

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the repeal of §116.118 *without changes* as published in the October 15, 2010, issue of the *Texas Register* (35 TexReg 9215).

Background and Factual Basis for the Adopted Repeal

On April 14, 2010, the United States Environmental Protection Agency (EPA) published notice in the *Federal Register* (75 Federal Register 19468) of its disapproval of the TCEQ rules that implement the state's qualified facilities program, established by the Legislature in 1995, as a state implementation plan revision. On September 15, 2010, the commission adopted amendments to Chapter 116 (TCEQ Rule Project Number 2010-006-116-PR; October 1, 2010, issue of the *Texas Register* (35 TexReg 8944)), to address the issues identified by EPA which resulted in the disapproval of the qualified facility program rules.

Section 116.118 addresses facilities that were exempted from obtaining an authorization to emit air contaminants under Texas Health and Safety Code (THSC), §382.0518(g), and how these facilities could meet the requirements of the qualified facility rules.

These facilities are also known as grandfathered facilities. In 2001, the legislature added THSC, §382.05181, which requires any facility constructed prior to 1971 to either obtain or apply for an authorization to emit contaminants by March 1, 2007, or March 1, 2008, depending on its location, or cease emitting air contaminants. During the public

comment period on Rule Project Number 2010-006-116-PR, EPA also noted that the application of §116.118 appeared to be limited to grandfathered facilities. The commission agreed and decided that §116.118 had no further application and should be repealed. The section could not be repealed at the September 15, 2010, adoption of Rule Project Number 2010-006-116-PR because it was noticed for amendment only in the publication of the rule proposal in the April 16, 2010, issue of the *Texas Register* (35 TexReg 2978). The commission is now taking action to repeal §116.118.

Section Discussion

The commission adopts the repeal of §116.118, Pre-change Qualification, based on the reasoning in Background and Factual Basis for the Proposed Repeal.

Final Regulatory Impact Analysis Determination

The commission reviewed the repeal in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the repeal does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

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 or a sector of the state. The specific intent of this repeal is to remove an obsolete regulation that has no further application to the air permitting program of the commission. The repeal is not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with federal standards and will not adversely affect 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.

Additionally, the repeal does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §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.

The repeal will remove a requirement from the air permitting rules that no longer has any applicability to the air permitting program. The repeal does not exceed a requirement of a delegation agreement or a contract between state and federal government if this rulemaking is adopted. The repeal was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act (TCAA)), and the Texas Water Code, which are cited in the Statutory Authority section of this rulemaking, including THSC, §382.003(9) and §382.0518.

Therefore, this repeal is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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 analysis for the repeal under the Texas Government Code, §2007.043. The primary purpose of this repeal is to remove an obsolete regulation that has no further application to the air permitting program of the commission. The repeal will not create any additional burden on private real property. The repeal 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 repeal 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 governmental action. Therefore, the repeal will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this repeal 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 the 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 repeal is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The repeal will benefit the environment by removing a potentially confusing regulation to help ensure that all facilities emitting air contaminants have an authorization under the TCAA. The CMP policy applicable to this repeal 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), the commission affirms that this action is consistent with CMP goals and policies.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 116 is an applicable requirement under 30 TAC Chapter 122, Federal Operating

Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, include any changes made using the amended Chapter 116 requirements into their operating permit.

Public Comment

The commission scheduled a public hearing on this proposal in Austin on November 8, 2010. The executive director's staff was present for the hearing, but there were no attendees. The commission received no comments on the proposal during the public comment period, which closed on November 15, 2010.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

[§116.118]

Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0511, concerning Permit Consolidation and Amendment, which allows the commission to combine permits; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in

determining a facility modification; §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified; and §382.05181, concerning Permit Required, which requires grandfathered facilities to obtain an air quality permit.

The adopted repeal implements THSC, §§5.103, 5.105, 382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0512, 382.0518, and 382.05181.