

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §116.114 and §116.194.

Sections 116.114 and 116.194 will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

This rulemaking is one of several concurrently proposed to address deficiencies identified by EPA in its review of the commission's public participation rules for approval as a revision to the SIP. The proposed amendments to Chapter 116 would update a cross-reference, delete outdated references, and clarify the public notice requirement citations for plant-wide applicability limit (PAL) permit applications.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 39, Public Notice; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 60, Compliance History. This rulemaking is proposed to address deficiencies identified by EPA in its review of the commission's public participation rules for approval as a revision to the SIP, and additional background information for this rulemaking project is included in those preambles.

EPA REVIEW OF SUBMITTED RULES

On November 26, 2008, the EPA proposed simultaneous limited approval and limited disapproval of revisions to the applicable implementation plan for the State of Texas which relate to public participation for air quality permit applications for new and modified sources (*Federal Register* notice of November

26, 2008, hereinafter referred to as "Public Participation Notice"). In the Public Participation Notice, (73 *Federal Register* 72012) regarding the review of the commission's public participation rules, and in its September 23, 2009, notice (74 *Federal Register* 48474 - 48475) regarding the review of the commission's rules for the PAL permitting program, EPA commented that for PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 Code of Federal Regulations (CFR) §51.160 and §51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR §51.165(f)(5) and (11) and §51.166(w)(5) and (11). EPA stated that the commission's rules for PAL permit applications were deficient, specifically because the rules do not include a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR §51.165(f)(5) and (11) and §51.166(w)(5) and (11). EPA commented that the rule applicability section in §39.403 does not include PALs, despite the cross-reference to Chapter 39 in §116.194. EPA also commented that for PALs for existing major stationary sources, the commission's rules do not include a requirement that all material comments are addressed before taking final action on the permit, consistent with 40 CFR §51.166(w)(5). To ensure that the commission's rules include sufficient authority for PALs, the commission is proposing to amend §116.194. Concurrently, the commission is proposing new and amended rules in Chapters 39 and 55 that include the specific public participation requirements for applications for the establishment or renewal of, or an increase in, a PAL.

In the Public Participation Notice, EPA identified several rules in Chapter 116 for which it is proposing limited approval/limited disapproval. In two notices published on September 23, 2009, (74 *Federal Register* 48467, regarding New Source Review, and 74 *Federal Register* 48480, regarding Flexible

Permits) EPA proposes disapproval of §116.194 and §116.740, and proposed no action on §116.406. The commission is proposing to address EPA's review as follows. This rulemaking addresses the concerns expressed by EPA found in §116.114 and §116.194. The commission is not proposing to withdraw previously submitted amendments to §116.114; those remain pending with EPA and those changes, together with the proposed changes in this rulemaking will be subject to EPA review. The commission is not proposing to withdraw §116.194, but proposes to submit this currently proposed amendment to EPA for its review.

The text in existing §116.111 and §116.116 (although subsequently amended and submitted to EPA in prior rulemakings) refers to Chapter 39. The commission is addressing the concerns specified by EPA with the changes to Chapter 39 proposed in this rulemaking. These two sections refer only to Chapter 39 and not specific sections within that chapter. Therefore, the commission is not withdrawing any versions of these sections previously submitted to EPA, nor making any changes to those sections. Section 116.312 refers only to Chapter 39 and not specific sections within that chapter. Therefore, the commission is not withdrawing this section, nor proposing amendments to it.

Section 116.124, which has subsequently been repealed by the commission, concerns compliance history and is beyond the scope of this rulemaking. EPA proposed no action on §116.183, which was repealed and readopted by the commission as §116.406; this section addresses notice for hazardous air pollutant permits which implement Federal Clean Air Act (FCAA), §112(g), which is a process separate from the SIP process. Therefore, the commission is not proposing any action regarding §39.406 at this time. However, concurrently proposed rulemaking in Chapter 39 addresses the public notice requirements for this type of permit.

