

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Adoption of Rules Review & Readoption of Chapter 116

**AGENDA REQUESTED:** September 27, 2023

**DATE OF REQUEST:** September 8, 2023

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Gwen Ricco, Agenda Coordinator, (512) 239-2678

**CAPTION: Docket No. 2022-1737-MIS.** Consideration for the adoption of the rules review and readoption of 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. This review is in accordance with Texas Government Code, Section 2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The proposal was published in the May 5, 2023, issue of the *Texas Register* (48 TexReg 2394). (David Munzenmaier, Amy Browning) (Project No. 2023-055-116-AI)

Richard C. Chism  
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**Director**

Samuel Short  
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**Division Deputy Director**

Gwen Ricco  
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**Agenda Coordinator**

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** September 8, 2023

**Thru:** Laurie Gharis, Chief Clerk  
Kelly Keel, Interim Executive Director

**From:** Richard C. Chism, Director *RCC*  
Office of Air

**Docket No.:** 2022-1737-MIS

**Subject:** Commission Approval for Adoption of Rules Review and Readoption of Rules  
Chapter 116, Control of Air Pollution by Permits for New Construction or Modification  
Rules Review of 30 Texas Administrative Code Chapter 116  
Non-Rule Project No. 2023-055-116-AI

**What the adopted action would do:**

This action will approve the rules review of Chapter 116, and readopt the chapter.

This action constitutes a determination by the Texas Commission on Environmental Quality (commission), after opportunity for public review and comment, that the initial reasons for adopting Chapter continue to exist.

**Applicable law:**

The review of the rules is authorized under the requirements of Texas Government Code, §2001.039; and the General Appropriations Act, Article IX, §9-10.13, 76th Texas Legislature, 1999, which require state agencies to review and consider for re adoption each of their rules every four years.

**Reason rules are needed:**

Executive director's staff conducted a review of the rules in Chapter 116 and determined that the reasons for adopting the rules in Subchapters A - G and I - M continue to exist.

The Texas Clean Air Act (TCAA), Texas Health and Safety Code (THSC), Chapter 382, authorizes the commission to issue permits and permit amendments to construct or modify a facility that may emit air contaminants. The rules in Chapter 116 implement the THSC, Chapter 382, by establishing the requirements for the New Source Review (NSR) permitting program. These rules are necessary to effectively administer the requirements of the TCAA and applicable portions of the federal Clean Air Act (FCAA), 42 United States Code §7401, *et seq.*

The types of air quality authorizations included in the rules in Chapter 116 are: de minimis facilities and sources; standard permits; NSR case-by-case permits; flexible permits; prevention of significant deterioration permits; and nonattainment permits. The rules provide specific requirements for applications for permit renewals, plant-wide applicability limits, portable facilities, and FCAA, §112(g) hazardous air pollutant permits, as well as emergency orders to respond to catastrophes.

Re: Docket No. 2022-1737-MIS

The chapter includes rules adopted to implement statutes with deadlines for issuing permits for electric generating facilities (EGFs), multiple plant permits, and permits for specific designated facilities (commonly referred to as FutureGen).

Finally, the chapter also includes rules to implement best available retrofit technology associated with the Regional Haze regulations adopted by the United States Environmental Protection Agency (EPA).

Most of the rules in Chapter 116 are incorporated into Texas' State Implementation Plan (SIP) to meet the requirements of FCAA, Title I.

**Rules found to be obsolete:**

None.

**Public comment:**

A public hearing was not offered for this review. The comment period for the rules review closed on June 6, 2023. Comments were received from the EPA Region 6. The EPA expressed a variety of concerns including but not limited to: establishing emission limits for de minimis sources; incorporation of Permits by Rule (PBR) into New Source Review permits; Best Available Control Technology (BACT) implementation in permitting actions; Plant-Wide Applicability Limit (PAL) permit renewal emissions calculations; the use and practice of retrospective reviews; construction permit voiding and/or extensions; and consideration of environmental justice principals in permit actions. At the time of this review, the Chapter 116 rules are being readopted without changes, but these comments will be considered as general stakeholder input for possible future policy or rulemaking actions.

**Affected agency program(s):**

The program area responsible for implementing these rules is the Air Permits Division and the Office of Compliance and Enforcement.

