The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§116.110, 116.116, 116.710, and 116.721; and new §116.118.

If adopted, the new and amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

**Background and Summary of the Factual Basis for the Proposed Rules**

The proposed rulemaking revises Chapter 116 to implement provisions of House Bill (HB) 2726, 86th Texas Legislature, 2019. This legislation revised Texas Health and Safety Code (THSC), §382.004, Construction While Permit Application Pending, to allow an applicant for a permit amendment to begin construction after the executive director has issued a draft permit including the permit amendment. Traditionally, the permit applicant would have to wait until the final permit is issued before commencing construction. The decision to begin construction is at the applicant’s own risk, and the statute does not allow the commission to consider construction commenced under THSC, §382.004 as a factor when determining whether to issue the amendment sought by the applicant. In addition, the statute does not allow for any construction which is prohibited by federal law. HB 2726 also added a restriction to THSC, §382.004 which prohibits the use of this option for early construction at concrete batch plants located within 880 yards of a property used as a residence.
As revised by HB 2726, THSC, §382.004 allows a person who submits a permit amendment application to begin construction after the executive director has issued a draft permit including the permit amendment. In accordance with THSC, §382.056(f), the executive director must conduct a technical review of and issue a preliminary decision on a permit application. During the technical review of a permit amendment application, the executive director's staff reviews the application to determine whether it satisfies state and federal regulatory requirements. The permit reviewer evaluates the emission sources and proposed emission rates and confirms that the applicant has proposed air pollution controls which represent, at a minimum, best available control technology (BACT). The permit reviewer also reviews the proposed emissions to verify that public health will be protected and that applicable air quality standards (such as National Ambient Air Quality Standards or NAAQS) will be met. The applicant’s air pollution control review, along with the permit reviewer's air pollution control evaluation and final recommendation provide a record that demonstrates that the operation of a proposed facility or related source will not cause or contribute to a condition of air pollution and will comply with all applicable federal regulations and state rules. Once the technical review is complete, by rule (30 TAC §39.419) the executive director files the preliminary decision and draft permit with the commission's chief clerk with instructions for the applicant to publish a Notice of Application and Preliminary Decision (NAPD) in the same newspaper that published the Notice of Receipt of Application and Intent to Obtain a Permit. By allowing
construction to begin only after the technical review of the application is complete and the draft permit has been issued, the proposed rulemaking ensures that critical components of the permit review, including the determination of BACT, the review of applicable state distance limitations, and the protectiveness review to evaluate health effects and compliance with applicable air quality standards, have been completed.

In addition to the specific requirements of the legislation and statute, the commission proposes certain amendments to Chapter 116 which are necessary for the proposed rulemaking to obtain approval from the EPA as a revision to the Texas SIP. The commission’s new source review (NSR) permitting rules for both minor and major sources are approved by the EPA into the SIP. State NSR programs approved by the EPA generally provide for preconstruction authorization in order to meet requirements of 40 Code of Federal Regulations (CFR) Part 51. However, states are given substantial latitude in crafting minor source preconstruction permitting programs that are also established under state law, such as is the case for Texas. Major NSR (both Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR)) rules in Chapter 116 are approved by the EPA as meeting the requirements of the Federal Clean Air Act (FCAA) and federal regulations. The EPA has approved other states’ rules allowing for commencement of construction prior to permit issuance where those rules applied only to minor sources and specifically excluded major NSR sources and other federally authorized sources. (See for example Mississippi’s rules approved July 10, 2006, 71 FR 38773.) The additional proposed amendments exclude certain permit
actions from the pre-permit construction rules because it is not "permissible under federal law" and are discussed in more detail in the Section by Section Discussion portion of this preamble.

The proposed rulemaking also includes minor revisions to certain other rule sections in Chapter 116 to add cross-references to the proposed new §116.118 pre-permit construction rules where necessary or appropriate.

Certain rule sections in Chapter 116, Subchapter H relating to grandfathered facilities which would otherwise be affected by the pre-permit construction provisions of THSC, §382.004 are not proposed for revision in this action because those sections are planned to be repealed in a separate rulemaking action (Rule Project Number 2020-001-116-AI) to implement the findings of a rules review conducted pursuant to Texas Government Code, §2001.039.

