

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** August 22, 2012

**DATE OF REQUEST:** August 3, 2012

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Bruce McAnally, (512) 239-2141

**CAPTION: Docket No. 2012-0822-RUL.** Consideration for publication of, and hearing on, an amendment to 30 TAC Chapter 106, Permits by Rule, Subchapter E, Aggregate and Pavement.

The proposed rulemaking would amend Section 106.141, Batch Mixers, to also include medium-sized batch mixing operations used in temporary construction and repair operations. Currently, these operations must apply for a case-by-case new source review permit or meet the requirements of the concrete batch plant standard permit, neither of which were designed to meet the operational needs or environmental concerns associated with medium-sized batch mixers. (Becky Southard, Becky Petty) (Rule Project No. 2012-007-106-PR)

Steve Hagle, P.E.  
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**Deputy Director**

Michael Wilson, P.E.  
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**Division Director**

Bruce McAnally  
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**Agenda Coordinator**

**Copy to CCC Secretary? NO YES X**

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners

**Date:** August 3, 2012

**Thru:** Bridget C. Bohac, Chief Clerk  
Zak Covar, Executive Director

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

**Docket No.:** 2012-0822-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 106, Permits by Rule  
Batch Mixers Permit by Rule (PBR) Amendment  
Rule Project No. 2012-007-106-PR

### **Background and reason(s) for the rulemaking:**

There is currently no standard permit or permit by rule (PBR) for medium-sized batch mixing equipment used in construction and repair operations. The current PBR used for small mixers, 30 TAC §106.141, Batch Mixers is limited to equipment with a five cubic feet capacity drum and smaller. Medium-sized batch mixing operations use drums larger than five cubic feet in capacity but are considerably smaller than the facilities authorized by the air quality standard permit for concrete batch plants. Owners or operators bring this portable equipment to a site for specific jobs designed for rapid production. The production limit in the air quality standard permit for concrete batch plants could conceivably cover a typical batch mixing operation, but the standard permit registration and public notice process was not designed for a medium-sized batch mixer used in temporary construction and repair operations.

The standard permit registration and public notice process required by Texas Health and Safety Code (THSC), §382.058, Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption, was not designed to meet the operational needs or environmental concerns associated with medium-sized batch mixers used in temporary construction and repair operations.

### **Scope of the rulemaking:**

#### **A.) Summary of what the rulemaking will do:**

The proposed amendment would expand §106.141, which currently authorizes drums of five cubic feet capacity and smaller, to also include batch mixing operations that use equipment larger than a five cubic feet capacity drum, but would not be considered a concrete batch plant.

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

N/A.

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

The proposed amendment to the PBR will only be applicable to specific small construction or repair equipment that mix materials such as concrete, grout, mortar, gunite, and stucco. New requirements include higher capacity limits, engine horsepower limits, dust control, and certification of emissions.

**Statutory authority:**

The amended section is proposed under Texas Water Code (TWC), §5.103, Rules, and §5.105, General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also proposed under THSC, §382.002, 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; §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, Permitting Authority of Commission; Rules, which authorizes the commission to issue a PBR for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.05196, Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities; and §382.057, Exemption, which authorizes exemptions from permitting.

The amended section implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

**Effect on the:**

**A.) Regulated community:**

Owners or operators of batch mixing operations would have a method of permitting that would be more appropriate for their processes. There would potentially be a small cost savings to the regulated community who elect to use the non-registered PBR with no fee, compared to the fees associated with a standard permit or case-by-case air permit. Also, the ability to comply with the technical requirements and operate efficiently would be most appropriate with a PBR rather than a standard permit or case-by-case permit.

**B.) Public:**

The public would not be formally notified of new batch mixing operations, but facilities would be required to follow limits that would more strictly minimize the potential for nuisance conditions. The proposed PBR amendment encourages project efficiency and use of smaller, more fuel efficient engines, resulting in reduced emissions.

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**C.) Agency programs:**

Although owners or operators of these operations currently require a standard permit or case-by-case new source review permit, which would require extensive staff review and a permit fee, the Air Permits Division has never received an application. From this perspective, this PBR amendment would have no fiscal implications to the agency. The Air Permits Division finds these operations better suited for a non-registered PBR, because they do not have a major affect on air quality and do not generate public health concerns.

**Stakeholder meetings:**

Since there is not one concentrated location for these facilities throughout the state, one stakeholder meeting was held at the Texas Commission on Environmental Quality (TCEQ) headquarters in Austin, Texas on January 19, 2012, at 9:00 am. The meeting was announced on the TCEQ website and was open to the public. Those represented at the meeting were from the construction and consulting industries and from municipalities. Response concerning the permit amendment was generally favorable. There was some discussion about increasing the limit on the number of days allowed at a site. Since limiting time at a site for various types of applications was problematic, the TCEQ did not include it as a limitation. Stakeholders also voiced concerns about volumetric mixing trucks operating at a site for long periods of time as a batch mixer rather than for transporting materials. After careful consideration, the commission decided that volumetric trucks would continue to be considered mobile sources and that volumetric trucks that operate on a site as stationary sources will continue to be required to obtain authorization using either §106.144, Bulk Mineral Handling, air quality standard permit for concrete batch plants, or case-by-case NSR permit.

