

The Texas Commission on Environmental Quality (TCEQ, commission, or agency) adopts new §§101.600 - 101.602.

Section 101.600 is adopted *with change* to the proposed text as published in the May 30, 2014, issue of the *Texas Register* (39 TexReg 4129). Sections 101.601 and 101.602 are adopted *without changes* to the proposed text, and, therefore will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

Senate Bill (SB) 1756, 83rd Legislature, 2013, amended the Texas Health and Safety Code (THSC), Chapter 382, Texas Clean Air Act (TCAA), to provide TCEQ with the authority to accept a surcharge from the applicant to cover the expenses incurred by expediting the processing of an application. THSC, §382.05155, Expedited Processing of Application, allows applicants to request, and the executive director may grant, expedited processing of applications. The commission interprets THSC, §382.05155 to only apply to an application filed under 30 Texas Administrative Code (TAC) Chapter 106, 116, or 122. The applicant must demonstrate that the purpose of the application will benefit the state or local economy and the executive director may expedite the processing of the application if it is determined that by expediting the processing it will benefit the economy of this state or an area of this state. THSC, §382.05155 allows the commission to authorize the use of overtime or contract labor to process expedited applications, and to add a surcharge to cover expenses incurred by the expediting process. THSC, §382.05155 specifies that the overtime or contract labor used to process

expedited applications is not included in the calculation of the number of full-time equivalent commission employees. Applicants must still comply with all applicable federal and state requirements, including the existing public notice requirements. These requirements will continue to include the opportunity, when applicable, to submit comments and request a public meeting, a notice and comment hearing, or a contested case hearing. In addition, when public notice is required for an expedited project, the published notice must indicate that the application is being processed in an expedited manner.

Section by Section Discussion

§101.600, Applicability

The commission adopts new §101.600, to establish that owners and operators may request expedited processing of applications filed under 30 TAC Chapter 106, 116, or 122, and to establish the standard the executive director must use to determine whether an application may be processed under this section. Adopted new §101.600(a) requires the owner or operator to demonstrate that the application and project will benefit the economy of this state or an area of this state. Adopted new §101.600(b) provides that the executive director may expedite the processing of an application if the executive director determines that expediting it will benefit the economy of this state or an area of this state. In addition to this determination, adopted subsection (b) provides that the executive director must have the available financial and physical resources for this purpose. The number of applications that can be expedited will depend upon available permitting resources, such as availability of qualified personnel (commission employees

or contract labor), office space, and computers. For the 2014 - 2015 biennium, the commission appropriation for the program is limited by the Appropriation Rider authorized by General Appropriations Act, Article IX, §18.57 (83rd Legislature, 2013). This rider limits the funds appropriated for this program to an amount not to exceed \$955,000 in fiscal year 2014 and not to exceed \$897,000 in fiscal year 2015. The Appropriation Rider limits the amount the commission can spend from the collected surcharge and does not include other fees, such as Prevention of Significant Deterioration (PSD) fees. Expending the appropriation authorized under this rider is contingent on the agency collecting revenue from the expedited permit program.

§101.601, Surcharge

The commission adopts new §101.601 to provide for the executive director to add a surcharge for processing expedited applications and to provide for a refund or additional charge when applicable. Adopted new §101.601(a) requires this surcharge to be added in an amount sufficient to cover expenses incurred by expediting the processing of an application. Adopted new §101.601(b) requires applicants to pay a surcharge at the time an application, filed under 30 TAC Chapter 106, 116, or 122, is submitted or is under review. Only after the surcharge is received will TCEQ begin expediting the processing of the application. Adopted new §101.601(c) allows the executive director to collect additional surcharge(s) from an applicant to cover the expenses of expediting the application above the original surcharge amount. The requirement that the executive director include a surcharge to cover the expenses of expediting an application is statutory. Once a request for expedited permitting is

received, the executive director will evaluate the resources necessary to expedite the processing of each application. The commission has included this provision allowing for additional surcharge(s) to meet the intent of the statute if additional surcharge is necessary to cover expenses incurred by expediting the application. Adopted new §101.601(d) states that the executive director may refund any unused portion of the surcharge.

