

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** January 24, 2014

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2013-1939-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 116, Control of Air Pollution by Permits for New Construction or
Modification
Flexible Permits State Implementation Plan (SIP) Conformity Rulemaking
Rule Project No. 2014-001-116-AI

Background and reason(s) for the rulemaking:

The Texas Flexible Permit Program (FPP) rules (Chapter 116, §116.13 and Subchapter G, Flexible Permits) first became effective on December 8, 1994. The FPP rules created a new type of minor New Source Review (NSR) permit called a flexible permit, as an alternative to traditional preconstruction permits under Chapter 116, Subchapter B, New Source Review Permits. Flexible permits were designed to exchange flexibility for emission reductions with the final goal being a well-controlled facility. The environmental benefits of the FPP included the permitting of grandfathered facilities and substantial emission reductions from the installation of controls. The FPP rules were first submitted to the United States Environmental Protection Agency (EPA) as a proposed SIP revision in 1994, and subsequent rule amendments were submitted several times between 1998 and 2003.

EPA published final notice of disapproval of the FPP in the *Federal Register* on July 15, 2010 (75 FR 41311). EPA's disapproval alleged that the FPP rules were not adequately enforceable and did not contain sufficient safeguards to ensure compliance with federal major source permitting regulations such as Prevention of Significant Deterioration (PSD) and Nonattainment NSR (NNSR). In response to EPA's disapproval, TCEQ adopted revised FPP rules on December 14, 2010, with changes intended to address EPA's alleged deficiencies. The disapproval was challenged by the State of Texas and others, and on August 13, 2012, the United States Court of Appeals for the 5th Circuit held that EPA's disapproval did not withstand Federal Administrative Procedure Act review. The court vacated EPA's disapproval and remanded the matter for EPA's further consideration. EPA did not appeal the decision, and subsequent negotiations between EPA and TCEQ identified revisions to the FPP rules which would be acceptable to both parties and result in an approvable program.

On September 24, 2013, the TCEQ adopted a SIP revision to the minor NSR FPP, consisting of the resubmittal of rules which were adopted in 1994 - 2003, the withdrawal of certain rules that are not required by the Federal Clean Air Act (FCAA), and the submittal of specific portions of the 2010 amendments adopted by the commission on December 14,

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2010. This submittal was transmitted to EPA on October 21, 2013, and EPA has verbally indicated that it will propose a conditional approval of the submittal.

The condition to be satisfied is that TCEQ subsequently submit amended rules that are properly structured according to the rulemaking requirements of the Texas Administrative Procedure Act and the rules for the Texas Administrative Code, including retaining certain specific portions of the 2010 rule amendments. EPA is expected to give TCEQ a deadline of one year from EPA's proposed approval to submit the amended rules as a SIP revision.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The rulemaking would repeal portions of rule language adopted in 2010 that are no longer necessary given the opinion issued by the Fifth Circuit. The rule language proposed for deletion primarily relates to monitoring, recordkeeping, reporting, and applicability of major NSR (federal PSD and NNSR) requirements. Select portions of the 2010 rules which EPA identified as necessary for SIP approval would remain. The rulemaking would also make certain other non-substantive changes to the FPP rules. Once submitted to EPA, this rulemaking is expected to result in the approval of the FPP as a Texas minor NSR permitting program.

B.) Scope required by federal regulations or state statutes:

This rulemaking is not specifically required by federal regulations or state statutes but is necessary for SIP approval of the FPP rules.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

Texas Health and Safety Code (THSC), §382.002, Policy and Purpose; THSC, §382.003, Definitions; THSC, §382.011, General Powers and Duties; THSC, §382.012, State Air Control Plan; THSC, §382.017, Rules; THSC, §382.051, Permitting Authority of Commission; Rules; THSC, §381.0511, Permit Consolidation and Amendment; THSC, §382.0512, Modification of Existing Facility; THSC, §382.0513, Permit Conditions; THSC, §382.0514, Sampling, Monitoring, and Certification; THSC, §382.0515, Application for Permit; THSC, §382.0517, Determination of Administrative Completion of Application; and THSC, §382.0518, Preconstruction Permit; Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy; and Title I of the FCAA, 42 United States Code, §§7401 *et seq.*

Effect on the:

A.) Regulated community:

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Resolution of this long-standing matter will provide necessary certainty with regard to what is part of the approved SIP, and is expected to lead to full approval of TCEQ's FPP by EPA. This program provides greater operational flexibility for permitted facilities, while ensuring that appropriate pollution controls are applied and that human health is protected. Participation in the FPP is voluntary.

B.) Public:

The proposed rulemaking will have no direct effect on the public. The rulemaking will provide greater certainty with regard to what is part of the approved SIP.

C.) Agency programs:

The proposed rulemaking would have no significant effect on agency programs.

Stakeholder meetings:

No stakeholder meetings have been held. A public hearing on the proposed rules is scheduled for March 27, 2014, and comments will be accepted during a 30-day public comment period.

Potential controversial concerns and legislative interest:

Flexible permits have been a controversial issue in the past; however, the executive director is not aware of any significant new or remaining controversy that would be raised with this proposed rulemaking. Major issues have already been addressed through negotiations between EPA, TCEQ, and lead petitioners.

Will this rulemaking affect any current policies or require development of new policies? No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If this rulemaking does not go forward or if it is not timely submitted to EPA, the FPP will not become a SIP-approved program. There are no practical alternatives to rulemaking to resolve this issue.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: February 12, 2014

Anticipated *Texas Register* publication date: February 28, 2014

Anticipated public hearing date (if any): March 18, 2014

Anticipated public comment period: February 14, 2014 - March 24, 2014

Anticipated adoption date: July 2, 2014

Agency contacts:

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Attachments

Copy of Commission Order from September 24, 2013 Agenda

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Tucker Royall
John Bentley
Office of General Counsel
Michael Wilhoit
Patricia Duón