**Agency contacts:**

David Munzenmaier, Project Manager, Air Permits Division, (512) 239-6092  
Amy Browning, Staff Attorney, Environmental Law Division (512) 239-0891  
Gwen Ricco, Texas Register/Agenda Coordinator, General Law Division (512) 239-2678

**Attachments:**

*Texas Register* publication of Proposed Rule Review Notice

cc: Chief Clerk, 7 copies

On behalf of the Finance Commission of Texas (commission), the Texas Department of Banking files this notice of intention to review and consider for readoption, revision, or repeal, the following chapter of Texas Administrative Code, Title 7, in its entirety:

Chapter 25 (Prepaid Funeral Contracts), comprised of Subchapter A (§§25.1 - 25.9); and Subchapter B (§§25.10 - 25.14, 25.17 - 25.19, 25.21 - 25.25, 25.31 and 25.41).

The review is conducted pursuant to Government Code, §2001.039. Comments regarding the review of this chapter, and whether the reasons for initially adopting the sections under review continue to exist, will be accepted for 30 days following the publication of this notice in the *Texas Register*.

Any questions or written comments pertaining to this notice of intention to review should be directed to Catherine Reyer, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705, or e-mailed to [legal@dob.texas.gov](mailto:legal@dob.texas.gov).

Any proposed changes to these sections as a result of the rule review will be published as a proposed rule in the *Texas Register*. Proposed rules are subject to public comment for a reasonable period prior to final adoption by the commission.

TRD-202301497  
Catherine Reyer  
General Counsel  
Texas Department of Banking  
Filed: April 26, 2023



## Texas Commission on Environmental Quality

### Title 30, Part 1

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 33, Consolidated Permit Processing.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, re-adoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 33 continue to exist.

Comments regarding suggested changes to the rules in Chapter 33 may be submitted but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rule-making action by the commission.

#### Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 33. Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to [fax4808@tceq.texas.gov](mailto:fax4808@tceq.texas.gov). Electronic comments may be submitted at: <https://tceq.commentinput.com/>. File size restrictions may apply to comments being submitted via the TCEQ Public Comment system. All comments should reference Non-Rule Project Number 2023-051-033-A1. Comments must be received by June 6, 2023. For further information, please contact David Munzenmaier, Air Permits Division, at (512) 239-6092.

TRD-202301503

Guy Henry  
Acting Deputy Director, Environmental Law Division  
Texas Commission on Environmental Quality  
Filed: April 26, 2023



The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 90, Innovative Programs.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, re-adoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 90 continue to exist.

Comments regarding suggested changes to the rules in Chapter 90 may be submitted but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rule-making action by the commission.

#### Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 328. Written comments may be submitted to Gwen Ricco, 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://tceq.commentinput.com/>. File size restrictions may apply to comments being submitted via the TCEQ Public Comment system. All comments should reference Non-Rule Project Number 2023-054-090-AD. Comments must be received by June 6, 2023. For further information, please contact Chris Leahy, External Relations Division, at (512) 239-2427.

TRD-202301504  
Guy Henry  
Acting Deputy Director, Environmental Law Division  
Texas Commission on Environmental Quality  
Filed: April 26, 2023



The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 116, Control of Air Pollution by Permits for New Construction or Modification.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, re-adoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 116 continue to exist.

Comments regarding suggested changes to the rules in Chapter 116 may be submitted during this review but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

#### Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 116. Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to [fax4808@tceq.texas.gov](mailto:fax4808@tceq.texas.gov). Electronic comments may be submitted at: <https://tceq.commentinput.com/>. File size restrictions may apply to comments being submitted via the TCEQ Public Comment

system. All comments should reference Non-Rule Project Number 2023-055-116-AI. Comments must be received by June 6, 2023. For further information, please contact David Munzenmaier, Air Permits Division, at (512) 239-6092.

TRD-202301505

Guy Henry

Acting Deputy Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: April 26, 2023



Texas Commission on Jail Standards

### **Title 37, Part 9**

In accordance with Texas Government Code §2001.039, the Texas Commission on Jail Standards proposes to review all its rules, Texas Administrative Code Title 37, Part 9. The Administrative Rules Advisory Committee will review the rules and consider which, if any, need to be amended or repealed. Following the review, the Committee will give its recommendations to the Commission.

The Committee will consider the following:

- Do current facts, law, policy, and experience support retaining this rule?
- Are the initial factual, legal, and policy reasons for adopting this rule still relevant?
- Is this rule commonly violated? Would amending the rule improve compliance?
- Does this rule still reflect current practices?
- Rule Vagueness:
  - Is this rule so vague that it impedes jails' ability to understand comply with it or it creates inconsistent rule interpretations? For example, does it use words such as "promptly," "regularly," or "as soon as possible?"
  - Can you amend the rule to reflect informal policies and guidance that staff created to enable jails to comply with this rule?