Section by Section Discussion

The commission proposes to make various stylistic changes, such as grammatical or reference corrections. These changes are non-substantive and are not specifically discussed in this preamble.

§116.110, Applicability

The commission proposes to amend §116.110(a). The proposed revision would add a
reference to proposed new §116.118 which implements HB 2726 and THSC, §382.004. The proposed change is necessary because the current rule language in §116.110(a) does not reflect the option under THSC, §382.004 to begin construction when the draft permit is issued.

§116.116, Changes to Facilities

The commission proposes to amend §116.116(b)(1) and (2). The proposed revisions would add a reference to proposed new §116.118 which implements HB 2726 and THSC, §382.004. The proposed change is necessary because the current rule language in §116.116(b)(1) and (2) does not reflect the option under THSC, §382.004 to begin construction when the draft permit is issued.

The commission also proposes to amend §116.116(e)(3) and (f), by replacing the term "notwithstanding" with the phrase "regardless of." This proposed change is intended to improve readability of the rule through the use of plain language.

§116.118, Construction While Permit Amendment Application Pending

The commission proposes new §116.118, which contains the technical and administrative requirements which are required for permit applicants seeking to begin construction under THSC, §382.004.

Proposed new §116.118(a) contains conditions relating to the purpose and
applicability of the section, and certain exclusions. Proposed new §116.118(a)(1) explains that an applicant for a permit amendment may begin construction, at their own risk, after the executive director has completed the technical review and issued a draft permit. For purposes of clarification, a draft permit is deemed to be issued on the date when the TCEQ Chief Clerk mails the preliminary decision and the NAPD, as required by §39.419.

Proposed new §116.118(a)(2) codifies the statutory requirement in THSC, §382.004(c) which excludes certain concrete batch plant facilities from being eligible for pre-permit construction. Specifically, any concrete batch plant facility located within 880 yards of a property that is used as a residence is not eligible to begin construction under THSC, §382.004 or proposed new §116.118.

Proposed new §116.118(a)(3) specifies that projects which trigger federal PSD or federal NNSR permitting are not eligible for pre-permit construction under proposed new §116.118. THSC, §382.004 only authorizes construction to the extent permissible under federal law, and federal regulations governing the PSD and NNSR programs do not allow construction to begin before the permit is issued. These conditions relating to permitting of major sources and major modifications are necessary for the proposed rulemaking to be approved by the EPA as a revision to the Texas SIP.

Proposed new §116.118(a)(4) specifies that this section does not apply to the
amendment of a Plant-wide Applicability Limit (PAL) issued under Chapter 116, Subchapter C (Plant-wide Applicability Limits). A PAL is not a substitute for, or an exemption from, preconstruction NSR requirements of Chapter 116, Subchapter B (New Source Review Permits) or Subchapter G (Flexible Permits). A PAL establishes a pollutant-specific annual emissions level below which new and modified facilities will not be subject to major NSR for that pollutant. The commission’s PAL rules are approved as part of the SIP to meet federal PAL requirements.

Proposed new §116.118(a)(5) specifies that projects which trigger requirements for a case-by-case determination of maximum achievable control technology under FCAA, §112(g) are not eligible for pre-permit construction under proposed new §116.118. THSC, §382.004 only authorizes construction to the extent permissible under federal law, and federal regulations governing the permitting of major sources of hazardous air pollutants do not allow construction to begin before the permit is issued. This condition is necessary for the proposed rulemaking to be approved by the EPA as a revision to the Texas SIP.

Proposed new §116.118(a)(6) specifies that qualified facility changes implemented under §116.116(e) are not covered by the proposed pre-permit construction provisions of proposed new §116.118. Qualified facility changes under §116.116(e) were authorized by Senate Bill 1126, 74th Texas Legislature, 1995, as a streamlined method for qualifying facilities to make limited changes without applying for a permit or
permit amendment. Although qualified facility changes under §116.116(e) and pre-permit construction under proposed new §116.118 are both streamlined methods to authorize changes to a facility, the underlying requirements and documentation are different. Therefore, it is administratively and functionally necessary to structure them as separate processes. Typically, a change which would require a traditional permit amendment would not meet the criteria to be considered a qualified facility change under §116.116(e), but there may be exceptions. If a permit holder is planning a change which could meet the requirements for a qualified facility change under §116.116(e) and also potentially qualify for pre-permit construction under proposed new §116.118, the permit holder will need to consider which streamlined option better meets their business needs.

