

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §106.50, Registration Fees for Permits by Rule *with change* to the proposed text as published in the July 12, 2002 issue of the *Texas Register* (27 TexReg 6194).

The new section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The commission reviews and processes approximately 6,000 air permit applications and registrations of various types annually. Of the total amount, approximately 3,700 - 4,000 are permit by rule (PBR) registrations, with the remainder comprised of new, renewal, or amendment applications. Prior to this rulemaking, the commission had not assessed a fee for review of a PBR registration.

The commission will assess a fee on PBR registrations received on or after November 1, 2002 to recover some of its registration review costs and fund the commission's air programs. Additionally, the commission will increase emissions fees and inspection fees in a concurrent 30 TAC Chapter 101 rulemaking as well as increase air permit, air permit renewal, and air permit amendment fees in a concurrent 30 TAC Chapter 116 rulemaking in this issue of the *Texas Register*.

The Clean Air Fund 151 (Fund 151) is the source of funding for essentially all air program related activities of the commission. This fund supports a wide range of activities including permitting, inspections, enforcement, air quality planning, mobile source program, emissions inventory, and

monitoring in addition to agency functions which support these activities. Revenues deposited to the fund are from several different fees collected from point sources and mobile sources as well as the general public. Over the last several years, the fund has carried a balance in the account which has allowed the agency to collect revenues below the annual budgeted expenditures. However, the fund balance is close to being depleted. Additionally, due to decreases in emissions, the revenue from fees which are assessed based upon emission levels has declined by an average of approximately 3% per year in recent years. The revenue estimates for Fund 151 reveal that there are insufficient funds to support the fiscal year (FY) 2003 appropriated level.

As part of its air program activities, the commission implements an approved federal operating permit program (Federal Clean Air Act, Titles IV and V, hereinafter referred to as "Title V"). As part of that approval, the commission was required to demonstrate that the fees collected from Title V sources are sufficient to support the Title V program. Currently under state law, this fee must be dedicated for use only on Title V activities. This fee is commonly referred to as the air emissions fee and is currently set at \$26 per ton. However, the fee demonstration submitted to EPA in August 2001 showed that the fee would need to be increased beginning in FY 2003 to provide sufficient support for the Title V program.

Activities which are not considered to be Title V activities must be supported through the remaining fees that are to be used to safeguard the air resources of the state. Essentially, these fees generally include permit, renewal, and amendment fees; inspection fees; and a portion of the motor vehicle safety inspection fee (as set by statute, Texas Health and Safety Code (THSC), §382.0622).

Given the declining availability of funds in Fund 151, the commission reviewed the air fees which it has the authority to change. Most of the air permit, renewal, and amendment fees have not been increased since the early 1990s. The air emissions fee has not been increased since 1995 and the air inspection fee since 1992. The vehicle inspection maintenance fee has been set recently to cover the cost of that program. Several other funding sources are dedicated for specific uses. In an effort to match fee revenue collections more closely with related expenditures, the commission also reviewed potential sources for new fees. After a review of the commission's existing air program related activity fees, the commission will adopt revisions to the emissions fee, inspection fee, permit, renewal, and amendment fees, as well as assess a new fee for review of registrations for PBR.

The commission previously instructed agency staff to initiate a study of the use of Fund 151 fees, including their use for the Title V program. This study is ongoing and is expected to result in a report to the commission in January 2003. In addition, projections involving the revenues and expenditures of Fund 151 have changed since proposal of the air fee increases based upon additional information. The revised projections currently indicate that the proposed fee increases are insufficient to cover projected expenditures through fiscal year 2005. For these reasons, the commission intends to review the air fee increases adopted in this package next year to determine the appropriate levels for each of the air fees.

## SECTION DISCUSSION

### *Subchapter B, Registration Fees for New Permits by Rule*

Adopted new §106.50, concerning registration fees for new PBR registrations, will establish a fee for persons claiming PBRs who file PBR registrations with the commission. The fee applies to those PBR

registrations that require the submission of a registration form, and to those registrations that are voluntarily submitted for commission review. This PBR fee is for registrations received on or after November 1, 2002. No fee will be assessed on previously submitted PBR registrations. No fee will be assessed on PI-7 registrations submitted solely for the purpose of establishing a federally enforceable emissions limit or remediation projects conducted which are reimbursable by the commission. One fee will be assessed for each registration form submitted, regardless of the number of facilities at an account which are identified on the registration form. The adopted PBR fee is a two-tiered fee; small businesses as well as municipalities, counties, and independent school districts with populations or districts of 10,000 or fewer residents will be assessed \$100 and all other entities will be assessed \$450. A small business is a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit, is independently owned and operated, and has fewer than 100 employees or less than \$1 million in annual gross receipts. The intent of this amendment is to recover some of the registration review costs.

Section 106.50(a)(1)(B) is adopted with change to the proposed text to decrease the fee for municipalities, counties, and independent school districts with populations or districts of 10,000 or fewer residents. In response to comments, the commission determined that smaller governmental entities should be afforded the same fee reduction as small businesses.