§101.602, Public Notice

The commission adopts new §101.602 to specify that for expedited applications with a surcharge, any required public notice, including that described in 30 TAC Chapters 39, 55, and 122, must also include a statement that the application is being processed in an expedited manner.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

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. The specific purpose of this adopted rulemaking, as discussed elsewhere in this preamble, is to implement SB 1756 by developing a process to expedite the processing of an application filed under 30 TAC Chapter 106, 116, or 122.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted new rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble, and is specifically required by state law. Further, the rules do not exceed a standard set by federal law or exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Therefore, this adopted rulemaking is not

subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the regulatory impact analysis determination.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Texas Constitution §17 or §19, Article I; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking under Texas Government Code, §2007.043. The specific purpose of this adopted rulemaking, as discussed elsewhere in this preamble, is to implement SB 1756 by developing a

process to expedite the application process.

The adopted rules will not create any additional burden on private real property. The adopted rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adoption also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the adopted rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal

management program during the public comment period. No comments were received on the CMP.

Public Comment

The commission held a public hearing on June 24, 2014. The comment period closed on June 30, 2014. The commission received comments from Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP), the United States Environmental Protection Agency (EPA), the TCEQ Office of the Public Interest Council (OPIC), the Texas Chemical Council (TCC), the Texas Pipeline Association (TPA), the Texas Oil and Gas Association (TXOGA), and Valero. Five commenters supported the proposed rulemaking, and two commenters were neutral. Four commenters suggested specific changes to the proposed rules.

Response to Comments

Comment

TIP, TCC, TPA, TXOGA, and Valero submitted comments in support of the revisions to Chapter 101.

Response

The commission appreciates the support. No change was made to the rules in response to this comment.

Comment

TPA, TXOGA, and TCC made suggestions regarding the economic benefit analysis. TPA suggested changing §101.600(a) and (b) to also include, "an area of this state" as having an economic benefit to be more consistent with the Texas Health and Safety Code and to ensure a benefit to the local economy. TCC commented that the economic benefit analysis should not be a burdensome process, that the burden is on the applicant to make the demonstration, and the evidence necessary to support the economic benefit finding should be minimal. TXOGA and TCC commented that the ED should maintain discretion in the economic benefit analysis and the analysis should not be a subject to challenge in a contested case hearing.

Response

The language has been changed to, "this state or an area of this state" in places that economic benefit is discussed, including §101.600(a) and (b). The commission has not specified criteria for evaluating economic benefit and will consider any demonstration of economic benefit to this state or an area of this state. The economic benefit analysis and determination is only used to determine whether the application is expedited. The economic benefit analysis is not part of the administrative or technical review and does not impact permit issuance. Therefore, the economic benefit analysis is not subject to the contested case hearing process.

Comment

TPA recommended changing "may" to "shall" in §101.600(b) to more clearly state that if

the resources are available and expediting the permit would benefit the economy, application of the process would be automatic. TPA also recommended changing "may" to "shall" in §101.601(d) that discusses refunding any unused portion of the surcharge to more clearly indicate that overpayments will be refunded and to ensure consistency with the THSC.

Response

Changing the rule language as recommended would be inconsistent with the statutory language and would remove the flexibility needed to administer these rules. In addition, there could be situations when expediting a permit application might not be possible, such as if the rider appropriations limit has been reached. No change was made to the rule in response to this comment.

Comment

TPA suggested including rule language that requires the commission to inform the applicant on its decision regarding expediting within ten business days.

Response

The commission is committed to responding to expedited requests in a reasonable amount of time. In the commission's experience, considerations such as these should be in the implementation procedures and policies so that specific facts such as permit type and complexity can be included. No

change was made to the rule in response to this comment.

Comment

EPA asked whether the proposed revisions to Chapter 101 would be submitted to EPA for review as a revision to the State Implementation Plan (SIP) or the Texas Federal Operating Permits Program.