Proposed new §116.118(a)(7) specifies that requests, claims, registrations, or applications for a standard permit under Chapter 116, Subchapter F (Standard Permits) or a permit by rule (PBR) under 30 TAC Chapter 106 (Permits by Rule) are not eligible for pre-permit construction under proposed new §116.118. Standard permits and permits by rule already provide a highly streamlined mechanism to authorize facilities and changes to facilities. In addition, if a PBR or standard permit is used to authorize a change at an existing permitted facility, that change is not considered a permit amendment and is not within the scope of THSC, §382.004. Therefore, the commission proposes this restriction to make it clear that the pre-permit construction provisions of proposed new §116.118 do not apply to claims, applications, or registrations for a
Proposed new §116.118(a)(8) specifies that proposed §116.118 does not relieve or exempt the applicant or project from any other applicable state or federal requirements; including, but not limited to, requirements for public notice and participation; federal applicability; emission control technology; and distance limitations.

Proposed new §116.118(b) specifies that applicants seeking to use the pre-permit construction provisions of proposed §116.118 must comply with the public notice requirements of Chapter 39, as is required for all permit amendments.

Proposed new §116.118(c)(1) states that projects which meet the criteria for pre-permit construction are still prohibited from commencing operation until the final permit amendment has been issued. Although THSC, §382.004 allows for construction in certain circumstances, it does not authorize operation of the facility and does not supersede existing requirements (such as THSC, §382.0518(f) and 30 TAC §116.115(b)(2)(B)) which do not allow for the operation of a facility until the final permit or permit amendment has been issued. In addition, the EPA has stated that pre-permit construction programs must include a prohibition on operation until the final permit is issued in order to obtain approval as a SIP revision.
Proposed new §116.118(c)(2) codifies the requirement in THSC, §382.004(b) that the commission may not consider pre-permit construction begun under §116.118 and THSC, §382.004 as a factor in determining whether to grant the permit amendment sought in the application.

§116.710, Applicability

The commission proposes to amend §116.710(a). The proposed revision would add a reference to proposed new §116.118 which implements HB 2726 and THSC, §382.004. The proposed change is necessary because the current rule language in §116.710(a) does not reflect the option under THSC, §382.004 to begin construction when the draft permit is issued.

§116.721, Amendments and Alterations

The commission proposes to amend §116.721(a). The proposed revision would add a reference to proposed new §116.118 which implements HB 2726 and THSC, §382.004. The proposed change is necessary because the current rule language in §116.721(a) does not reflect the option under THSC, §382.004 to begin construction when the draft permit is issued.

The commission also proposes to amend §116.721(d)(1), by replacing the term "notwithstanding" with the phrase "regardless of." This proposed change is intended to improve readability of the rule through the use of plain language.
Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

This rulemaking addresses necessary changes in order to implement HB 2726 to allow an applicant for a permit amendment to begin construction after the executive director has issued a draft permit including the permit amendment. The option to begin construction is a voluntary decision made by the applicant.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be compliance with state law.

The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does
not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

**Rural Communities Impact Assessment**

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

**Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect.

**Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

**Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this
proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does the proposed rulemaking increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rules should not impact positively or negatively the state’s economy.

**Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule with the specific intent 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 proposed amendments to §§116.110, 116.116, 116.710, and 116.721; and new §116.118 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do the new or
amended rules 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. Rather, this proposed rulemaking implements changes to THSC, §382.004 as enacted by passage of HB 2726.

