

The Texas Commission on Environmental Quality (TCEQ, agency, commission) adopts the amendment to §55.201 *without change* to the proposed text as published in the November 8, 2013, issue of the *Texas Register* (38 TexReg 7860), and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

In *Massachusetts v. EPA* (549 U.S. 497 (2007)) the Supreme Court of the United States ruled that greenhouse gases (GHGs) fit within the Federal Clean Air Act (FCAA or Act) definition of air pollutant. This ruling gave United States Environmental Protection Agency (EPA) the authority to regulate GHGs from new motor vehicles and engines if EPA made a finding under FCAA, §202(a) that six key GHGs taken in combination endanger both public health and welfare, and that combined emissions of GHGs from new motor vehicles and engines contribute to pollution that endangers public health and welfare. EPA issued its "Endangerment Finding" for GHGs On December 15, 2009 (Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, Final Rule, as published in the December 15, 2009, issue of the *Federal Register* (74 FR 66496)). Based on the Endangerment Finding, EPA subsequently adopted new emissions standards for motor vehicles (the "Tailpipe Rule" as published in the May 7, 2010, issue of the *Federal Register* (75 FR 25324)). The rule established standards for light-duty motor vehicles to improve fuel economy thereby reducing emissions of GHGs. The standards were effective January 2, 2011. EPA also reconsidered its interpretation of the timing of applicability of Prevention of Significant Deterioration (PSD) under the FCAA (the "Timing

Rule" as published in the April 2, 2010, issue of the *Federal Register* (75 FR 17004)). EPA's interpretation of the FCAA is that PSD requirements for stationary sources of GHGs take effect when the first national rule subjects GHGs to regulation under the Act. EPA determined that once GHGs were actually being controlled under any part of the Act they were subject to regulation under the PSD program. Specifically, EPA took the position that beginning on January 2, 2011, GHG control requirements would be required under the PSD and Title V permitting programs because national standards for GHGs under the Tailpipe Rule were effective on January 2, 2011.

EPA's regulation of GHGs under the FCAA presented substantial difficulties for the EPA and states, particularly with regard to the PSD program. For instance, the most common of the GHGs, carbon dioxide (CO₂), is emitted in quantities that dwarf the Act's major source thresholds for program applicability. As a result, under EPA's Timing Rule, PSD requirements could have expanded from approximately 500 issued permits annually to more than 81,000 nationwide, as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514, 31537 and 31538). To avoid this result, EPA excluded much of this new construction activity from the PSD program by altering the Act's statutory emission rate applicability thresholds for GHGs. This "Tailoring Rule," as published in the June 3, 2010, issue of the *Federal Register* (75 FR 31514) newly defined the statutory term "subject to regulation" and established higher GHGs emission thresholds for applicability of PSD and Title V permitting than specified in the FCAA. The Tailoring Rule also phased in

permitting requirements in a multi-stepped process.

Before the *Massachusetts* decision in 2007, EPA took the position that GHGs are not regulated under the FCAA, and GHGs unquestionably were not regulated when EPA approved Texas' State Implementation Plan (SIP) in 1992. Texas has had an approved SIP since 1972, as published in the May 31, 1972, issue of the *Federal Register* (37 FR 10842). In 1983, Texas was delegated authority to implement the PSD program, as published in the February 9, 1983, issue of the *Federal Register* (48 FR 6023). Following this delegation, Texas submitted several SIP revisions to enable it to administer the PSD program (collectively the "PSD SIP submission"). EPA approved Texas' PSD SIP in 1992, granting the state full authority to implement the PSD program, as published in the June 24, 1992, issue of the *Federal Register* (57 FR 28093).

The Texas PSD SIP submission and approval proceedings produced a well-developed record on how Texas would address the applicability of newly-regulated pollutants under the PSD program. During the SIP submission process, Texas consistently explained to EPA that the PSD provisions in the SIP are not prospective rulemaking, and do not incorporate future EPA interpretations of the Act or its regulations.

EPA's GHGs regulations created practical difficulties about how EPA could apply its Tailoring Rule in states with approved SIPs. In August 2010, Texas advised EPA that it

could not retroactively reinterpret its SIP to cover GHGs, which were not regulated at the time Texas' SIP was approved in 1992 and were, in fact, a composite pollutant defined for the first time in the Tailoring Rule. Texas also explained that the PSD program only encompassed National Ambient Air Quality Standard (NAAQS) pollutants, but confirmed as a regulatory matter that the approved PSD program encompasses all federally regulated new source review (NSR) pollutants, including any pollutant that otherwise is subject to regulation under the FCAA, as stated in 30 TAC §116.12(14)(D).