SECTION BY SECTION DISCUSSION

The commission proposes to amend §116.114(a)(2)(C) to update a cross-reference based on the proposed amendments to §39.419, Notice of Application and Preliminary Decision.

The commission also proposes to amend §116.114(c)(2) to delete the obsolete reference to initial issuance of voluntary emission reduction permits and electric generating facility permits. The deadline for submitting these types of permit applications was September 1, 2001 and September 1, 2002, respectively. There are no pending applications for these types of permits. In a concurrent rulemaking, the commission is proposing amendments to Chapter 39 that also acknowledge these now-outdated notice requirements.

The commission proposes to amend §116.194 to clarify the public notice requirement citations for PAL permit applications. The amendment clarifies, in proposed designated subsection (a), that the public notice requirements apply to applications for establishment or renewal of, or an increase in, a PAL permit. The remaining existing text is proposed for deletion, except for the last sentence which is proposed as designated subsection (b). Proposed subsection (b) provides that this section does not exempt an applicant for a new source review permit from the requirements of Chapter 116, Subchapter B, New Source Review Permits.

When the commission adopted §116.194, effective February 1, 2006, the public participation requirements for PALs were designated by reference in this section to various sections in Chapter 39. However, at the time §116.194 was adopted (2006), the commission did not amend Chapter 39 to include

any reference to PAL applications. Therefore, the commission is proposing this amendment to §116.194 as well as concurrently proposing amendments to Chapter 39 that ensure that PAL applications are subject to adequate public participation requirements. Specifically, those are publication of notice of the executive director's draft permit and air quality analysis, and providing the public an opportunity to comment on those. The commission is proposing these amendments to obtain SIP approval for its public participation requirements and process for the commission's new source review air quality permitting program. Additional background regarding the issues associated with the commission's rules for public notice for air quality permit applications is included in the proposed Chapter 39 preamble.

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 rules are in effect, no significant fiscal implications are anticipated for the agency. The proposed rules are not expected to have a fiscal impact on other units of state or local governments since they are administrative in nature and do not impose new requirements.

The EPA, in its review of the proposed SIP, expressed concerns regarding current notice and public meeting requirements found in Chapter 39. EPA requested the agency provide for additional notice and opportunity for public participation regarding certain air permits. The proposed rules amend Chapter 116 and are part of concurrent rulemakings for Chapters 39, 55, and 60. Fiscal impacts of rules proposed for Chapters 39, 55, and 60 can be found in separate fiscal notes for those chapters.

The proposed rules amend Chapter 116 to update references based on concurrent rulemaking proposed by the agency to amend Chapter 39 to address public participation for air quality permits. Specifically, the

proposed rules for Chapter 116 update a cross-reference, delete outdated references, and clarify the public notice and participation requirement citations for PAL permit applications. The proposed amendments to Chapter 116 are administrative in nature and do not impose any new requirements for public notice or public meetings. Nor do the proposed rules eliminate any public notice or meeting requirements. Therefore, the proposed rules are not expected to have a fiscal impact on other state agencies or local governments.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be consistency in state rules regarding requirements for public notice and public hearings as well as consistency with federal requirements.

The proposed rules for Chapter 116 update a cross-reference, delete outdated references, and clarify the public notice and participation requirement citations for PAL permit applications. The proposed amendments to Chapter 116 are administrative in nature and do not impose any new requirements for public notice or public meetings. Nor do the proposed rules eliminate any public notice or meeting requirements. Therefore, the proposed rules in Chapter 116 are not expected to have a fiscal impact on individuals or large businesses.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules are administrative in nature and will not have a fiscal impact on small

businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules comply with federal regulations and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

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 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 has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is 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 rulemaking is to clarify the public notice requirement citations for PAL permit applications, delete obsolete language and update a cross-reference to a rule in Chapter 39. In a concurrent rulemaking, the commission is proposing amendments to Chapter 39, which will necessitate amendments to these rules to ensure that the amended rules are correct. The

primary purpose of the proposed amendments is to address deficiencies in the public notice requirements of the rules as identified by the EPA in the Public Participation Notice. Correction of these deficiencies is necessary to ensure that the rules can be a federally approved part of the Texas SIP. The 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 because the rulemaking merely corrects the changed cross-reference.