Texas Government Code, §2001.0225 applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of federal law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general authority of the commission. The proposed amendments to §§116.110, 116.116, 116.710, and 116.721; and new §116.118 do not exceed a standard set by federal law or an express requirement of state law or a requirement of a delegation agreement and the rulemaking is not developed solely under the general powers of the agency but is authorized by THSC, §382.004. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.
Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007 is applicable. The proposed amendments to §§116.110, 116.116, 116.710, and 116.721; and new §116.118 implement changes to THSC, §382.004 as enacted by passage of HB 2726 to allow an applicant for an NSR permit amendment to begin construction, at their own risk, after the executive director has issued a preliminary decision and draft permit including the amendment. The proposed rulemaking will not burden private real property or affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this proposed rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The proposed new and amended rules do not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in
accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed rules would increase flexibility for applicants for certain air permit amendments, by allowing them to begin construction on a project after the draft permit has been issued. However, the permit amendment is still required to meet all applicable state and federal rules, regulations, and standards applicable to emissions of air contaminants. The proposed rules would not authorize or allow increased emissions of air contaminants. The CMP policy applicable to the proposed rulemaking is the policy that commission rules comply with federal regulations in 40 CFR to protect and enhance air quality in the coastal areas (31 TAC §501.32). This rulemaking complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.
Written comments on the consistency of this rulemaking 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**

This rulemaking will not have a significant effect on sites which are subject to the Federal Operating Permits Program. Federal Operating Permits do not directly regulate or restrict construction. Applicants seeking to initiate pre-permit construction for a permit amendment under the proposed rules must comply with any applicable requirements of Chapter 122 that would apply to any NSR permit amendment.

**Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on March 12, 2020, at 10:00 a.m. in Building E, Room 201S, 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 Sandy Wong, Office of Legal Services at
(512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, 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: https://www6.tceq.texas.gov/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2019-129-116-AI. The comment period closes on March 17, 2020. Copies of the proposed rulemaking can be obtained from the commission’s website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Michael Wilhoit, TCEQ Air Permits Division Operational Support Section, at (512) 239-1222.
SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 1: PERMIT APPLICATION

§§116.110, 116.116, 116.118

Statutory Authority

The amendments and new section are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; 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 amendments and new section are also proposed under Texas Health and Safety Code (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, §382.004, concerning Construction While Permit Application Pending, which allows, to the extent permissible under federal law, an applicant for a permit amendment to begin construction at the person's own risk, upon issuance of a draft permit including the amendment; 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, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.0518, concerning Preconstruction Permit, which prescribes the permitting and review procedures for obtaining a permit to construct a new facility or modification of an existing facility that may emit air contaminants; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which prescribes the public participation requirements for certain applications filed with the commission. In addition, the amendments and new section are also proposed under the 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, including preconstruction permitting program requirements.

The proposed amendments and new section implement THSC, §382.004.

§116.110. Applicability.

(a) Permit to construct. Except as provided in §116.118 of this title (relating to Construction While Permit Amendment Application Pending), before any actual work is begun on the facility, any person who plans to construct any new facility
or to engage in the modification of any existing facility which may emit air contaminants into the air of this state shall either:

(1) obtain a permit under §116.111 of this title (relating to General Application);

(2) satisfy the conditions for a standard permit under the requirements in:

(A) Subchapter F of this chapter (relating to Standard Permits);

(B) Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(C) Chapter 332 of this title (relating to Composting); or

(D) Chapter 330, Subchapter N of this title (relating to Landfill Mining);

(3) satisfy the conditions for a flexible permit under the requirements in Subchapter G of this chapter (relating to Flexible Permits);
(4) satisfy the conditions for facilities permitted by rule under Chapter 106 of this title (relating to Permits by Rule); or

(5) satisfy the criteria for a de minimis facility or source under §116.119 of this title (relating to De Minimis Facilities or Sources).

(b) Modifications to existing permitted facilities. Modifications to existing permitted facilities may be handled through the amendment of an existing permit.

(c) Compliance history. For all authorizations listed in subsections (a) and (b) of this section or §116.116 of this title (relating to Changes to Facilities), compliance history reviews may be required under Chapter 60 of this title (relating to Compliance History).

(d) Exclusion. Owners or operators of affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E [C] of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR [Code of Federal Regulations] Part 63)) are not authorized to use:

(1) a permit by rule under Chapter 106 of this title;
(2) standard permits under Subchapter F of this chapter that do not meet the requirements of Subchapter E [C] of this chapter; or

(3) §116.116(e) of this title [(relating to Changes to Facilities)].