Following promulgation of the Tailoring Rule, EPA issued a proposed "Finding of Substantial Inadequacy and SIP Call," as published in the September 2, 2010, issue of the *Federal Register* (75 FR 53892). This action proposed finding the SIPs of 13 states, including Texas', "substantially inadequate" because these SIPs did not apply PSD requirements to GHGs-emitting sources. EPA proposed to require these states (through their SIP-approved PSD programs) to regulate GHGs as defined in the Tailoring Rule. EPA also proposed a Federal Implementation Plan (FIP) that would apply specifically to states that did not or could not agree to reinterpret their SIPs to impose the Tailoring Rule and did not meet SIP submission deadlines. EPA finalized its GHG SIP Call in the December 12, 2010, issue of the *Federal Register* (75 FR 77698) and required Texas to submit revisions to its SIP by December 1, 2011.

EPA published an interim final rule partially disapproving Texas' SIP; imposing the GHGs

FIP effective as of its date of publication, as published in the December 30, 2010, issue of the *Federal Register* (75 FR 82430). EPA stated that FCAA, §110(k)(6) authorized it to change its previous approval of Texas' PSD SIP into a partial approval and partial disapproval. EPA's basis was that it had erroneously approved Texas' PSD SIP submission because the SIP did not appropriately address the applicability of newly-regulated pollutants to the PSD program in the future. EPA further stated that its action was independent of the GHG SIP Call because that action was aimed at a narrower issue of applicability to GHGs, whereas its decision retroactively disapproving Texas' PSD SIP submission was addressed to Texas' purported failure to address, or assure the legal authority for, application of PSD to all pollutants newly subject to regulation. EPA published the final rule retroactively disapproving Texas' PSD SIP in part and promulgating the FIP as published in the May 3, 2011, issue of the *Federal Register* (76 FR 25178).

The effect of EPA's FIP is that major source preconstruction permitting authority is divided between two authorities - EPA for GHGs and the state of Texas for all other pollutants. Currently, major construction projects and expansions in Texas that require PSD permits must file applications with both EPA Region 6 (for GHGs) and TCEQ (for all non-GHG pollutants).

House Bill (HB) 788, 83rd Legislature, 2013, added new Texas Health and Safety Code

(THSC), §382.05102. This new section grants TCEQ authority to authorize emissions of GHGs consistent with THSC, §382.051, to the extent required under federal law. THSC, §382.05102 directs the commission to adopt implementing rules, including a procedure to transition GHG PSD applications currently under EPA review to the TCEQ. Upon adoption, the rules must be submitted to EPA for review and approval into the Texas SIP. THSC, §382.05102 excludes permitting processes for GHGs from the contested case hearing procedures in THSC, Chapter 382; Texas Water Code, Chapter 5; and Texas Government Code, Chapter 2001. THSC, §382.05102 also requires that the commission repeal the rules adopted under this authority and submit a SIP revision to EPA, if (at a future date) emissions of GHGs are no longer required to be authorized under federal law.

The commission initiated this rulemaking to fulfill the directive from the legislature. The legislature found that "in the interest of the continued vitality and economic prosperity of the state, the Texas Commission on Environmental Quality, because of its technical expertise and experience in processing air quality permit applications, is the preferred authority for emissions of {GHGs}."

Texas has challenged in federal court EPA's GHG regulations as well as EPA's SIP Call and FIP. Implementation of HB 788 through this rulemaking is not adverse to Texas' claims in its ongoing challenges to EPA's actions regarding GHGs generally or relating to the SIP. The commission's action to conduct rulemaking for submittal and approval by EPA is

consistent with Texas' position that state law does not give EPA the authority to automatically change state regulations.

Concurrently with this rulemaking, the commission is adopting new and amended rules to 30 TAC Chapters 39 (Public Notice), 101 (General Air Quality Rules), 106 (Permits by Rule), 116 (Control of Air Pollution by Permits for New Construction or Modification), and 122 (Federal Operating Permits Program) to implement HB 788. Except where specifically noted, all adopted changes to Chapters 39, 55, 101, 106, 116, and 122 are necessary to achieve the goal of implementation of HB 788, obtaining SIP approval of certain rules, and rescission of the FIP.

