

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

**AGENDA REQUESTED:** February 13, 2013

**DATE OF REQUEST:** January 25, 2013

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

**CAPTION: Docket No. 2012-0822-RUL.** Consideration of the adoption of amendments to 30 Texas Administrative Code Chapter 106, Permits by Rule, Subchapter E, Aggregate and Pavement.

The adoption would amend Section 106.141, Batch Mixers, to include medium-sized batch mixing operations used in temporary construction and repair operations. This would allow medium-sized batch mixers to use a permit by rule (PBR) for authorization, instead of a case-by-case new source review permit or the standard permit for concrete batch plants. The amended PBR will address the operational needs and environmental concerns associated with these facilities more appropriately. The proposed rules were published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7048). (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.  
\_\_\_\_\_  
**Division Director**

Bruce McAnally  
\_\_\_\_\_  
**Agenda Coordinator**

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

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners

**Date:** January 25, 2013

**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 Rulemaking Adoption  
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:**

Under current rules, there is no standard permit or PBR that is appropriate for medium-sized batch mixing equipment used in construction and repair operations. The PBR used for small mixers, 30 Texas Administrative Code (TAC) §106.141, Batch Mixers is currently 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 short-term jobs.

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, is not designed to meet the operational needs or environmental concerns associated with medium-sized batch mixers used in temporary construction and repair operations. The amendments to §106.141 would provide an appropriate and efficient method of authorization for medium-sized batch mixers.

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

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

The amendments expand the applicability of §106.141 to authorize batch mixing operations with drum capacities of 27 cubic feet or less. The PBR excludes 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 permit under §116.111, General Application.

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

N/A.

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

Re: Docket No. 2012-0822-RUL

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

**Statutory authority:**

The amended section is adopted 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 adopted 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 will have a method of permitting that is more appropriate for their processes. There will 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 will be most appropriate with a PBR rather than a standard permit or case-by-case permit.

**B.) Public:**

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

**C.) Agency programs:**

Although owners or operators of medium-sized batch mixers were required to use a standard permit or case-by-case new source review permit before the amendments, which

Re: Docket No. 2012-0822-RUL

would have required extensive staff review and a permit fee, the agency never received an application. From this perspective, these PBR amendments will have no fiscal implications for the agency. The agency finds these operations better suited for a non-registered PBR, because they do not have a major effect on air quality and do not present a public health concern.

**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 amendments was generally favorable. There was some discussion about increasing 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. However, the cement supplement storage silos and material transfer equipment at the home site of these trucks are considered stationary sources and are subject to the permitting requirements of 30 TAC Chapter 116.

**Public comment:**

TCEQ did not receive any comments.

**Significant changes from proposal:**

There have been no changes from proposal.

**Potential controversial concerns and legislative interest:**

The public may have questions about nuisance issues regarding dust and noise. Industry should generally support the PBR amendments 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 are used in short construction and repair jobs, the regulated community prefers a PBR that does not require registration. Because batch mixers do not have a major effect on air quality, they are in one area for a short period of time, and they do not present a public health concern, the agency does not expect legislative concern regarding these amendments.

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

This rulemaking will require the agency to communicate a different permitting method for medium-sized batch mixers, but it will not require development of new permitting policies. Before the amendments, these facilities were required to apply for a standard permit or

Re: Docket No. 2012-0822-RUL

case-by-case permit. The Air Permits Division will communicate the availability of the amended PBR and its applicability requirements.

**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 would be required to apply for a standard permit or case-by-case permit.

One 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 between five cubic feet and 27 cubic feet.

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 between five cubic feet and 27 cubic feet.

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

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

**Anticipated Texas Register publication date: March 1, 2013**

**Anticipated effective date: March 7, 2013**

**Six-month Texas Register filing deadline: February 22, 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

cc: Chief Clerk, 2 copies  
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The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendment to §106.141 *without change* to the proposed text as published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7048) and will not be republished.