(e) Change in ownership.

(1) Within 30 days after the change of ownership of a facility permitted under this chapter, the new owner shall notify the commission and certify the following:

(A) the date of the ownership change;

(B) the name, address, phone number, and contact person for the new owner;

(C) an agreement by the new owner to be bound by all permit conditions and all representations made in the permit application and any amendments and alterations;

(D) there will be no change in the type of pollutants emitted; and
(E) there will be no increase in the quantity of pollutants emitted.

(2) The new owner shall comply with all permit conditions and all representations made in the permit application and any amendments and alterations.

(f) Submittal under seal of Texas licensed professional engineer. Applications for permit or permit amendment with an estimated capital cost of the project above $2 million, and not subject to any exemption contained in the Texas Engineering Practice Act (TEPA), shall be submitted under seal of a Texas licensed professional engineer. However, nothing in this subsection shall limit or affect any requirement which may apply to the practice of engineering under the TEPA or the actions of the Texas Board of Professional Engineers. The estimated capital cost is defined in §116.141 of this title (relating to Determination of Fees).

(g) Responsibility for permit application. The owner of the facility or the operator of the facility authorized to act for the owner is responsible for complying with this section.


(a) Representations and conditions. The following are the conditions upon which a permit, special permit, or special exemption are issued:
(1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and

(2) any general and special conditions attached to the permit, special permit, or special exemption itself.

(b) Permit amendments.

(1) Except as provided in subsection (e) of this section or §116.118 of this title (relating to Construction While Permit Amendment Application Pending), the permit holder shall not vary from any representation or permit condition without obtaining a permit amendment if the change will cause:

(A) a change in the method of control of emissions;

(B) a change in the character of the emissions; or

(C) an increase in the emission rate of any air contaminant.

(2) Any person who requests permit amendments must receive prior approval by the executive director or the commission, except as provided in §116.118.
of this title. Applications must be submitted with a completed Form PI-1 and are subject to the requirements of §116.111 of this title (relating to General Application).

(3) Any person who applies for an amendment to a permit to construct or reconstruct an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

(4) Any person who applies for an amendment to a permit to construct a new facility or modify an existing facility shall comply with the provisions in Chapter 39 of this title.

(c) Permit alteration.

(1) A permit alteration is:

(A) a decrease in allowable emissions; or

(B) any change from a representation in an application, general condition, or special condition in a permit that does not cause:
(i) a change in the method of control of emissions;

(ii) a change in the character of emissions; or

(iii) an increase in the emission rate of any air contaminant.

(2) Requests for permit alterations that must receive prior approval by the executive director are those that:

(A) result in an increase in off-property concentrations of air contaminants;

(B) involve a change in permit conditions; or

(C) affect facility or control equipment performance.

(3) The executive director shall be notified in writing of all other permit alterations not specified in paragraph (2) of this subsection.
(4) A request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.111(a)(2)(C) of this title.

(5) Permit alterations are not subject to the requirements of §116.111(a)(2)(C) of this title.

(d) Permits by rule under Chapter 106 of this title (relating to Permits by Rule) in lieu of permit amendment or alteration.

(1) A permit amendment or alteration is not required if the changes to the permitted facility qualify for an exemption from permitting or permit by rule under Chapter 106 of this title unless prohibited by permit condition as provided in §116.115 of this title (relating to General and Special Conditions).

(2) All changes authorized under Chapter 106 of this title to a permitted facility shall be incorporated into that facility's permit when the permit is amended or renewed.

(e) Changes to qualified facilities.
(1) Prior to determining if this subsection may be applied to a proposed change to a facility, the following will apply:

(A) The facility must be authorized under this chapter or Chapter 106 of this title.

(B) A separate netting analysis shall be made for each proposed change to determine the applicability of major New Source Review by demonstrating that any increase in actual emissions is below the threshold for major modification as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions). Proposed changes exceeding the major modification threshold cannot be authorized under this subsection. This analysis shall meet the definition and requirements of net emissions increase in §116.12 of this title.