Specific Changes to Chapters 39 and 55

The commission adopts changes to two chapters regarding public participation. The adopted amendments to Chapters 39 and 55 are distinguishable from current public participation rules and the Texas SIP. First, GHG PSD permit applications are not subject to an opportunity to request a contested case hearing or reconsideration of the executive director's decision. Second, based on EPA's current interpretation of its PSD rules, no air quality analysis is required for GHG permits. Therefore, when no such analysis is required, none will be prepared by the commission and available for public comment.

HB 788 specifically excludes GHG PSD permit applications from the requirements relating

to a contested case hearing. Requests for reconsideration were added by HB 801 (76th Legislature, 1999) as an alternative to the opportunity to request a contested case hearing. However, this remedy is not independent of the right to request a contested case hearing. Absent a right to request a contested case hearing, there is no independent right to request reconsideration of the executive director's decision. The commission interprets HB 788 to require that all other HB 801 requirements, discussed later in this preamble, apply to GHG PSD permit applications.

In addition, although HB 788 does not specify that GHG PSD permit applications are exempt from requests for the commission to reconsider the executive director's preliminary decision, the legislative history of the bill provides that the intent of HB 788 is to shorten the time to obtain a permit by simplifying the permit process. Requests for reconsideration and contested case hearing are interim administrative remedies which add time to the process, and are not part of EPA's procedural mechanisms.

The majority of the existing public participation and notice requirements in Chapters 39 and 55, which implement both federal and state law, will apply to the GHG PSD applications. Many of these requirements were clarified in or added by HB 801. The Chapter 39 amendments will be submitted as revisions to the SIP, but the Chapter 55 amendment is not required for the SIP. The public participation and notice requirements include newspaper publication of Notice of Receipt of Application and Intent to Obtain

Permit (NORI) and Notice of Application and Preliminary Decision (NAPD), each with particular language; sign posting; alternate language newspaper publication and sign posting (where applicable); placement of a copy of the application, the executive director's preliminary decision (draft permit), and preliminary determination summary in a public place for review and copying; providing opportunity for and mandatory attendance at a public meeting (which is mandatory when requested by a member of the public for any PSD permit application or by a legislator who represents the general area where the facility is or is proposed to be located); and notice to certain affected agencies and representatives, including EPA Region 6, local air pollution control agencies with jurisdiction, the chief executives of the city and county where the source is or would be located, and any State or Federal Land Manager, and Indian Governing Body. In addition, the executive director's draft permit and preliminary decision, and preliminary determination summary are available electronically on the commission's Web site at the time of publication of the NAPD. Finally, the executive director is required to respond to comments submitted by preparing a Response to Comments, which is mailed to commenters and posted on the commission's Web site, with the executive director's decision. Some of these requirements and procedures were changed in rulemaking and described in the preamble adopted June 2, 2010. Background information regarding the commission's public participation rules for PSD permits can be found in the preamble adopting new and amended rules as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198 - 5255, 5274 - 5277, and 5344 - 5348).

Any GHG PSD permit issued by the executive director will be subject to the Motion to Overturn Process in §50.139, or, if issued by the commission, will be subject to a Motion for Rehearing. Both of these administrative remedies are subject to appeal to Texas District Court for persons who participated in the steps of the administrative process by submitting comments and filing the appropriate challenge with the commission. As discussed in the preamble for the most recent rule amendments regarding public participation for air quality permit applications, as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198), access to judicial review for air quality permits is governed by THSC, §382.032. Generally, a person must comply with the requirement to exhaust the available administrative remedies prior to filing suit in district court. In addition, EPA has approved the Texas Title V Operating Permit Program, which required the submission of a Texas Attorney General opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution. The Attorney General Opinion specifically states that "{a}ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution." The state statutory authority cited in support of the Texas Title V Operating Permit Program includes THSC, §382.032, which is the underlying authority for the appeal of Texas' air quality permit actions, including the PSD permitting program. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with Article III of the United

States Constitution is also applicable for every action of the commission subject to the Texas Clean Air Act (TCAA), including PSD permit decisions.