Comments on the review may be submitted to any of the following: TCJS Rule Review, attention: William Turner, P.O. Box

12985, Austin, Texas 78711-12985; Fax (512) 463-3185; e-mail: will.turner@tcjs.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this notice is published in the *Texas Register*.

TRD-202301484

Brandon Wood

Executive Director

Texas Commission on Jail Standards

Filed: April 25, 2023



## **Adopted Rule Reviews**

Texas Education Agency

### **Title 19, Part 2**

Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 150, Commissioner's Rules Concerning Educator Appraisal, Subchapter AA, Teacher Appraisal; Subchapter BB, Administrator Appraisal; and Subchapter CC, Superintendent Appraisal, pursuant to Texas Government Code, §2001.039. TEA proposed the review of Chapter 150, Subchapters AA-CC, in the November 25, 2022 issue of the *Texas Register* (47 TexReg 7931).

Relating to the review of Chapter 150, Subchapters AA-CC, TEA finds that the reasons for adopting Subchapters AA-CC continue to exist and readopts the rules. TEA received no comments related to the review of Subchapters AA-CC. No changes to Chapter 150, Subchapters AA and CC, are necessary as a result of the review. In the future, TEA anticipates updating Subchapter BB to align the rules with other TEA administrative rules.

This concludes the review of Chapter 150.

TRD-202301491

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Filed: April 26, 2023



The Texas Commission on Environmental Quality (commission) has completed its Rule Review of 30 Texas Administrative Code (TAC) Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, as required by Texas Government Code, §2001.039. Texas Government Code, §2001.039, requires a state agency to review and consider for readoption, readoption with amendments, or repeal each of its rules every four years. The commission published its Notice of Intent to Review these rules in the May 5, 2023, issue of the Texas Register (48 TexReg 2394).

The review assessed whether the initial reasons for adopting the rules continue to exist, and the commission has determined that those reasons exist for the rules in Chapter 116, Subchapters A - G and I - M.

The rules in Chapter 116 are required because the Texas Clean Air Act (TCAA), Texas Health and Safety Code (THSC), Chapter 382, authorizes the commission to issue permits and permit amendments to construct or modify a facility that may emit air contaminants. The rules in Chapter 116 establish the requirements for the New Source Review (NSR) permitting program and are also necessary to effectively administer the requirements of the TCAA and applicable portions of the federal Clean Air Act (FCAA), 42 United States Code §7401, *et seq.*

The types of air quality authorizations included in the rules in Chapter 116 are: de minimis facilities and sources; standard permits; NSR case-by-case permits; flexible permits; prevention of significant deterioration permits; and nonattainment permits.

The rules provide specific requirements for applications for permit renewals, plant-wide applicability limits, portable facilities, and FCAA, §112(g) hazardous air pollutant permits, as well as emergency orders to respond to catastrophes.

The chapter includes rules adopted to implement statutes with deadlines for issuing permits for electric generating facilities (EGFs), multiple plant permits, and permits for specific designated facilities (commonly referred to as FutureGen).

Finally, the chapter also includes rules to implement best available retrofit technology associated with the Regional Haze regulations adopted by the United States Environmental Protection Agency (EPA).

Most of the rules in Chapter 116 are incorporated into Texas' State Implementation Plan (SIP) to meet the requirements of FCAA, Title I.

#### Public Comment

The public comment period closed on June 6, 2023. Comments were received on this review from the EPA Region 6.

#### ***Comments***

EPA provided a variety of comments and concerns about the major and minor NSR provisions. A summary of EPA's comments is provided below:

- A. TCEQ should evaluate 30 TAC §116.119 to determine whether threshold or emission limits below which an emission unit needs to obtain NSR

authorization, and thus included in a title V permit if applicable, should be established. Additionally, this rule does not identify applicable permits by rule (PBR) considered as insignificant emission units. The TCEQ further implements this rule in determining exclusion of insignificant emission units from title V permits; however, this rule has not been approved into Texas' SIP.