**Potential controversial concerns and legislative interest:**

Staff expects the public to have questions about nuisance issues regarding dust and noise. Staff expects the industry to generally support the PBR amendment since they would otherwise need to get a standard permit or case-by-case permit, but they may have concerns about capacity limits and dust control requirements. Since these batch mixers would be used in short construction and repair jobs, the regulated community would prefer a PBR that did not require registration. Because batch mixers do not have a major effect on air quality, they are only in one area for a short period of time, and do not generate public health concerns, staff does not expect legislative concern regarding this amendment.

**Will this rulemaking affect any current policies or require development of new policies?**

Currently, these facilities are required to apply for a standard permit or case-by-case permit. If this proposal were to be adopted, the Air Permits Division would need to communicate the availability of the amended PBR and its applicability requirements.

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

If this rulemaking does not go forward, owners or operators of medium-sized batch mixers and owners or operators of larger concrete batch plants would be required to come in for a standard permit or case-by-case permit.

An alternative would be to move batch mixers with a capacity of five cubic feet or less to the De Minimis Facilities list. In place of the current authorization, §106.141 could be amended to only include batch mixers with a capacity of more than five cubic feet, but would not be considered a concrete batch plant.

Another alternative would be to leave §106.141 as it currently is and create a separate new PBR that would authorize batch mixers with a capacity of more than five cubic feet, but would not be considered a concrete batch plant.

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** August 22, 2012

**Anticipated *Texas Register* publication date:** September 7, 2012

**Public hearing date:** October 2, 2012

**Public comment period:** September 7, 2012- October 8, 2012

**Anticipated adoption date:** February 13, 2013

**Agency contacts:**

Becky Southard, Rule Project Manager, 239-1638, Air Permits Division

Becky Petty, Staff Attorney, 239-1088

Bruce McAnally, Texas Register Coordinator, 239-2141

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The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §106.141.

### **Background and Summary of the Factual Basis for the Proposed Rule**

There is currently no standard permit or permit by rule (PBR) specifically designed for medium-sized batch mixing operations commonly used in construction and repair operations. The current batch mixer PBR, §106.141 authorizes equipment with a five cubic feet capacity drum and smaller. Medium-sized batch mixing operations use drums with a capacity larger than five cubic feet, and is considerably smaller than the facilities authorized by the air quality standard permit for concrete batch plants that may have a production rate of up to 300 cubic yards per hour. Medium-sized batch mixing operations are portable, brought to a site for specific jobs, and designed for rapid production. Because of the small size of these operations, it is appropriate for owners or operators to use this authorization for both temporary and permanent projects. The standard permit registration and public notice process required by Texas Health and Safety Code (THSC), §382.058, Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption, was not designed for a medium-sized batch mixer used in temporary construction and repair operations.

The proposed PBR amendment would expand §106.141 to include batch mixing operations with drum capacities larger than five cubic feet, up to 27 cubic feet. The PBR

would still exclude concrete batch plants, which can be authorized under the air quality standard permit for concrete batch plants or a case-by-case new source review (NSR) permit under 30 TAC §116.111, General Application.

### **Section Discussion**

The commission proposes changes to §106.141(a) that would allow larger batch mixers to be authorized with the PBR. In this subsection, the commission also proposes the addition of specific example products that owners or operators can make with these mixers. The proposed amendment includes additional paragraphs that include engine size restrictions and best management practices for dust control. As in all PBRs, owners or operators are required to comply with Chapter 106, Subchapter A, General Requirements.

Stakeholders suggested including volumetric trucks in this amendment, but after careful consideration, the commission decided that volumetric trucks would continue to be considered mobile sources. The Air Permits Division has examples of volumetric trucks filled with cement or flyash from material handling silos. This PBR amendment does not restrict owners or operators from claiming §106.144, Bulk Mineral Handling, for these types of operations when appropriate. When silos are filling volumetric trucks and those trucks are used for larger scale batch mixing, the concrete batch plant standard permit or case-by-case NSR permit are appropriate authorizations as the truck capacity

is larger than the 27 cubic feet limitation in this PBR amendment.

**Fiscal Note: Costs to State and Local Government**

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule would amend §106.141 to include medium-sized batch mixing operations in the current PBR for concrete batch mixers. A medium-sized batch mixing operation uses drums larger than a five cubic feet capacity, but their capacity is considerably smaller than facilities for concrete batch plants that have production rates up to 300 cubic yards per hour. Like small batch mixing operations, medium-sized batch mixing operations have portable equipment and they are designed for the rapid production of concrete at a job site. Under current rule, owners or operators of medium-sized batch mixing operations are required to meet the requirements of the standard permit or apply for a case-by-case NSR permit, which has a fee and requires public notice. However, the agency has never received an application for medium-sized batch mixing operations. These operations typically have a negligible overall effect on air quality and are usually temporary in nature. For these reasons, the agency proposes to amend the current PBR for concrete batch mixers to include those larger than allowed

by current rule but that would not be considered a concrete batch plant.