Section Discussion

The adopted amendment to §55.201(i)(3)(C) provides that an application for an air quality permit under Chapter 116, Subchapter B, Division 6 that would authorize only emissions of GHGs (as defined in adopted amendments to 30 TAC §101.1) is a type of application that is not subject to contested case hearing. This amendment is consistent with HB 788 and the corresponding statute in THSC, §382.05102(d). Existing subparagraph (C) is re-lettered as subparagraph (D).

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking 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 rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by amending §55.201 to add an exemption from requests for contested case hearing for applications for GHG PSD permits.

Additionally, even if the rule met the definition of a major environmental rule, the rulemaking 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 adopted amendment 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 TCAA), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble, and is specifically required by state law. The specific intent of this rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by amending §55.201 to add an

exemption from requests for contested case hearing for applications for GHG PSD permits. Further, the amendment does not exceed a standard set by federal law or 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. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

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 Texas Constitution §17 or §19, Article I; 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 adopted rulemaking under Texas Government Code, §2007.043. The primary purpose of this rulemaking, as discussed elsewhere in this preamble, is to implement HB 788 by amending the rule to add an exemption from requests for contested case hearing for applications for GHG PSD permits.

The adopted rule will not create any additional burden on private real property. 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 rulemaking 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 rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking 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 the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. 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 rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Advisory Committee and determined that the rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking 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 adopted rule updates a procedural requirement that governs the submittal of air quality GHG PSD permit applications. The CMP policy applicable to this rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR) to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received on the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

The adopted rule will not require any changes to outstanding federal operating permits.

Public Comment

The commission held a public hearing on December 5, 2013. The public comment period ended on December 9, 2013. The commission received comments from Air Alliance Houston (AAH); Association of Electric Companies of Texas, Inc (AECT); C3 Petrochemicals (C3P); Calpine Corporation (Calpine); Environment Texas; Gas Processors Association (GPA); Golden Pass Products LLC (Golden Pass); Golden Spread Electric Cooperative, Inc. (GSEC); House Bill 788 Working Group (HB788WG); Jackson Walker L.L.P.; Lone Star Chapter of the Sierra Club (Sierra Club); Natgasoline, LLC; Occidental Chemical Corporation (OCC); OCI Beaumont, LLC; Pioneer Natural Resources (Pioneer); Public Citizen; State Representative Lon Burnam; Sustainable Energy and Economic Development Coalition (SEED); Texas Chemical Council (TCC); Texas Combined Heat and Power Initiative (TXCHPI); Texas Industry Project (TIP); Texas Oil and Gas Association (TXOGA); Texas Pipeline Association (TPA); Texas Solid Waste Association of North America (TxSWANA); Weaver Boos Consultants, LLC (Weaver); and Zephyr Environmental Corporation (Zephyr). This comprehensive list includes all of the commenters for all of the chapters of this concurrent rulemaking project. The individual comments are addressed in the Response to Comment section of the appropriate chapter. Eighteen of the commenters supported the rulemaking or portions of the rulemaking, six

commenters opposed portions of the rulemaking, and 18 commenters suggested changes.

Response to Comments

Comment

GPA and TPA commented in support of §55.201(i)(3)(C), which provides there is no right to a contested case hearing on a GHG PSD application. GPA commented that it is concerned that a request for a contested case hearing could delay the issuance of a permit. GPA and TPA urged the TCEQ to make clear in the rules that the executive director may issue a GHG PSD permit even if a request for a contested case hearing was filed. TPA suggested that a request for a contested case hearing be considered a comment on the application, and the executive director could state in his response to comments that a contested case hearing is not provided for under the law.

Response

HB 788, codified as THSC, §382.05102, states that the GHG PSD processes are not subject to the requirements related to a contested case hearing, which are otherwise applicable to PSD permit applications. The commission agrees that the executive director may issue a GHG PSD permit even if a request for contested case hearing is filed for that application. Generally, the executive director's response to comment for applications that are subject to a public comment process but without a statutory right for a hearing will include the

request as a comment and provide the statutory citation as part of the response.

If an applicant files a request for a GHG PSD permit as part of an application that includes other case by case authorization requests and a hearing request is received on the consolidated application, the commission will be required to consider the hearing request for the non-GHG portion of the application and, if granted, the issues for the contested case. The consolidated permit document cannot be issued until the resolution of the remainder of the permits that would be included in the consolidated permit document, and construction cannot commence until all authorizations are issued.

