In addition, the regulatory analysis requirements of Texas Government Code, §2001.0225, only apply 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. Specifically, the adoption will amend the commission rule regarding permit renewal application submittals that will allow renewal applications to be processed by the commission concurrently with amendment applications provided certain conditions are met. This adoption therefore does not exceed an express requirement of federal law. The amendment will implement changes to THSC, §382.055 as a result of passage of SB 1673 in the 80th Legislature, 2007. The amendment is needed to implement state law but does not exceed those new requirements. The rule does not involve a delegation agreement or contract between the state and federal government to implement a state and federal program. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.0518, 382.055, and 382.056.

The commission solicited comments on the draft regulatory impact analysis determination and no comments were received.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's

right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact assessment for the rule. Promulgation and enforcement of the rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rule also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the government action. Therefore, the rule will not cause a "taking," as defined under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. 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 rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission solicited comments on the consistency of this rulemaking, but no comments on the CMP

were received.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The amended sections are applicable requirements under the Federal Operating Permits Program, but no revisions to operating permits will be required as a result of this rulemaking.

PUBLIC COMMENT

The proposed revisions were published in the December 21, 2007, issue of the *Texas Register*. A public hearing on the proposal was held in Austin on January 29, 2008, at the TCEQ. No comments were received at the public hearing. The commission received written comments from the EPA during the public comment period, which closed on February 4, 2008.

EPA suggested modifications to the rules as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

The EPA commented that requirements relating to public notice and comment procedures for renewing and amending a permit concurrently must meet all federal requirements. It also noted that the more stringent of the renewal and amendment public notice procedures must be used. The EPA expressed concern that the public notice requirements should not be relaxed if a renewal and amendment is processed concurrently.

The requirements concerning the concurrent processing of renewals and amendments meet all

federal requirements and the associated public notice requirements have not been relaxed. In a concurrent review, the renewal and amendment applications could be noticed together and would require publication in a newspaper with at least a 30-day public comment period, which are required under federal rules. The purpose of this rulemaking is to implement the statutory change to THSC, §382.055, that establishes the timing of permit renewals and does not change public notice requirements or permit fees. No change has been made as a result of this comment.

The EPA commented that earlier versions of §116.315 have been submitted for SIP approval on September 4, 2002, and September 25, 2003, but have not yet been approved by the EPA. The EPA stated that other related pending reviews for SIP approval include revisions to §§116.310, 116.311, 116.312, 116.313, 116.314, and revisions to 30 TAC Chapter 39 submitted December 15, 1995; July 22, 1998; October 25, 1999; September 4, 2002; October 4, 2002; and September 25, 2003. The EPA commented that the revision to §116.315 cannot be processed until the EPA has approved the previously submitted SIP revisions.

The commission anticipates that this SIP revision can be processed simultaneously with previous revisions governing permit review and public notice. While this amendment adds language to §116.315 concerning the concurrent processing of renewals and amendments, this amendment does not change the intent of the existing rule language that was submitted to the EPA in previous SIP revisions. No change has been made as a result of this comment.

The EPA asked for clarification regarding public notice references and suggested that the current language does not clearly state what is required. EPA asked if THSC, §382.056, requirements are

implemented under Chapter 39. It also stated that if THSC, §382.056, requirements are implemented under Chapter 39, the concerns provided in a letter dated August 14, 2006, concerning public participation should be addressed.

Reference to THSC, §382.056, in amended §116.315 follows the text of SB 1673. This rulemaking provides an alternative means of submitting and reviewing renewal and amendment applications concurrently; however, it does not alter or eliminate the requirements for public notice as required in Chapter 39. The requirements in THSC, §382.056 are implemented under Chapter 39.

Commission staff is in the process of 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 addresses public participation, it does not change the existing rule language that was submitted to the EPA in previous SIP revisions. No change has been made as a result of this comment.

The EPA commented that §116.315(c) should further explain what an application and fee for renewals and amendments entails by including cross references to the appropriate regulatory requirements. EPA also stated that clarification was needed as to what fees would be incurred during concurrent renewal and amendment review. EPA also requested that the agency provide a statement of basis for the decision of which fee must be paid.

As stated in the previous response, the purpose of this rulemaking is to implement the statutory change to THSC, §382.055 that establishes the timing of permit renewals. Concurrent processing of a renewal and an amendment does not change the fee amount from what it would have been if they were processed separately, but the fees would be due when the applications are submitted. Since

one fee amount was not chosen over another, a statement of basis was not provided. No change has been made as a result of this comment.

The EPA discouraged the inclusion of §116.315(b) that granted executive discretion to allow a variance from the six-month renewal application deadline and asked for replicable provisions to determine when a variance would be allowed. EPA also requested clarification as to whether a timely submittal of a renewal application under §116.315(a) or (b) allows the permit to remain in effect in the event that the action on the renewal request is not completed prior to the expiration date.

The basis of the inclusion of §116.315(b) is not within the scope of this rulemaking. Variances are allowed in instances where the executive director did not send out a timely renewal notice. It is also possible for an applicant to request an extension. If the request was provided before the expiration date to allow for executive director approval, and if the executive director approves the request, a variance may be allowed. As long as the agency receives the renewal application before the expiration date, the application is considered timely and the applicant can continue to operate under the original permit until the permit is renewed. Issuance of the renewal does not necessarily have to occur before the expiration date in order for the permit to remain in effect. No change has been made as a result of this comment.

SUBCHAPTER D: PERMIT RENEWALS

§116.315

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC, and under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also adopted under THSC, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.0518, which authorizes the commission to issue permits for modification to an existing facility that may emit air contaminants; §382.055, which authorizes the commission to review and renew preconstruction permits according to a specific schedule; and §382.056, which authorizes the commission to require applicants for a permit amendment or permit renewal to publish notice of intent to obtain the authorization.

The amendment implements TWC, §5.103, THSC, §§382.011, 382.012, 382.017, 382.0518, 382.055, and 382.056, and SB 1673, 80th Legislature, Regular Session, 2007.

§116.315. Permit Renewal Submittal.

(a) With the exception of subsections (b) and (c) of this section, an application for renewal must be submitted at least six months, but no earlier than 18 months, prior to expiration of the permit or the permit will expire.

(b) With executive director approval, the application may be submitted before or after the time period specified in subsection (a) of this section.

(c) A renewal application with appropriate fee may be submitted at the same time as an amendment application to modify an existing facility as long as it is submitted not more than three years before the permit's expiration date and the amendment is subject to public notice requirements under Texas Health and Safety Code, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing.

(d) Any permit issued:

(1) before December 1, 1991, is subject for review 15 years after the date of issuance;

(2) on or after December 1, 1991, is subject for review every ten years after the date of issuance; or

(3) at non-federal sources on or after December 1, 1991, may, for cause, contain a provision requiring renewal between five and ten years.