- B. TCEQ should consider revising 30 TAC §116.151 to clarify that nonattainment permit requirements are linked to an area's designation status for air pollutants at the time of permit issuance. This recommendation is to ensure that the language in 30 TAC §116.151 aligns with the language in 30 TAC §116.150(a) which includes "...as of the date of issuance of the permit...". EPA also emphasizes that netting applies to any source meeting the definition of major source based on sitewide emissions, not just those holding a major source permit.
- C. EPA stated that there are concerns that PBRs are not being appropriately incorporated into NSR permits. This potentially allows for circumvention of major NSR requirements by not establishing enforceable limits and avoids cumulative increases through multiple PBR authorizations. TCEQ should review the scope and implementation of 30 TAC §116.116 to ensure internal commission guidance aligns with regulations on the use of PBRs in lieu of permit amendments and how those PBRs are incorporated into permits when a permit is amended or renewed.



- D. TCEQ should review rules and/or guidance to ensure that the appropriate definition of Best Available Control Technology (BACT) is implemented for major sources and that the definition of BACT used for Prevention of Significant Deterioration (PSD) BACT determinations is no less stringent than the Federal definition of BACT.
- E. EPA stated that Plant-Wide Applicability Limit (PAL) permits are frequently renewed at existing PAL when emissions calculated in accordance with 40 CFR 52.21(aa)(6) are well below 80 percent of the current PAL. TCEQ should review the scope and implementation of PAL permits rules to ensure limits are properly adjusted at renewal and include a written rationale for the limit which is subject to public review and comment.
- F. TCEQ should review the use of “retrospective review” under Chapter 116. Specifically, guidance that the use of rules and attainment status that were in place at the time a source was constructed or modified is used instead of rules and major source thresholds and applicability in place at the time of the retrospective review. EPA expressed concern that this could result in a source being authorized in violation of an existing NAAQS. EPA acknowledged that the opposite could also occur where a source could be subject to more stringent requirements if the designation is less stringent.
- G. EPA stated that, at the time of SIP approval, their interpretation of 30 TAC §116.120 was that a permit or permit amendment was “*automatically void*” if

one of the conditions in §116.120(a)(1)-(3) occurs unless there is a request for an extension of time; however, the rule as written does not expressly state when the extension must be requested. TCEQ should review the scope and implementation of 30 TAC §116.120 to clarify the timing for submitting construction extension requests as well as ensure appropriate health impacts reviews and reviews of BACT/LAER/netting or offsets are completed prior to approval of a second extension and limit executive director discretion on extension requests.

H. EPA stated that they would like TCEQ to consider environmental justice principles in all permitting activities, particularly in ensuring active engagement with communities located near facilities and potentially impacted by permitting actions. TCEQ should also review all rules to consider what authority TCEQ currently has when considering other permitted facilities within the area of a pending permitting action to consider how all facilities may contribute to community risk.

***Response to all comments***

**The commission recognizes that the EPA has expressed concern about several aspects of the Chapter 116 rules implementing the New Source Review (NSR) permitting program. As stated in the May 5, 2023, *Texas Register* notice of this rules review, the commission is not considering any rule amendments to the Chapter 116 rules as part of this review action. The NSR authorization mechanism**

**implemented by Chapter 116 is an essential component of the agency's air permitting program, and the commission finds that the reasons that the Chapter 116 rules were initially adopted continue to exist. The commission is readopting Chapter 116 without change. The commission will consider these comments as ongoing stakeholder input for possible future policy or rulemaking action.**

As a result of the review the commission finds that the reasons for adopting the rules in 30 TAC Chapter 116 continue to exist and readopts these sections in accordance with the requirements of Texas Government Code, §2001.039.

# Texas Commission on Environmental Quality



## ORDER ADOPTING RULES REVIEW AND READOPTING RULES

Docket No. 2022-1737-MIS  
Non-Rule Project No. 2023-055-116-AI

On September 27, 2023, the Texas Commission on Environmental Quality (Commission) approved the rules review of 30 Texas Administrative Code (TAC) Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, in accordance with the requirements of Texas Government Code, § 2001.039, which requires a state agency to review and consider for re-adoption each of its rules every four years. The proposed Notice of Intention to Review was published in the May 5, 2023, issue of the *Texas Register* (48 TexReg 2394).

IT IS THEREFORE ORDERED BY THE COMMISSION, that the rules review of 30 TAC Chapter 116 is hereby adopted. The rules and the preamble to the rules approved by the Commission are incorporated by reference in this Order as if set forth at length verbatim in this Order.

IF ANY PORTION OF THIS ORDER is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

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Jon Niermann, Chairman

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Date Signed