

The Texas Commission on Environmental Quality (commission or TCEQ) proposes amendments to §116.160.

These proposed amendments 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

On February 1, 2006, the TCEQ submitted amendments to 30 Texas Administrative Code (30 TAC) §116.160(a) and a new §116.160(c)(1) and (2), to the EPA as a SIP revision to the Texas prevention of significant deterioration (PSD) SIP. These amendments included the inadvertent removal of certain references to federal definitions and requirements regarding best available control technology (BACT) as it relates to PSD, and the permit review regarding PSD review for projects that become major stationary sources or major modifications solely because of a relaxation of an enforceable limitation on the source or modification's capacity to emit a pollutant. On September 23, 2009, the EPA published notice of the proposed disapproval of these revisions to the Texas PSD SIP (74 *Federal Register* 48467, September 23, 2009). In addition to the sections noted above, the EPA's September 23, 2009 notice included additional concerns regarding TCEQ's February 1, 2006, SIP submittal as well as a submittal of a SIP revision made by the TCEQ on June 10, 2005. These issues will be addressed in a subsequent rulemaking.

The EPA stated in the notice that the 2006 SIP revision submittal removed from 30 TAC §116.160(a) the incorporation by reference of the federal PSD definition of best available control technology (BACT) as defined in 40 Code of Federal Regulations (40 CFR) §52.21(b)(12) and that the currently approved PSD SIP requires that a state include this definition of BACT as part of its SIP. The EPA also noted that the

2006 submittal also removed the PSD SIP requirement at 40 CFR §52.21(r)(4) that had previously been incorporated by reference. The currently approved PSD SIP mandates this requirement. This provision specifies that if a project becomes a major stationary source or major modification solely because of a relaxation of an enforceable limitation on the source or modification's capacity to emit a pollutant, then that source or modification is subject to PSD requirements. Although these references are currently missing from 30 TAC § 116.160, in its permitting actions, the TCEQ does not circumvent Federal New Source Review (FNSR) requirements and does not allow a control technology review to be conducted that results in a technology that is less than BACT defined in federal rule. Additionally, TCEQ ensures that if a project becomes a major source through the relaxation of an enforceable limitation, PSD review is required.

The commission is also proposing to include the reference to 40 CFR 52.21(j) which implements the definition of BACT. Although this reference has not historically been included in the commission's rule regarding the applicable requirements for a PSD permit, this is proposed for addition because it complements the reinserted definition of BACT.

In an effort to ensure that TCEQ regulatory requirements regarding the PSD permitting program meets the requirements of the Federal Clean Air Act and are approvable into the SIP, the commission is proposing the following amendments to eliminate any deficiencies that would prevent approval. Because these amendments would reinstate PSD permit program requirements that were previously approved by EPA as part of the Texas SIP and because they incorporate by reference the federal rules, these amendments are at least as stringent as the FNSR revised base program. These amendments will not interfere with any applicable requirement concerning attainment of the national ambient air quality

standards, reasonable further progress, or any other applicable requirement under the Federal Clean Air Act, 42 USC, §§7401 *et seq.*

SECTION BY SECTION DISCUSSION

§116.160, Prevention of Significant Deterioration Requirements

The commission is proposing to amend §116.160(c)(1) by adding a reference to the federal definition of BACT located in 40 CFR §52.21(b)(12). The application of BACT is an integral part of air pollution control under the Federal Clean Air Act and a primary consideration during review of sources subject to FNSR by TCEQ staff. Although there is a definition of BACT in 30 TAC §116.10, the federal definition of BACT is necessary for the PSD permitting program and therefore must be included in the commission's rules for that program.

The commission is proposing to amend §116.160(c)(2) by adding references to two federal requirements related to the application of BACT to FNSR sources subject to PSD requirements. In addition to other references to federal regulations §116.160(c)(2)(A) now includes a reference to 40 CFR §52.21(j), which is the federal requirement to use control technology that is equivalent or more stringent than BACT. Although the EPA did not address this requirement in its September 23, 2009 notice of disapproval, the inclusion provides regulatory certainty that the federal definition of BACT applies to those facilities subject to PSD. Additionally, the reference to 40 CFR §52.21(k) previously in §116.160(c)(2)(B) has been incorporated into §116.160(c)(2)(A) and the section has been renumbered accordingly. New §116.160(c)(2)(C) references 40 CFR §52.21(r)(4), which is the federal requirement ensuring that sources or modifications which become major as a result of the relaxation of an enforceable limitation are subject to PSD requirements. Inclusion of a reference to this federal requirement will help ensure that the

TCEQ's regulation of these types of major stationary sources or modifications will be as stringent as the federal program.