Section 106.50(b)(2) is adopted with change to the proposed text to exempt remediation projects conducted which are reimbursable by the commission. Since these projects are funded by the commission, there is no need to collect a fee for the registration review.

Section 106.50(d) is adopted with change to the proposed text to correct a typographical error in the mailing address for payment of fees submitted.

The commission recognizes that many types of businesses which relocate frequently may be subject to a fee with each relocation. The commission requested comments on ways to mitigate the costs to businesses which relocate frequently. No comments were received on ways to mitigate costs to businesses which relocate frequently.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute.

“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 amendment to Chapter 106 is not, itself, intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants. Therefore, the commission finds that it is not a major “environmental” rule. The PBR fee collected under the adopted revision to Chapter 106 will impose a one-time fee of \$450 for most persons claiming a PBR, and a lesser amount for those persons claiming a PBR which are small businesses and smaller governmental entities. The new rule will not impact existing businesses which are currently operating under a PBR or standard exemption. Therefore, the rule should not 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.

As defined in Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements of a “major environmental rule.” This rulemaking does not exceed an express requirement of federal or state law. The rulemaking does not exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed and authorized under THSC, Texas Clean Air Act (TCAA), §§382.011, 382.017, 382.062, and 382.0622, and generally under TCAA, §§382.001 *et seq.*

Written comments on the draft regulatory impact analysis determination were solicited. No comments were received on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission conducted a takings impact evaluation for this rule in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to create a PBR fee to

maintain funding, at appropriated levels, sufficient to support a portion of the overall air quality program.

Promulgation and enforcement of the rule will not burden private, real property because it is a fee rule which supports air quality programs of the commission.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program or will affect an action/authorization identified in §505.11(a)(6), 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 Council and determined that the new rule is consistent with CMP goals and policies because the rulemaking is a fee rule which is a procedural mechanism for paying for commission programs; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the rule will not violate (exceed) any standards identified in the applicable CMP goals and policies.

Written comments on the consistency of this rulemaking with the CMP were solicited. No comments were received on the consistency of this rulemaking with the CMP.

#### PUBLIC COMMENT

A public hearing was held on August 12, 2002, in Austin. The comment period closed on August 12, 2002. The commission received comments from Alliance for a Clean Texas (ACT); Associated General Contractors of Texas (AGC); AZZ Incorporated (AZZ); Texas Compliance Advisory Panel (CAP); City of Lubbock (COL); City of Victoria (COV); Dallas Small Business Advisory Committee (DSBAC); Fort Worth Small Business Advisory Committee (FWSBAC); Greater Houston Cleaners & Laundries Association (GHCLA); Golden Triangle Small Business Advisory Committee (GTSBAC); Gull Industries Incorporated (GII); Harwood Industries, Inc. (HII); High Tech Finishing (HTF); Houston Sierra Club (HSC); Printing and Imaging Association Mid-America (PIA); Schumacher Company, Inc. (SCI); Texas Automobile Dealers Association (TADA); Texas Chemical Council (TCC); Texas Cotton Ginners' Association (TCGA); Texas Independent Automobile Dealers Association (TIADA); Texas Municipal League (TML); Texas Oil and Gas Association (TxOGA); Texas Poultry Federation (TPF); Tyler Steel Company (TSC); and two individuals. Oral comments were received from ACT at the hearing. Of the 26 commenters for Chapter 106, two were generally in favor of fee increases while the remainder were generally and/or specifically against fee increases.

#### RESPONSE TO COMMENTS

Prior to September 1, 2002, the TCEQ was the Texas Natural Resource Conservation Commission (TNRCC). Since the comments were received before September 1, 2002, the agency is sometimes referred to as the TNRCC.

### **General**

#### *Comment*

ACT commented that it fully supports the need for the commission to have increased revenue in order to pay for the programs funded through the Clean Air Account.

### **RESPONSE**

**The commission agrees that it is necessary to increase fees to pay for Clean Air Account programs and appreciates the comment.**

#### *Comment*

TxOGA commented that it commits to its ongoing efforts to ensure that the commission is adequately funded and retains delegation of vital environmental programs.

### **RESPONSE**

**The commission appreciates TxOGA's support of the commission's delegation of environmental programs. The commission is also committed to ensure that it is adequately funded and retains all program delegations.**

*Comment*

TCC commented that it recognizes that the commission may be facing a shortfall in funding associated with the air permitting and inspection programs.

**RESPONSE**

**The commission appreciates TCC's recognition of the difficult funding issues faced by the commission.**

*Comment*

HSC commented that it supports the fee increases for permits by rule.

**RESPONSE**

**The commission appreciates HSC's support.**

*Comment*

ACT generally supported basing fees on emissions to reward companies for pollution prevention.