The executive director is still in the process of implementation activities, including preparing a guidance document and updating notice forms, and as part of that activity is considering whether applicants may file consolidated applications. The executive director is also considering whether providing notice of an application for a GHG PSD permit may be consolidated and published with notice for other associated case-by-case NSR permit requests included in the same application. No change has been made to the rule in response to these comments.

Comment

TPA commented that the general provision regarding the location of a public meeting in §55.154(b) should apply to GHG PSD applications. TPA commented that §55.154(b) provides that public meetings may be held in the county where the facility is located or proposed to be located, but the proposed new or amended sections in Chapter 39 do not contain any specific provision about the location of public meetings for GHG PSD applications. TPA commented that the project's home county is the most logical place to hold public meetings and neither the public nor the applicant should have any objection to holding the meeting in the county where the project is contemplated. TPA requests that the agency clarify its intent regarding locations of public meetings for GHG PSD applications.

Response

No change has been made to the rules in Chapter 39 or Chapter 55 as part of this rulemaking in response to this comment. The location of a public meeting for all PSD applications, including GHG PSD applications, is governed by existing §55.154(b), which is not open as part of this rulemaking.

Comment

TPA requested clarification on the applicability of §55.154(c)(1) to GHG PSD applications regarding when a public meeting will be granted. TPA commented that §55.154(c)(1) requires that a public meeting be held if (among other things) the executive director

determines that there is a substantial or significant degree of public interest in a permit application, which is consistent with EPA's practice. TPA also commented that in addition to EPA, Oklahoma and Arkansas retain regulatory discretion regarding when a public meeting will be held, based on level of public interest. TPA suggested that TCEQ clarify that it retains some discretion in determining whether or not to grant a request for a public meeting.

Response

TCEQ rules, including §55.154, provide that a public meeting on a PSD application will be held if requested by any interested person. Although §55.154(c)(1) provides that a meeting will be held if the executive director determines that there is a substantial or significant degree of public interest in a permit application, §55.154(c)(3), which specifically concerns PSD applications, does not include the discretionary provisions found in §55.154(c)(1).

EPA's authority regarding holding public hearings and the public participation rules for the permits it issues are found in 40 CFR Part 124; these rules are not applicable to SIP-approved states such as Texas. Further, the Arkansas rules cited in the comment do not apply to PSD permits and as such are not part of the Arkansas SIP. No change has been made to the rule in

response to this comment.*Comment*

GPA and TPA commented that the proposed language in §39.411(e)(15) should be revised to limit the ability to request a public meeting to "interested persons." They commented that current language in §39.411(e)(5), (f)(8)(D) and (f)(9)(B) and §55.154(c)(3) reference "interested persons" and it is inconsistent for new language in §39.411(e)(15) to reference "any person." TPA commented that the change is needed to maintain consistency and to prevent persons located in areas geographically distant from the project at issue from being granted a public meeting, based on the claim that GHG emissions may have a global impact. GPA commented that the proposed language to allow "any person" goes beyond the federal requirements in 40 CFR §51.166(q).

Response

Although the commission does not find that the exclusion of the word "interested" results in a rule that exceeds federal requirements, the commission agrees that the rule as proposed be amended to provide that interested persons may request a public meeting and adopts this change to ensure consistency with existing rule language. However, persons located in areas geographically distant from the project at issue can request a public meeting for GHG PSD applications. Specifically, the commission's rule

regarding public meetings, §55.154, which is not currently open for public comment, provides that a meeting will be held regarding PSD applications if requested by any interested person, and that rule is part of the Texas SIP. Section 55.154(c)(1) provides that a meeting will be held if the executive director determines that there is a substantial or significant degree of public interest in a permit application; however, §55.154(c)(3), which specifically concerns PSD applications, does not include the discretionary provisions found in §55.154(c)(1).

As stated in the adoption preamble in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198), the addition of §55.154(c)(3) was in response to EPA's concerns that for a new or modified source subject to PSD or nonattainment requirements, the rules do not require the TCEQ to provide an opportunity for any interested person to give oral comments on PSD and nonattainment air quality draft permits. The provision in §55.154 that provides the executive director with discretion to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application is not consistent with the federal requirements for PSD applications. Under the Texas rule, for non-PSD applications the decision to grant a public meeting is within the executive director's discretion and must be based upon substantial or significant public

interest. In contrast, the rules adopted by EPA for PSD applications provide for the opportunity of interested persons to request a public hearing and public notice of that opportunity. The TCEQ's public meetings are the same type of proceeding as EPA's public hearings.