(2) Prior to changes under this subsection, facility owners or operators will submit Form PI-E, Notification of Changes to Qualified Facilities, and the following additional requirements will apply:

(A) Facility owners or operators will simultaneously submit, where applicable, an application for a permit revision for each permit issued under §116.111 of this title involved in the qualified facility transaction.
(B) Owners or operators of facilities authorized under Subchapter F of this chapter [Chapter,] (relating to Standard Permits) shall submit a revision to the representations in the facility registration in accordance with §116.611 of this title (relating to Registration to Use a Standard Permit).

(C) Any applicable permit issued under §116.111 of this title will be revised to reflect changes under this subsection to facilities authorized under Chapter 106 of this title. If no applicable permit issued under §116.111 of this title is involved in the qualified facility transaction then changes shall be certified by a registration for an emission rate under §106.6 of this title (relating to Registration of Emissions).

(D) No allowable emission rate as defined in §116.17 of this title (relating to Qualified Facility [Facilities] Definitions) shall be exceeded.

(E) The facility has received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur, or uses control technology that is at least as effective as the best available control technology (BACT) [BACT] that the commission required or would have required for a facility of the same class or type as a condition of issuing a permit or permit amendment 120 months before the change will occur. There will be no reduction in emission control efficiency.
(3) Regardless of any other subsection of this section, a physical or operational change may be made to a qualified facility if it can be determined that the change does not result in:

(A) a net increase in allowable emissions of any air contaminant; and

(B) the emission of any air contaminant not previously emitted.

(4) In making the determination in paragraph (3) of this subsection, the effect on emissions of the following shall be considered:

(A) any air pollution control method applied to the qualified facility;

(B) any decreases in allowable emissions from other qualified facilities at the same commission air quality account that have received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur; and
(C) any decrease in actual emissions from other qualified facilities at the same commission air quality account that are not included in subparagraph (B) of this paragraph.

(5) The determination in paragraph (3) of this subsection shall be based on the allowable emissions for air contaminant categories and any allowable emissions for individual compounds. If a physical or operational change would result in emissions of an air contaminant category or compound above the allowable emissions for that air contaminant category or compound, there must be an equivalent decrease in emissions at the same facility or a different facility at the same account.

(A) The equivalent decrease in emissions shall be based on the same time periods (e.g., hourly and 12-month rolling average rates) as the allowable emissions for the facility at which the change will occur.

(B) Emissions of different compounds within the same air contaminant category may be interchanged. Emissions of substances that were, but are not currently, listed as a volatile organic compound (VOC) by the United States Environmental Protection Agency (EPA) may be substituted for emissions of compounds currently listed by EPA as a VOC as referenced in §101.1 of this title (relating to Definitions) provided the compound being used as a substitute is not
regulated as a hazardous air pollutant and is not toxic. The substitution of current VOCs for compounds that have been removed from the VOC list by EPA is prohibited.

(C) For allowable emissions for individual compounds, any interchange shall adjust the emission rates for the different compounds in accordance with the ratio of the effects screening levels of the compounds. The effects screening level shall be determined by the executive director.

(D) For allowable emissions for air contaminant categories, interchanges shall use the unadjusted emission rates for the different compounds.

(E) The facility owner or operator shall demonstrate that the change will not adversely affect ambient air quality.

(F) An air contaminant category is a group of related compounds, such as volatile organic compounds, particulate matter, nitrogen oxides, and sulfur compounds.

(6) Persons making changes to qualified facilities under this subsection shall comply with the applicable requirements of §116.117 of this title (relating to Documentation and Notification of Changes to Qualified Facilities).
(7) As used in this subsection, the term "physical and operational change" does not include:

(A) construction of a new facility; or

(B) changes to procedures regarding monitoring, determination of emissions, and recordkeeping that are required by a permit.

(8) Additional air pollution control methods may be implemented for the purpose of making a facility a qualified facility. The implementation of any additional control methods to qualify a facility shall be subject to the requirements of this chapter. The owner or operator shall:

(A) utilize additional control methods that are as effective as BACT [best available control technology (BACT)] required at the time the additional control methods are implemented; or

(B) demonstrate that the additional control methods, although not as effective as BACT, were implemented to comply with a law, rule, order, permit, or implemented to resolve a documented citizen complaint.
(9) For purposes of this subsection and §116.117 of this title, the following subparagraphs apply.