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.

No fiscal implications are anticipated for other state agencies or local governments as a result of administration or enforcement of the proposed rules. The proposed rules restore certain references to federal definitions and requirements and provide consistency with actual practices of the agency when reviewing air permits.

The proposed rulemaking amends 30 Texas Administrative Code, Chapter 116 to include several references to federal definitions and requirements regarding FNSR and PSD that were inadvertently removed during a prior rulemaking. The references to 40 CFR §52.21(b)(12), the federal definition of BACT, and 40 CFR §52.21(r)(4), the federal requirement that ensures sources or modifications which become major as a result of the relaxation of an enforceable limitation are subject to PSD requirements, are requirements of the PSD state implementation plan. The reference to 40 CFR §52.21(j), the federal requirement to use control technology that is equivalent or more stringent than BACT, while not a requirement of the existing PSD SIP, provides regulatory certainty that the federal definition of BACT applies to those facilities subject to PSD.

The proposed rulemaking does not impose any new requirements and does not increase costs to any regulated entity. Although, the agency inadvertently removed requirements of the proposed rules in a

prior rulemaking, it continued to require all applicants to comply with BACT when conducting a control technology review. The agency also ensured that PSD reviews were completed as required if a project became a major source through the relaxation of an enforceable limitation. The proposed rules do not change current agency application of federal regulations; rather they provide clarification and ensure consistency with federal PSD SIP requirements. There will not be any fiscal impacts to state agencies and local governments as a result of the proposed rules.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be consistency with the federal permitting process for NSR and PSD and assurance that state regulation of major stationary sources or modifications will be as stringent as the federal program. The proposed rules will also remove any impediment to the inclusion of agency rules into the PSD SIP.

The proposed rules will not have any fiscal impact on individuals or large businesses. Although, the agency inadvertently removed requirements of the proposed rules in a prior rulemaking, it continued to require all applicants to comply with BACT when conducting a control technology review. The agency also ensured that PSD reviews were completed as required if a project became a major source through the relaxation of an enforceable limitation. The proposed rules do not change current agency application of federal regulations; rather they provide clarification and ensure consistency with federal PSD SIP requirements.

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 do not change current agency application of federal regulations; rather they provide clarification and ensure consistency with federal PSD SIP requirements.

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 are required to 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 reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action 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. Although the PSD permitting program is specifically

intended to protect the environment and reduce risks to human health from environmental exposure to air pollutants, the primary purpose of this rulemaking is to correct deficiencies in §116.160 as identified by the EPA. Specifically, those corrections are to add certain references to Federal definitions and requirements regarding best available control technology (BACT) as it relates to PSD, and the review regarding PSD review for projects that become major stationary sources or major modifications solely because of a relaxation of an enforceable limitation on the source or modification's capacity to emit a pollutant. Correction of these deficiencies is necessary to ensure that the rules can be a federally approved part of the Texas SIP. The Texas SIP already includes the requirements of 40 CFR 52.21(b)(12) and (r)(4), and although these requirements were omitted in the previous rulemaking, the TCEQ continued to implement them. As discussed elsewhere in this preamble, no fiscal implications are anticipated for other state agencies, local governments, individuals, or for large, small or micro-businesses as a result of administration or enforcement of the proposed rules. Therefore, these rules 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.

As defined in the 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 §116.160 were developed to correct deficiencies in commission's PSD

permitting program to ensure SIP approval by EPA and thus meet a requirement of federal law. 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 is authorized under THSC, §§382.011, 382.012, 382.017, 382.051, 382.0513, 382.0515 and 382.0518, and FCAA, 42 USC, §§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.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments to §116.160 amend the requirements for PSD permits. The primary purpose of the proposed rulemaking to correct deficiencies in §116.160 as identified by the EPA. Correction of these deficiencies is necessary to ensure that the rules can be approved by EPA as part of the Texas SIP. Promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed rules do 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 a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do partially fulfill a federal mandate under 42 USC, §7410. Consequently, the exemption that applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will 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 commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. 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 action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1), relating to Goals). The proposed amendments add references to federal regulations that the state has no authority to change. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e) (relating to Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program) the commission affirms that this rulemaking action is consistent with CMP goals and policies.