As defined in Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to Chapter 39 were developed to correct deficiencies in the public notice requirements for air quality permit applications identified by EPA in the Public Participation Notice. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the FCAA, and authorized under THSC, §§382.002, 382.011, 382.012, 382.017, 382.0291, 382.040, 382.051, 382.0512, 382.0515, 382.0516, 382.0518, 382.055, and 382.056 and FCAA, 42 United States Code, §§7401 *et seq.*

Written comments on the draft regulatory impact analysis determination may be submitted to the contact

person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

DRAFT TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for this proposed rules in accordance with Texas Government Code, §2007.043. The following is that assessment. The proposed rules will clarify the public notice requirement citations for PAL permit applications, delete obsolete language, and update a cross-reference to a rule in Chapter 39. The proposed rule does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the rules are not subject to the Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

These amendments will not require any changes to outstanding federal operating permits.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 25, 2010 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members 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 Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Duron, 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/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-004-039-LS. The comment period closes February 16, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466 or Margaret Ligarde, Environmental Law Division, (512) 239-3426.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

§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 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 amendment 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; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §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; THSC, §382.051, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0518, which authorizes the commission to issue preconstruction permits; THSC, §382.055, which establishes the commission's authority to review and renew preconstruction permits; THSC, §382.056, which requires an applicant for a permit issued under THSC, §382.0518 to publish notice of intent to obtain a permit. The amendment is also proposed under THSC, §382.0291, concerning Public Hearing Procedures; THSC, 382.040, concerning Documents; Public Property; THSC, 382.0512,

concerning Modification of Existing Facility; THSC, 382.0515, concerning Application for Permit; THSC, 382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.0291, 382.040, 382.051, 382.0512, 382.0515, 382.0516, 382.0518, 382.055, and 382.056 and FCAA, 42 USC, §§7401 *et seq.*

§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(e) [§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] 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.

SUBCHAPTER C: PLANT-WIDE APPLICABILITY LIMITS

DIVISION 1: PLANT-WIDE APPLICABILITY LIMITS

§116.194

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 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 amendment 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; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §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; THSC, §382.051, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0518, which authorizes the commission to issue preconstruction permits; THSC, §382.055, which establishes the commission's authority to review and renew preconstruction permits; THSC, §382.056, which requires an applicant for a permit issued under §382.0518 to publish notice of intent to obtain a permit. The amendment is also proposed under THSC, §382.0291, concerning Public Hearing

Procedures; THSC, §382.040, concerning Documents; Public Property; THSC, §382.0512, concerning Modification of Existing Facility; THSC, §382.0515, concerning Application for Permit; THSC, §382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials. The amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.0291, 382.040, 382.051, 382.0512, 382.0515, 382.0516, 382.0518, 382.055, and 382.056, and FCAA, 42 USC, §§7401 *et seq.*

§116.194. Public Notice and Comment.

(a) Applications for establishment or renewal of, or an increase in, a plant-wide applicability limit permit under this division are subject to the notice and comment requirements in Chapter 39 of this title (relating to Public Notice). [Applications for initial issuance of plant-wide applicability limit permits under this division are subject only to §§39.401, 39.405, 39.407, 39.409, 39.411, 39.419, 39.420, and 39.601 - 39.605 of this title (relating to Purpose; General Notice Provisions; Mailing Lists; Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing; Text of Public Notice; Notice of Application and Preliminary Decision; Transmittal of the Executive Director's Response to Comments and Decision; Applicability; Mailed Notice; Newspaper

Notice; Sign-Posting; and Notice to Affected Agencies, respectively), except that any reference to requests for reconsideration or contested case hearings in §39.409 or §39.411 of this title shall not apply.]

(b) Nothing in this section exempts an applicant for a new source review permit from the requirements of Subchapter B of this chapter (relating to New Source Review Permits).