

The Texas Commission on Environmental Quality (TCEQ or commission) proposes the repeal of §116.118.

BACKGROUND AND FACTUAL BASIS FOR THE PROPOSED 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 Texas Legislature in 1995, as a state implementation plan (SIP) revision. On September 15, 2010, the commission adopted amendments to Chapter 116 (TCEQ Rule Project No. 2010-006-116-PR) to address the issues identified by the 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 amended THSC, Chapter 382 to require 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 No. 2010-006-116-PR, the 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 The commission agreed and decided that §116.118 had no further application and should be repealed. The section could not be repealed at the September 15, 2010, adoption of Rule Project No. 2010-006-116-PR because it was noticed for amendment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

§116.118, Pre-Change Qualification

The commission proposes the repeal of §116.118, based on the reasoning in the BACKGROUND AND FACTUAL BASIS FOR THE PROPOSED REPEAL.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed repeal is in effect, no fiscal implications are anticipated for the agency or any other unit of state or local government as a result of administration or enforcement of the proposed repeal.

The proposed repeal would remove §116.118 from TAC. This section, which applies to grandfathered facilities, became obsolete as of March 2008, as all the grandfathered facilities had obtained permits by that time. No fiscal implications are anticipated for the agency or any other unit of state or local government as a result of the repeal.

PUBLIC BENEFIT AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed repeal is in effect, the anticipated public benefit will be a more efficient air permitting program as a result of the removal of obsolete regulations.

The proposed repeal is administrative in nature and is not anticipated to impose any additional costs or to result in cost savings for businesses or individuals.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed repeal. The proposed repeal is administrative in nature and will not result in any additional costs or cost savings for facility owners or operators.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed the proposed repeal and determined that a small business regulatory flexibility analysis is not required because the repeal would remove an obsolete regulation and would not adversely affect a small or micro-business in a material way for the first five years the proposed repeal is in effect. The proposed repeal is administrative in nature and does not impose any additional costs on facility owners or operators.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT 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 the proposed repeal is to remove an obsolete regulation that has no further application to the air permitting program of the commission. As discussed in the FISCAL NOTE portion of this preamble, the proposed repeal is not anticipated to add any significant additional costs to affected individuals or businesses beyond what is already required to comply with these federal standards on 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 proposed repeal will remove a requirement from the air permitting rules that no longer has any applicability to the air permitting program. The proposed 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 proposed repeal is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). Comments on this draft determination may be submitted to

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

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 proposed repeal under the Texas Government Code, §2007.043. The primary purpose of the proposed repeal is to remove an obsolete regulation that has no further application to the air permitting program of the commission. The proposed repeal will not create any additional burden on private real property. The proposed 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 proposed 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 proposed 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 proposed 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(l)). The proposed rulemaking 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 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), the commission affirms that this action is consistent with CMP goals and policies. Written comments on the consistency of the proposed repeal 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 under 30 TAC Chapter 122, Federal Operating Permits Program. If the proposed repeal is adopted, 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.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on November 8, 2010, at 10:00 a. m. in Building B, Room 201A 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 Devon Ryan, 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 2010-052-116-PR. The comment period closes on November 15, 2010. Copies of the proposed repeal 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 Mr. Beecher Cameron, Air Permits Division, at (512) 239-1495.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

[\$116.118]

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code, §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 Texas Water Code; and under Texas Health and Safety Code, §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 proposed under Texas Health and Safety Code, §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; and §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified.

The proposed repeal implements Texas Water Code, §5.103 and §5.105 and Texas Health and Safety Code, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0512, and 382.0518.

[\$116.118. Pre-change Qualification.]

[(a) If either of the following conditions exists, it will be necessary to establish that a facility is a qualified facility before a physical or operational change may be made under the notification procedure of §116.117 of this title (relating to Documentation and Notification of Changes to Qualified Facilities):]

[(1) the facility is a qualified facility on the basis of best available control technology and the requirement for the facility type has not been previously established by the executive director; or]

[(2) the facility does not have allowable emissions established for an air contaminant relevant to the change in a maximum allowable emissions rate table, PI-8 form, or PI-E form.]

[(b) The pre-change qualification shall be made by submitting a PI-E form to the commission's New Source Review Permits Division. The facility shall be qualified in accordance with the information contained in the PI-E form after receipt of written notification from the

commission that there are no objections, or 45 days after the PI-E form is received by the commission, whichever occurs first. The pre-change qualification may be submitted at the same time as a pre-change notification under §116.117(b) of this title or at any other time prior to making a change to a qualified facility.]