Comment

Sierra Club commented that HB 788 does not allow a contested case hearing on GHG PSD permit applications, and hoped TCEQ would take seriously its commitment to assess GHG PSD applications, especially the Best Available Control Technology (BACT) portion, and allow public input on the application.

Response

Except for the opportunity to request a contested case hearing, the public participation components of GHG PSD permitting are the same as other PSD permit applications, and thus there are opportunities for the public to provide comment on both the application and the executive director's draft permit. The executive director is required by §55.152 to respond to all relevant and material, or otherwise significant public comment in a formal Response to Comment document, which includes responding to comments regarding BACT. No change has been made to the rule in response to this comment.

Comment

TCC and TIP commented in general support of the proposed revisions in Chapters 39 and 55. However, TCC encouraged TCEQ to clarify by rule or preamble language that testimony and evidence produced for a contested case hearing on a PSD non-GHG permit application associated with the project requiring a GHG-PSD permit are limited to non-GHGs and shall not include consideration of GHGs. TCC and TIP requested that it be further clarified that a contested case hearing on a non-GHG application should not be used as a vehicle to litigate such GHG authorizations.

TXOGA suggested adding clarifying language to the preamble for Chapter 39 to limit collateral presentation of GHGs at contested case hearings. TXOGA requested TCEQ clarify that testimony and evidence presented in PSD non-GHG permit applications subject to a contested case hearing are limited to non-GHG pollutants and shall not include consideration of GHG.

Response

The commission appreciates the support, and agrees that testimony and evidence produced for a contested case hearing regarding applications for permits other than for a GHG PSD permit, but which concern the same project requiring a GHG PSD permit, are limited to non-GHGs and shall not include consideration of the GHG application or any GHG draft permit. In addition, a

contested case hearing on a non-GHG application shall not be used as a vehicle to litigate the GHG application or to allow a collateral attack on the GHG draft permit. No change has been made to the rule in response to these comments.

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR CONTESTED
CASE HEARING**

§55.201

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendment is also adopted 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; 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; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or

modifications to existing facilities that may emit air contaminants; THSC, §382.05102, which relates to the permitting authority of the commission for greenhouse gas emissions THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under THSC, §382.0518 to publish notice of intent to obtain a permit. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendment is also adopted under Federal Clean Air Act, 42 United States Code, §§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 adopted amendment implements House Bill 788 (83rd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05102, 382.0515, 382.0518, and 382.056; and Texas Government Code, §2001.004 and §2001.006.

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, and may not be based on an issue that was raised solely in a public comment withdrawn by

the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

(e) Any person, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title (relating to Definitions), may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title, who was provided notice as required

under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program);

(C) a permit issued under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions); or

(D) amendment, modification, or renewal of an air 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. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(a)(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

(6) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine From Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(7) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

(8) an application for a pre-injection unit registration under §331.17 of this title (relating to Pre-Injection Units Registration);

(9) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(11) an application for a production area authorization that is submitted after September 1, 2007, unless the application for the production area authorization seeks:

(A) an amendment to a restoration table value in accordance with the requirements of §331.107(g) of this title (relating to Restoration);

(B) the initial establishment of monitoring wells for any area covered by the authorization, including the location, number, depth, spacing, and design of the monitoring wells, unless the executive director uses the recommendations of an independent third-party expert as provided in §331.108 of this title (relating to Independent Third-Party Experts); or

(C) an amendment to the type or amount of financial assurance required for aquifer restoration, or by Texas Water Code, §27.073, to assure that there are sufficient funds available to the state to utilize a third-party contractor for aquifer restoration or plugging of abandoned wells in the area. Adjustments solely associated with the annual inflation rate adjustment required under §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates), or for adjustments due to decrease in the

cost estimate for plugging and abandonment of wells when plugging and abandonment has been approved by the executive director in accordance with §331.144 of this title (relating to Approval of Plugging and Abandonment) are not considered an amendment to the type or amount of financial assurance required for aquifer restoration or well plugging and abandonment.