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

Prior to this rulemaking action, there was no standard permit or permit by rule (PBR) specifically designed for medium-sized batch mixing operations commonly used in construction and repair activities. Before the adoption of this amendment, §106.141 authorized equipment with a mixing drum of up to a five cubic feet in capacity. Medium-sized batch mixing operations use drums with a capacity larger than five cubic feet, but are considerably smaller than the facilities authorized by the air quality standard permit for concrete batch plants. The concrete batch plant standard permit authorizes facilities with 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 PBR amendment expands the applicability of §106.141 to include batch mixing operations with drum capacities up to 27 cubic feet. The PBR may not be used to authorize 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 adopts changes to §106.141 that allow medium-sized batch mixers to be authorized with the PBR. In this section, the commission also adopts the addition of specific example products that owners or operators can make with these mixers. The amendment adds 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 the amendment, but after careful consideration, the commission decided to continue considering volumetric trucks to be mobile sources. Volumetric (or compartmentalized) trucks are prevalent in the concrete industry. These trucks are equipped with a water tank and individual bins for aggregate, cement, and cement supplements (flyash, etc.). These trucks are mainly used for small

repair jobs that do not require large amounts of concrete. The agency continues to consider the transporting and mixing by these trucks to be a mobile source activity. However, the loading equipment (cement or cement supplement storage silos) at the home site of these trucks is considered a stationary source, and is subject to permitting requirements. These sources can be authorized using an NSR permit or a PBR. This PBR amendment does not restrict owners or operators from claiming §106.144, Bulk Mineral Handling, when appropriate.

### **Final Regulatory Impact Determination**

The commission reviewed the amendment in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, Regulatory Analysis of Major Environmental Rules, and determined that the amendment 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 amendment constituted a major environmental rule, a regulatory impact analysis would not be required because the 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 rulemaking does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the rulemaking is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the 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 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 of this preamble.

The purpose of the PBR amendment is to expand the applicability of §106.141 to more facilities. Before the adoption of this amendment, the PBR authorized batch mixer drums of five cubic feet capacity and smaller. The amended PBR includes batch mixing operations that use equipment larger than a five cubic feet capacity drum but that the commission does not consider concrete batch plants.

The commission invited public comment on the draft regulatory impact analysis determination and received no comments during the public comment period.

### **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 batch mixers that use equipment larger than a five cubic feet capacity drum but that the commission does not consider 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 rulemaking and found that it 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 rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program, and found the 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 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 this rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the rule is consistent with these CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program and did not receive comments during the public comment period.

#### **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, Permits by Rule requirements into their operating permit.

#### **Public Comment**

The commission held a public hearing on October 2, 2012. The comment period closed on October 8, 2012. The commission did not receive any comments.

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

### **§106.141**

#### **Statutory Authority**

The amendment is adopted 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 adopted 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 adopted 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.

## **ORDER ADOPTING AMENDED RULE**

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

On February 13, 2013, the Texas Commission on Environmental Quality (commission) adopted an amended rule in 30 Texas Administrative Code Chapter 106, Permits by Rule, Subchapter E, Aggregate and Pavement, concerning Batch Mixers. The proposed amended rule was published in the September 7, 2012, issue of the *Texas Register* (37 TexReg 7048).

IT IS THEREFORE ORDERED BY THE COMMISSION that the amended rule is hereby adopted. The commission further authorizes staff to make any non-substantive revisions to the amended rule necessary to comply with *Texas Register* requirements. The adopted amended rule and the preamble to the adopted amended rule are incorporated by reference in this Order as if set forth at length verbatim in this Order.

This Order constitutes the Order of the commission required by the Administrative Procedure Act, Government Code, § 2001.033, State Agency Order Adopting Rule.

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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Bryan W. Shaw, Ph.D., Chairman

Commission in 2012 for use in the sale of a new home where construction is incomplete. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

§537.31. *Standard Contract Form TREC No. 24-13[+2].*

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 24-13[+2] approved by the Texas Real Estate Commission in 2012 for use in the sale of a new home where construction is completed. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

§537.32. *Standard Contract Form TREC No. 25-10[9].*

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 25-10[9] approved by the Texas Real Estate Commission in 2012 for use in the sale of a farm or ranch. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

§537.37. *Standard Contract Form TREC No. 30-11[+0].*

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 30-11[+0] approved by the Texas Real Estate Commission in 2012 for use in the resale of a residential condominium unit. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

§537.44. *Standard Contract Form TREC No. 37-5[4].*

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 37-5[4] approved by the Texas Real Estate Commission in 2012 for use as a resale certificate when the property is subject to mandatory membership in an owners' association. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

§537.47. *Standard Contract Form TREC No. 40-6[5].*

The Texas Real Estate Commission adopts by reference standard contract form, TREC No. 40-6[5] approved by the Texas Real Estate Commission in 2012 for use as an addendum to be added to promulgated forms of contracts when there is a condition for third party financing. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.texas.gov.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 20, 2012.