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

Chapter 116 is an applicable requirement of 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements. Additionally, sources subject to the adopted rules may become subject to the federal operating permit program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on February 22, 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 Jessica Rawlings, 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 2010-005-116-PR. The comment period closes March 1, 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 Blake Stewart, Air Permits Division, at (512) 239-6931.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 6: PREVENTION OF SIGNIFICANT DETERIORATION REVIEW

STATUTORY AUTHORITY

The amendments are 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 TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; 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 amendments are 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. The amendments are also proposed under 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, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0515, concerning Application for Permit, and THSC, §382.0518, which authorizes the commission to issue preconstruction permits. The amendments are 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 standards will be achieved and maintained within each air quality control region of the state.

The amended sections implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.0513, 382.0515 and 382.0518, and FCAA, 42 USC, §§7401 *et seq.*

§116.160. Prevention of Significant Deterioration Requirements.

(a) Each proposed new major source or major modification in an attainment or unclassifiable area shall comply with the requirements of this section. The owner or operator of a proposed new or modified facility that will be a new major stationary source for the prevention of significant deterioration air contaminant shall meet the additional requirements of subsection (c)(1) - (4) of this section.

(b) The *de minimis* threshold test (netting) is required for all modifications to existing major sources of federally regulated new source review pollutants, unless the proposed emissions increases associated with a project, without regard to decreases, are less than major modification thresholds for the pollutant identified in 40 Code of Federal Regulations (CFR) §52.21(b)(23).

(c) In applying the *de minimis* threshold test (netting), if the net emissions increases are greater than the major modification levels for the pollutant identified in 40 CFR 52.21(b)(23), the following requirements apply.

(1) In addition to those definitions in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) the following definitions from prevention of significant deterioration of air quality regulations promulgated by the United States Environmental Protection Agency (EPA) in 40 CFR §52.21 and the definitions for protection of visibility and promulgated in 40 CFR §51.301 as amended July 1, 1999, are incorporated by reference:

(A) 40 CFR ~~§51.21(b)(12) - (15)~~ §52.21(b)(12) - (15) [§52.21(b)(13) - (15)], concerning best available control technology, baseline concentrations, dates, and areas;

(B) 40 CFR §52.21(b)(19), concerning innovative control technology; and

(C) 40 CFR §52.21(b)(24) - (28), concerning federal land manager, terrain, and Indian reservations/governing bodies.

(2) The following requirements from prevention of significant deterioration of air quality regulations promulgated by the EPA in 40 CFR §52.21 are hereby incorporated by reference:

(A) 40 CFR §52.21(c) - (k) [§52.21(c) - (i)], concerning increments, ambient air ceilings, restrictions on area classifications, exclusions from increment consumption, redesignation, stack heights, [and] exemptions, control technology review, and source impact analysis;

[B) 40 CFR §52.21(k), concerning source impact analysis;]

(B) [(C)] 40 CFR §52.21(m) - (p), concerning air quality analysis, source information, additional impact analysis, and sources impacting federal Class I areas; and

(C) 40 CFR §52.21(r)(4), concerning relaxation of an enforceable limitation;

(D) 40 CFR §52.21(v), concerning innovative technology.

(3) The term "facility" shall replace the words "emissions unit" in the referenced sections of the CFR.

(4) The term "executive director" shall replace the word "administrator" in the referenced sections of the CFR except in 40 CFR §52.21(g) and (v).

(d) All estimates of ambient concentrations required under this subsection shall be based on the applicable air quality models and modeling procedures specified in the EPA Guideline on Air Quality Models, as amended, or models and modeling procedures currently approved by the EPA for use in the state program, and other specific provisions made in the prevention of significant deterioration state implementation plan. If the air quality impact model approved by the EPA or specified in the guideline is inappropriate, the model may be modified or another model substituted on a case-by-case basis, or a generic basis for the state program, where appropriate. Such a change shall be subject to notice and opportunity for public hearing and written approval of the administrator of the EPA.