Background and reason(s) for the rulemaking:
House Bill (HB) 2726, 86th Texas Legislature, 2019, revised Texas Health and Safety Code (THSC), §382.004, Construction While Permit Amendment Application Pending. The revised statute allows an applicant for a permit amendment to begin construction on the project after the executive director has issued a draft permit including the permit amendment. Traditionally, an applicant would not be able to commence construction until the final permit amendment has been issued. The statute does not authorize any construction which is prohibited by federal law, and the construction is done at the applicant’s own risk. Rulemaking is necessary to make commission air permitting rules consistent with the provisions of HB 2726 and THSC, §382.004.

Scope of the rulemaking:

A.) Summary of what the rulemaking would do:
The rulemaking would amend Chapter 116 to provide the framework and associated conditions to support the pre-permit construction allowed by THSC, §382.004. New §116.118 would contain provisions establishing the applicability and scope of the rules, and various restrictions and limitations. Certain other existing sections in Chapter 116 which address construction or modifications would be revised to add cross references to new §116.118.

B.) Scope required by federal regulations or state statutes:
Proposed new §116.118 would allow an applicant for a permit amendment to begin construction once the draft permit is issued, as provided for under THSC, §382.004. Proposed §116.118 would also include various conditions and limitations from the statute, such as a prohibition on pre-permit construction for certain concrete batch plants; rule language to reflect the statutory requirement that the construction is at the applicant’s own risk; and rule language to reflect the statutory requirement that the commission shall evaluate the permit application without considering construction initiated under this rule.

THSC, §382.004 specifies that pre-permit construction is only allowed "to the extent permissible under federal law," and certain restrictions in proposed §116.118 relate to permit actions which, under federal law, are not eligible for pre-permit construction. Specifically, the proposed rules exclude projects which trigger federal Prevention of
Significant Deterioration permitting, Nonattainment Review permitting, and case-by-case
Maximum Achievable Control Technology determinations. These proposed conditions are
included for consistency with federal law and to ensure the rules meet United States
Environmental Protection Agency (EPA) criteria for approvability as a state
implementation plan (SIP) revision.

C.) Additional staff recommendations that are not required by federal rule or state
statute:
None.

Statutory authority:
Texas Water Code (TWC), §5.013, General Jurisdiction of Commission;
TWC, §5.102, General Powers;
TWC, §5.103, Rules;
TWC, §5.105, General Policy;
THSC, §382.002, Policy and Purpose;
THSC, §382.004, Construction While Permit Amendment Application Pending;
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;
THSC, §382.0518, Preconstruction Permit; and
THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing.

Effect on the:

A.) Regulated community:
Applicants for an air permit amendment would have more flexibility when modifying an
existing facility. The option to begin construction before the final permit amendment is
issued would tend to allow projects to be completed and begin operation sooner.
However, if an applicant elects to begin construction early and the final permit contains
changes, the applicant may incur additional costs to retrofit or modify the facilities so
they meet all conditions of the final permit.

B.) Public:
The public would be largely unaffected. Any project covered by the statute and rule must
still comply with all applicable requirements relating to pollution control technology,
protection of public health, emissions monitoring, and demonstration of compliance. All
existing rules for public notice and public comment would remain in effect.

C.) Agency programs:
The effect on agency programs is expected to be negligible. A small amount of internal
training may be necessary to familiarize staff with the changes.

Stakeholder meetings:
The commission has not held any stakeholder meetings related to this rulemaking;
however, a rule public hearing would be held in Austin during the comment period.
Potential controversial concerns and legislative interest:
There may be some legislative interest in this rulemaking as it is related to the implementation of HB 2726.

Would 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, commission rules would not be consistent or compatible with the revised statutory provisions of THSC, §382.004 relating to construction while a permit amendment is pending. This could result in confusion for the regulated community and the public. There are no practical alternatives to rulemaking.

Key points in the proposal rulemaking schedule:
- Anticipated proposal date: January 29, 2020
- Anticipated Texas Register publication date: February 14, 2020
- Anticipated public hearing date (if any): March 12, 2020
- Anticipated public comment period: February 14, 2020 - March 17, 2020
- Anticipated adoption date: July 15, 2020

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Attachments:
HB 2726

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