TRD-201204422

Loretta R. DeHay

General Counsel

Texas Real Estate Commission

Earliest possible date of adoption: October 7, 2012

For further information, please call: (512) 936-3092



## TITLE 30. ENVIRONMENTAL QUALITY

### PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

## CHAPTER 106. PERMITS BY RULE SUBCHAPTER E. AGGREGATE AND PAVEMENT

### 30 TAC §106.141

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 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.

#### 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.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 24, 2012.

TRD-201204501

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: October 7, 2012

For further information, please call: (512) 239-2141



## **TITLE 40. SOCIAL SERVICES AND ASSISTANCE**

### **PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES**

#### **CHAPTER 101. ADMINISTRATIVE RULES AND PROCEDURES**

##### **SUBCHAPTER E. APPEALS AND HEARING PROCEDURES**

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), proposes to amend Chapter 101, Administrative Rules and Procedures, Subchapter E, Appeals and Hearing Procedures, Division 1, General Rules, §101.907, Filing a Request for Review, and §101.943, Motion for Reconsideration, and Division 3, Division for Early Childhood Intervention Services, §101.1107, Administrative Hearings Concerning Individual Child Rights, and §101.1109, Motion for Reconsideration; and proposes a new rule in Subchapter E, Appeals and Hearing Procedures, Division 3, Division for Early Childhood Intervention Services, §101.1113, Computation of Time.

DARS proposes the amendments and new rule to comply with guidance received by DARS from the U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS), Office of Special Education Programs (OSEP), concerning the Individuals with Disabilities Education

Act (IDEA), Part C, State Application and Assurances. The proposed amendments and new rule relate to due process administrative appeal and hearing procedures in DARS' Early Childhood Intervention (ECI) program.

Specifically, DARS is proposing revisions to §101.907, to comply with the IDEA Part C due process hearing procedure in 34 CFR §303.420(b), which states that a due process hearing may only be filed by the parent; and to §101.943, to comply with the requirement in 34 CFR §303.423(b), which permits motions for reconsiderations prior to issuing a final decision, but the final decision must be issued within the 30-day timeline. Additionally, DARS proposes to amend rules in Subchapter E, Division 3, Division for Early Childhood Intervention Services, §101.1107, to comply with the IDEA Part C due process hearing procedure in 34 CFR §303.420(b), which states that a due process hearing may only be filed by the parent; and §101.1109, to comply with the requirement in 34 CFR §303.423(b), which permits motions for reconsiderations prior to issuing a final decision, but the final decision must be issued within the 30-day timeframe. In addition, new rule §101.1113 is proposed to be consistent with the definition of days in 34 CFR §303.9, which states that the term days means calendar days, and to comply with OSEP guidance that the term calendar days includes weekends, holidays, and non-business days.

On February 27, 2012, DARS received the U.S. Department of Education, Office of Special Education and Rehabilitative Services requested changes to certain rules based on its Continuous Improvement Visit to DARS during the week of October 24, 2011. DARS will formally publish the proposal in the *Texas Register* for a 60-day comment period.

The proposed amendments and new rule are authorized by the Texas Human Resources Code, Chapters 73 and 117; and the Individuals with Disabilities Education Act, as amended, 20 USC §1400 et seq. and its implementing regulations, 34 CFR Part 303, as amended.

Mary Wright, DARS Chief Financial Officer, has determined that for each year of the first five years that the proposed amendments and new rule will be in effect, there are no foreseeable fiscal implications to either costs or revenues of state or local governments as a result of enforcing or administering the proposed amendments and new rule.

Ms. Wright also has determined that for each year of the first five years the proposed amendments and new rule will be in effect, the public benefit anticipated as a result of enforcing the changes will be compliance with federal statutes and regulations. Ms. Wright has also determined that there is no probable economic cost to persons who are required to comply with the proposed amendments and new rule.

Further, in accordance with Texas Government Code, §2001.022, Ms. Wright has determined that the proposed amendments and new rule will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Ms. Wright has determined that the proposed amendments and new rule will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendments and new rule may be submitted within 60 days of publication of this proposal in the *Texas Register* to Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756 or electronically to [DARSRules@dars.state.tx.us](mailto:DARSRules@dars.state.tx.us).