The proposed PBR would limit the capacity of batch mixers to 27 cubic feet or less, limit the size of internal combustion engines to 25 horsepower or less, and require best management practices to control dust. The current PBR does not require registration, notice, or the payment of a fee.

Units of local government or other state agencies that own or operate medium-sized batch mixing operations are not expected to experience any fiscal implications because of the proposed rule. The agency has not received any permit applications or fees in the past for these operations, and the proposal to include them in the current PBR would not require registration or payment of a fee. The agency does not have data regarding the number of medium-sized batch mixing operations that may be owned or operated by governmental entities.

### **Public Benefits and Costs**

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule would be the efficient authorization of medium-sized batch mixing operations that allows the agency to focus resources on facilities that have a larger environmental impact.

The proposed rule would not have a significant fiscal impact on individuals or large businesses that own or operate medium-sized batch mixing operations. The proposal to include these operations in the current PBR would not require registration or the payment of a fee. Although current rule requires that these operations be permitted on a case-by-case basis or meet the requirements of the standard permit, the agency has received no applications or fees to permit these operations in the past. The agency has no data regarding the number of medium-sized batch mixers owned or operated by businesses or individuals.

#### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses that own or operate medium-sized batch mixers. The proposal to include these operations in the current PBR would not require registration or the payment of a fee. Although current rule requires that these batch mixing operations be permitted on a case-by-case basis or meet the requirements of the standard permit, the agency has received no applications or fees to permit these operations in the past.

#### **Small Business Regulatory Flexibility Analysis**

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does

not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

### **Local Employment Impact Statement**

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, Regulatory Analysis of Major Environmental Rules, and determined that the proposed rule does not meet the definition of a major environmental rule as defined in the statute. According to Texas Government Code, §2001.0225, a major environmental rule means "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." While the purpose of this rulemaking is to increase protection of the environment and reduce risk to human health, it is not expected that this rulemaking will adversely affect in a material way the

economy, a sector of the economy, productivity, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, no regulatory impact analysis is required.

Furthermore, even if the proposed rulemaking constituted a major environmental rule, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this rulemaking; and 4) the proposed rulemaking is authorized by specific sections of the THSC, Chapter 382 (also known as the Texas Clean Air Act), cited in the Statutory Authority section.

The purpose of the proposed PBR amendment is to expand the applicability of §106.141 to more facilities. Currently, the PBR authorizes batch mixer drums of five cubic feet capacity and smaller. Under the proposed amendment, the PBR would also include batch mixing operations that use equipment larger than a five cubic feet capacity drum but are not considered to be concrete batch plants.

The commission invites public comment on the draft regulatory impact analysis determination. 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.

### **Draft Takings Impact Assessment**

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043, Takings Impact Assessment. The primary purpose of the rulemaking is to expand a PBR authorization for registering batch mixers that use equipment larger than a five cubic feet capacity drum but are not considered to be concrete batch plants. The expansion of the PBR authorization does not 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. This rulemaking will not revoke the authorizations of previously authorized facilities. Consequently, this rulemaking

action does not meet the definition of a takings under Texas Government Code, §2007.002(5), Definitions.

### **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 Texas Administrative Code (TAC), §505.22, Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing coastal natural resource areas, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone. The proposed amendment will balance economic development with other concerns by limiting batch mixer capacity, limiting engine size, and requiring dust control measures.

The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC, §501.32, Policies for Emission of Air Pollutants). Therefore, in accordance with 31 TAC, §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

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.

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**

Chapter 106, is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, include any changes made using the amended Chapter 106 requirements into their operating permit.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on October 2, 2012, 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. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Mr. Bruce McAnally, 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: <http://www5.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 2012-007-106-PR. The comment period closes October 8, 2012. Copies of the proposed rulemaking can be obtained from the commission's

*[http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html)*. For further information,  
please contact Ms. Becky Southard, Air Permits Technical Program Support Section,  
(512) 239-1638.

## **SUBCHAPTER E: AGGREGATE AND PAVEMENT**

### **§106.141**

#### **Statutory Authority**

The amendment is proposed under Texas Water Code, §5.103, Rules, and §5.105, General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended section is also proposed under Texas Health and Safety Code, §382.002, 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; §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.05196, Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities; and §382.057, Exemption, which authorizes exemptions from permitting.

The proposed amendment implements Texas Health and Safety Code, §§382.002,

382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

**§106.141. Batch Mixers.**

Batch mixers with rated capacity of 27 [five] cubic feet or less for mixing cement, sand, aggregate, lime, gypsum, additives, and/or water to produce concrete, grout, stucco, mortar, or other similar products; and that comply with the following conditions; [or similar materials] are permitted by rule.

(1) An internal combustion engine rated at 25 horsepower or less may be used to power the mixer.

(2) The owner or operator shall use best management practices for dust control by:

(A) cleaning up spilled raw materials, waste products, or finished products on a daily basis; and

(B) controlling dust in transfer systems, stockpiles, work areas, storage, and truck unloading areas.