(A) Intraplant trading means the consideration of decreases in allowable and actual emissions from other qualified facilities in accordance with paragraph (4) of this subsection.

(B) The allowable emissions from facilities that were never constructed shall not be used in intraplant trading.

(C) The decreases in allowable and actual emissions shall be based on emission rates for the same time periods (e.g., hourly and 12-month rolling average) as the allowable emissions for the facility at which the change will occur and for which an intraplant trade is desired.

(D) Actual emissions shall be based on data that is representative of the emissions actually achieved from a facility during the relevant time period (e.g., hourly or 12-month rolling average).

(10) The existing level of control may not be lessened for a qualified facility.
(11) A separate netting analysis shall be performed for each proposed change under this subsection.

(f) Use of credits. Regardless of [Notwithstanding] any other subsection of this section, discrete emission reduction credits may be used to exceed permit allowables as described in §101.376(b) of this title (relating to Discrete Emission Credit Use) if all applicable conditions of §101.376 of this title are met. This subsection does not authorize any physical changes to a facility.

§116.118. Construction While Permit Amendment Application Pending.

(a) Purpose, applicability, and exclusions.

(1) To the extent permissible under federal law and the requirements of this section, an applicant for a permit amendment may, at their own risk, begin construction related to the application if the executive director has completed the technical review and issued a draft permit including the permit amendment.

(2) An applicant may not begin construction under this section if the facility that is the subject of the permit amendment is a concrete batch plant located
within 880 yards of a property that is used as a residence. This limitation on construction does not affect or supersede the designation of an affected person under Texas Health and Safety Code (THSC), §382.056 or §382.058.

(3) Any new facility or group of facilities, or changes to an existing facility or group of facilities, that constitutes a new major stationary source or a major modification, as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) is not eligible for construction under this section.

(4) This section does not apply to the amendment of a Plant-wide Applicability Limit issued under Subchapter C of this chapter (relating to Plant-wide Applicability Limits).

(5) Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) are not eligible for construction under this section.

(6) This section does not apply to qualified facility changes authorized under §116.116(e) of this title (relating to Changes to Facilities).
(7) This section does not apply to requests, claims, registrations, or applications for a standard permit under Subchapter F of this chapter (relating to Standard Permits) or a permit by rule under Chapter 106 of this title (relating to Permits by Rule).

(8) This section does not relieve the applicant or project from any other applicable requirements. An applicant seeking to begin construction under this section shall comply with all other applicable state and federal requirements pertaining to an application for a permit amendment (such as, but not limited to, requirements concerning public notice and participation, federal applicability, emission control technology, applicable distance limitations, etc.).

(b) Public notice. An applicant seeking to begin construction under this section shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

(c) Prohibitions on facility operation and commission action.

(1) Any facility constructed or modified under this section shall not be operated until the commission has issued the final permit amendment authorizing the construction or modification.
(2) The commission may not consider construction begun under this section in determining whether to grant the permit amendment sought in the application.
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Rule Project No. 2019-129-116-AI

SUBCHAPTER G: FLEXIBLE PERMITS

§116.710, §116.721

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; 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 amendments are also proposed under Texas Health and Safety Code (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, §382.004, concerning Construction While Permit Application Pending, which allows, to the extent permissible under federal law, an applicant for a permit amendment to begin construction at the person's own risk, upon issuance of a draft permit including the amendment; 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, §382.017,
concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.0518, concerning Preconstruction Permit, which prescribes the permitting and review procedures for obtaining a permit to construct a new facility or modification of an existing facility that may emit air contaminants; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which prescribes the public participation requirements for certain applications filed with the commission. In addition, the amendments are also proposed under the 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, including preconstruction permitting program requirements.

The proposed amendments implement THSC, §382.004.

§116.710. Applicability.