Response

The commission is not submitting Project 2013-042-101-AI or any portions of the rulemaking to EPA as a SIP or Texas Federal Operating Permits Program revision. No change was made to the rule in response to this comment.

Comment

TCC asked the commission to revise the preamble to clarify that the current caps for each fiscal year do not also include permit fees in 30 TAC §116.141.

Response

The financial limits in the Section by Section Discussion for §101.600, Applicability, are referring to funds appropriated by the legislature, not a financial cap that the agency can control. The limit in the appropriations rider is the amount the commission can spend in fiscal years 2014 and 2015 from the surcharge(s) collected through the expedited permit process to pay for additional resources. This does not include other fees, such as PSD

fees. The preamble was updated to include this clarification. No change was made to the rule in response to this comment.

Comment

EPA, TCC, and OPIC asked how the commission would ensure that any contracted workers hired to expedite permits would not introduce a conflict of interest in developing and issuing air permits.

Response

The commission plans to initially use current employees as the additional resources needed to implement the expedited permitting program. The rule language allowing for the use of contract labor reflects the statutory language in the THSC. If the commission chooses in the future to use contract labor to work on expedited permit projects, appropriate language in the contract will address potential conflicts of interest. No change was made to the rule in response to this comment.

Comment

TCC sought clarification regarding a scenario when both a New Source Review (NSR) permit and Title V permit is required. TCC asked if the applicant would have the option to expedite only one permit or the other, or if both permits would be required to be expedited. TCC also wanted clarification regarding how a surcharge would be assessed in that scenario.

Response

Requests for expediting application reviews will be made by the applicant as part of each application submitted. A separate surcharge will be assessed for each request that the executive director has determined meets the requirements of the §§101.600 - 101.602. The applicant will not be required to expedite multiple applications, even in circumstances when the applicant has multiple applications pending with the Air Permits Division. The expedited permit program is a voluntary program and the applicant can request to expedite any or all applications submitted.

Comment

OPIC, TCC, TXOGA, and TIP expressed concerns regarding expedited permit applications and public notice. TCC and TXOGA requested clarification on how the commission is planning on handling a situation when an application has already been to public notice and then the applicant chooses to expedite the application process.

Response

The commission will continue to follow all public notice process requirements for both NSR and Title V permitting. An application for an expedited permit will continue to meet the same public notice timeframes as required by current public notice rules. In instances when the applicant

requests an application to be expedited after public notice has been correctly completed, the commission does not intend to require the applicant to republish notice. No change was made to the rule in response to these comments.

Comment

OPIC specifically expressed concern about the timeline for public review being reduced.

Response

Expedited permit applications will continue to be subject to the existing public notice deadlines and timeframes specified in current rules covering the public notice and comment process. However, the intended purpose of the underlying legislation is to shorten the overall time between the filing of a permit application and the issuance or denial of the permit, and as a natural consequence, certain steps in the administrative and technical review portions of the permit review may occur more rapidly. The public will continue to be able to state their views regarding all aspects of the permit application and technical review, and will continue to have the opportunity to request a public meeting, contested case hearing, motion to overturn, or a request for reconsideration (as applicable) under the same time constraints currently allowed.

Comment

EPA asked for an explanation of how the commission will integrate the expedited process into the Title V workload. Specifically, EPA asked how the commission was planning on keeping the expedited surcharge separate from Title V emission fees.

Response

The commission will continue to follow all air permitting process requirements for both NSR and Title V permitting. Application fees, emission fees, and expedited permitting surcharges will be tracked separately. Expedited permitting surcharge funds will not be placed in or combined with the commission's Title V fee account (Account No. 5094); rather, as specified in the rider for SB 1756 in the General Appropriations Act, the surcharges will be paid from Clean Air Account No. 151. The commission will create a separate and distinct tracking number for the expedited surcharge and any resulting incentives for payroll accounting purposes. No change was made to the rule in response to this comment.

