

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** October 3, 2014

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

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

Docket No.: 2013-1626-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 101, General Air Quality Rules
SB 1756, Expedited Permitting Program
Rule Project No. 2013-042-101-AI

Background and reason(s) for the rulemaking:

Historically, the rules of the Texas Commission on Environmental Quality (TCEQ, commission, or agency) and its predecessor agencies have not specifically provided for the expedited processing of applications. While there are existing mechanisms to accelerate the review of an application, those mechanisms have been implemented through business practices, not through rule.

Senate Bill (SB) 1756 adds a new section to the Texas Health and Safety Code (THSC), Chapter 382, Texas Clean Air Act (TCAA), which provides TCEQ the authority to accept a surcharge from the applicant to cover the expenses incurred by expediting the processing of an application.

New THSC, §382.05155, Expedited Processing of Application, allows applicants to request, and the executive director may grant, expedited processing of applications if the applicant demonstrates the purpose of the application will benefit the state or local economy. This new section 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 existing public notice requirements.

Scope of the rulemaking:

The commission interprets the THSC, §382.05155 to only apply to an application filed under Title 30 Texas Administrative Code (TAC) Chapter 106, 116, or 122. This adopted rulemaking will provide applicants with the option to pay a surcharge to request the expedited processing of an application where the applicant has demonstrated that the purpose of the application will benefit the state or local economy. Also, 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. The adopted rulemaking is a new subchapter in 30 TAC Chapter 101.

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A.) Summary of what the rulemaking will do: This adopted rulemaking will add 30 TAC Chapter 101, Subchapter J, Expedited Permitting, new §101.600, Applicability; §101.601, Surcharge; and §101.602, Public Notice, to provide applicants with an option to pay a surcharge to cover expenses incurred by TCEQ's expedited processing of applications.

B.) Scope required by federal regulations or state statutes: Applicants requesting expedited processing must 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.

C.) Additional staff recommendations that are not required by federal rule or state statute: None.

Statutory authority:

The rulemaking is 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 THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; 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; and 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, 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.

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The adopted rulemaking implements SB 1756, 83rd Legislature, 2013; THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05155, and 382.056; and Texas Government Code §2001.004 and §2001.006.

Effect on the:

A.) Regulated community: Applicants will be given the option to pay a surcharge to expedite the processing of applications filed under 30 TAC Chapter 106, 116, or 122. The commission anticipates no adverse fiscal impact to the regulated community, because the applicant can choose whether or not to make an expedited request.

B.) Public: The adopted rulemaking is not expected to directly affect the general public. When public notice is required for an application filed under 30 TAC Chapter 106, 116, or 122, and the applicant has opted to pay a surcharge, the public will be informed through the current public notice process that it will be processed under the adopted Subchapter J. The public notice, comment period, and contested case hearing process will not be affected by the adopted rulemaking. All emissions activities must be authorized through current permitting methods, which ensure protection of public health and the environment.

C.) Agency programs: The adopted rulemaking will have an effect on agency programs, including permit processing, human resource workloads, and employee compensation. However, the commission may add a surcharge to an application fee in an amount sufficient to cover the expenses incurred by the expedited process, including overtime, contract labor, and other costs, so the commission does not anticipate a significant fiscal impact to agency programs.

Stakeholder meetings: In order to expedite the rulemaking, the commission did not hold any stakeholder meetings. The commission provided an appropriate period of time for public comment (at least 30 days), and held a hearing on the adopted rules. The commission will also continue to provide updates on key milestones on the agency web site.

Public comment:

The commission held a public hearing on June 24, 2014. No oral comments were presented. During the public comment period, comments were received 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 rulemaking, and two commenters were neutral. The neutral commenters had questions regarding implementation, contract labor, and public notice. Four commenters suggested adding changes to the rules regarding the economic benefit analysis, deadlines, surcharge amounts, and refund policy. The suggested changes also included various implementation suggestions.

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Significant changes from proposal:

The commission made a change suggested by TPA. TPA suggested changing TAC §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.

Potential controversial concerns and legislative interest:

Some of the regulated community may have the general perception of unfairness if some applicants have the ability to pay to get a permit faster, while others may not have the financial ability to do so. However, the surcharge collected for expedited applications under adopted §101.600 will be used to cover additional resources needed to expedite the processing of an application, including overtime, contract labor, and other expenses. Therefore, applications expedited with additional resources under Subchapter J should not delay the review of an application without a surcharge payment, because those projects will be worked with current resources.

Does this rulemaking affect any current policies or require development of new policies? Yes. Although the expedited process will be based on the current permitting process, the agency will develop new policies and procedures to implement the surcharge procedures.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking? Without this rulemaking, the agency would not be able to completely fulfill the requirements of the bill or the intent of the legislature. Alternatives to this rulemaking include using existing expedited processing mechanisms that have previously been implemented through business practices.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: May 30, 2014

Anticipated Texas Register adoption publication date: November 7, 2014

Anticipated effective date: November 13, 2014

Six-month Texas Register filing deadline: November 30, 2014

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Attachments:

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