(a) Flexible permit. A person may obtain a flexible permit which allows for physical or operational changes as provided by this subchapter as an alternative to obtaining a new source review permit under §116.110 of this title (relating to Applicability), or in lieu of amending an existing permit under §116.116 of this title (relating to Changes to Facilities). A person may obtain a flexible permit under
§116.711 of this title (relating to Flexible Permit Application) for a facility, group of facilities, or account before any actual work is begun, except as provided in §116.118 of this title (relating to Construction While Permit Amendment Application Pending), provided however:

(1) only one flexible permit may be issued for an account;

(2) modifications to existing facilities included in a flexible permit may be authorized by the amendment of an existing flexible permit;

(3) a new facility may be authorized by the amendment of an existing flexible permit; and

(4) a flexible permit may not cover facilities at more than one account.

(b) Change in ownership. The new owner of a facility, group of facilities, or account shall comply with §116.110(e) of this title, provided however, that all facilities authorized by a flexible permit must change ownership at the same time and to the same person, or both the new owner and existing permit holder must obtain a permit alteration allocating the emission caps or individual emission limitation prior to the transfer of the permit by the commission. After the sale of a facility, or facilities, but prior to the transfer of a permit requiring a permit alteration, the original permit
holder remains responsible for ensuring compliance with the existing flexible permit and all rules and regulations of the commission.

(c) Submittal under seal of Texas licensed professional engineer. All applications for a flexible permit or flexible permit amendment shall comply with §116.110(f) of this title.

(d) Responsibility for flexible permit application. The owner of the facility, group of facilities, or account or the operator of the facility, group of facilities, or account who is authorized to act for the owner is responsible for complying with this section, except as provided by subsection (b) of this section.


(a) Flexible permit amendments. All representations with regard to construction plans and operation procedures in an application for a flexible permit or flexible permit amendment, as well as any general and special conditions, become conditions upon which the subsequent flexible permit is issued. Except as provided in §116.118 of this title (relating to Construction While Permit Amendment Application Pending), it shall be unlawful for any person to vary from such representation or flexible permit provision if the change will cause a change in the method of control of emissions or the character of the emissions, will relax emission controls, or will result
in a significant increase in emissions unless application is made to the executive director to amend the flexible permit in that regard and such amendment is approved by the executive director or commission. Applications to amend a flexible permit shall be submitted with a completed Form PI-1 and are subject to the requirements of §116.711 of this title (relating to Flexible Permit Application).

(b) Flexible permit alterations.

(1) A flexible permit alteration is for any variation from a representation in a flexible permit application or a general or special provision of a flexible permit that does not require a flexible permit amendment.

(2) All flexible permit alterations which may involve a change in a general or special condition contained in the flexible permit, or affect control equipment performance must receive prior approval by the executive director. The executive director shall be notified in writing of all other flexible permit alterations within ten days of implementing the change, unless the permit provides for a different method of notification. Any flexible permit alteration request or notification shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.711 of this title, including the protection of public health and welfare. The
appropriate commission regional office and any local air pollution program having jurisdiction shall be provided copies of all flexible permit alteration documents.

(3) Flexible permit alterations shall not be subject to the requirements of best available control technology [Best Available Control Technology] identified in §116.711(2) of this title.

(c) Changes not requiring an amendment or alteration. The following changes do not require an amendment or alteration, except that an amendment is required if the change will cause a change in the method of control of emissions or the character of the emissions, will relax emission controls, will result in a significant increase in emissions as determined under §116.718 of this title (relating to Significant Emission Increase), or conflicts with an existing permit condition:

(1) a change in throughput; or

(2) a change in feedstock.

(d) Permit by rule under Chapter 106 of this title (relating to Permits by Rule) in lieu of permit amendment or alteration.
(1) Regardless of subsection (a) or (b) of this section, no permit amendment or alteration is required if the changes to the permitted facility qualify for a permit by rule under Chapter 106 of this title unless prohibited by permit provision as provided in §116.715 of this title (relating to General and Special Conditions). All such changes permitted by rule to a permitted facility shall be incorporated into that facility’s permit at such time as the permit is amended or renewed.

(2) Emission increases authorized by Chapter 106 of this title at an existing facility authorized by a flexible permit shall not cause an exceedance of the emissions cap or individual emission limitation.