Comment

TIP, OPIC, TCC, TPA, and TXOGA provided implementation suggestions. TIP provided implementation suggestions for expediting permit projects regarding staffing, timing of applicability, and public notice language. OPIC expressed concerns regarding implementation of contract labor and preservation of sufficient time for public review of application documents. TCC provided many implementation suggestions for expediting permit projects regarding economic benefit analysis, the surcharge, applicability, project

prioritization, staffing, and administration. TPA provided implementation suggestions regarding response letter deadlines, issuance deadlines, and staffing. TXOGA provided implementation suggestions regarding staffing, public notice timing, specificity of providing economic benefit, and the surcharge. TIP requested that the commission confirm, and TXOGA and TPA commented, that all aspects of the permit application process, e.g., the modeling and toxicology analyses, can be expedited, and owners or operators may elect expedited treatment for applications after initial submission. TCC recommended a "once in, always in" approach, meaning once an applicant has requested expedited processing, the application remains in the program for all purposes until a draft permit is issued.

Response

The commission appreciates the suggestions and will consider them in its implementation process. The commission will continue to follow all air permitting process requirements for both NSR and Title V permitting. The commission agrees that under the rule, all parts of the permit application process that do not have a specific timeline in rule or statute may be expedited. The commission will take appropriate measures to inform applicants of all implemented procedures and policies by developing guidance and promptly responding to public questions. No change was made to the rule in response to these comments.

Comment

TCC and TXOGA suggested that any surcharge money accumulated in one fiscal year should be allowed to be used the next fiscal year. TXOGA specifically suggested adding rule language to accomplish this.

Response

The ability to carry forward appropriation authority across bienniums requires specific legislative authority. The commission currently does not have this authority for expedited air permits funding. The commission is limited to carrying forward appropriation authority within the same biennium. No change was made to the rule in response to this comment.

SUBCHAPTER J: EXPEDITED PERMITTING

§§101.600 - 101.602

Statutory Authority

The new rules are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The rulemaking is also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.05155, concerning Expedited Processing of Application, which authorizes the commission to develop a process for expediting applications and

charging a surcharge; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under THSC, §382.0518 to publish notice of intent to obtain a permit. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The adopted rulemaking implements Senate Bill 1756 (83rd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.051, 382.05155, and 382.056; and Texas Government Code, §2001.004 and §2001.006.

§101.600. Applicability.

(a) An owner or operator may request the expedited processing of an application filed under Chapter 106, 116, or 122 of this title (relating to Permits by Rule; Control of Air Pollution by Permits for New Construction or Modification; and Federal Operating Permits Program, respectively) if the applicant demonstrates that the purpose of the application will benefit the economy of this state or an area of this state .

(b) Subject to the availability of commission resources for expediting permit applications, the executive director may expedite the processing of an application filed under Chapter 106, 116 or 122 of this title if the executive director determines that

expediting it will benefit the economy of this state or an area of this state .

§101.601. Surcharge.

(a) The executive director may add a surcharge for an expedited application filed under Chapter 106, 116, or 122 of this title (relating to Permits by Rule; Control of Air Pollution by Permits for New Construction or Modification; and Federal Operating Permits Program, respectively) in an amount sufficient to cover the expenses incurred by expediting it, including overtime, contract labor, and other costs.

(b) Any surcharge will be remitted in the form of a check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality (TCEQ) or TCEQ and delivered with the application to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3088. Applications filed under Chapter 106, 116, or 122 of this title as described in this subchapter will not be considered for expedited processing until the surcharge is received.

(c) If the cost of processing an expedited application under this subchapter exceeds the collected surcharge amount, the executive director may assess and collect additional surcharge(s) from the applicant to cover the additional costs of expediting the permit. The executive director will not grant final approval under Chapter 106, 116, or 122 of this title if an outstanding surcharge amount is due.

(d) The executive director may refund any unused portion of the surcharge.

§101.602. Public Notice.

When existing public notice requirements must be met and the applicant pays a surcharge as described in §101.601 of this title (relating to Surcharge), the applicable public notice must indicate that the application is being processed in an expedited manner.