**RESPONSE**

**The commission appreciates the comment. However, the purpose of this rulemaking is to enable the commission to recover a portion of its operating costs, and collect sufficient revenue to support appropriated funding levels, not necessarily to create incentives for pollution prevention.**

*Comment*

TIADA suggested designing new incentive programs, such as rebates, to encourage pollution control and compliance rather than more fees.

**RESPONSE**

**As a result of the 77th Legislature, the commission will be promoting compliance in new ways, by granting regulatory incentives for approved Environmental Management Systems (EMSs), and using an entity's compliance history in order to make regulatory decisions about that entity. While financial incentives are difficult to grant, there is an existing program that approves pollution control equipment for property tax exemptions. The commission is seeking to encourage compliance using innovative and positive means. However, these incentive programs neither reduce air program workload nor generate funding for the air programs. Therefore, the commission finds that this new fee is necessary to cover its operating costs.**

*Comment*

TIADA commented that it opposes any more fees and stated that its industry is over-regulated, citing examples of auto inspections, lawsuit costs regarding the constitutionality of a particular fee, the motor vehicle finance license, and Internal Revenue Service regulation of accounting methodology.

**RESPONSE**

**The commission acknowledges that many industries are subject to multiple fees and regulations from various governmental agencies. However, the commission cannot control regulations placed**

**on the industry by other sources. The new fee is necessary to help provide sufficient funding for the commission's air programs.**

*Comment*

HSC does not believe the commission is doing all that it can to cover all its expenses.

**RESPONSE**

**The commission strives to balance its need for adequate program funding with the costs its fees represent for the regulated community. The commission estimates that the increases will provide sufficient revenue to fund air program activities through FY 2003. The commission intends to review the air fee increases adopted in this package next year to ensure that Fund 151 has adequate funding in subsequent fiscal years. The commission determined that it is taking sufficient action to cover its expenses and to ensure that Fund 151 has adequate funds through FY 2003.**

*Comment*

SCI stated that the large fee increases do not demonstrate sound fiscal responsibility or sound management of budgetary resources.

**RESPONSE**

**The commission strives to manage its fiscal resources in a sound and efficient manner. The commission has operated its air programs without increasing fees since the early 1990's. The fee**

**increases are not large when due consideration is given to the length of time in which fees were not increased.**

*Comment*

TPF suggested that the commission should not have as large of an ending balance.

**RESPONSE**

**The commission revised its proposal since the receipt of these comments during the stakeholder process. The commission is not projecting a \$12 million balance in any FY from 2003 to 2005 under the revised proposal. The adopted fees are expected to result in a fund balance of \$3.7 million in FY 03, and a negative fund balance in FY 04 and FY 05. The commission determined that some level of fund balance is necessary for effective operation of the air programs and to cover recurring monthly costs such as payroll. Since the revised version of the proposal accommodates these requests, no further changes to the rules were made in response to these comments.**

*Comment*

AGC commented that the proposed fees will represent a significant and increased financial burden and that the creation of new fees is not justified. SCI commented that it is not convinced that the air related fees are justified. SCI commented that it objects to the proposed PBR fee. PIA and GHCLA suggested not charging a PBR fee.

## **RESPONSE**

**The commission does not agree with these comments. The commission relies on fees for the majority of its funding. Many of the fees that support the commission's air programs have not been increased since the early 1990's. In the last several years, Fund 151 has carried a balance that has allowed the commission to collect revenues below the annual budgeted expenditures and appropriations. However, the revenue estimates for Fund 151 reveal that there are insufficient funds to support the FY 2003 appropriated levels at current fee rates. Consequently, fee increases are necessary to provide sufficient funding for the commission's air programs. Although the new PBR fee results in an increased financial obligation, the commission does not consider the financial obligation to be overburdensome. The fee for PBR registrations is a one-time fee of \$450 or \$100. Registrations are valid for the entire length of time the facility operates under the conditions of the registration and does not require renewal. In addition, the justification of the new fee is to enable the commission to recover a portion of its costs to review the approximately 3,700 - 4,000 PBR registrations received per year. Recovering PBR registration review costs will help ensure that Fund 151 has sufficient funds. No changes were made to the rule in response to these comments.**

### *Comment*

TIADA commented that the fee increases would be passed along to consumers and would especially impact the poor.

**RESPONSE**

**The commission acknowledges that businesses typically pass along their costs when setting prices. However, the commission finds that these costs are necessary to adequately fund the air programs and to protect air quality.**

*Comment*

Considering the significant portion of air fees paid by its members, TCC urged the commission to continue to consider means to adequately fund the water program.

**RESPONSE**

**Addressing issues related to funding for water programs is beyond the scope of this rulemaking. The commission notes that the legislature determines the appropriations for all agency programs each biennium. No changes to the rule were made in response to this comment.**

*Comment*

CAP commented that fees should be targeted to those activities with the greatest environmental impact.

**RESPONSE**

**The commission notes that fees are generally targeted to those activities with the greatest environmental impact. Because facilities permitted by rule are less significant sources of air contaminants and the registration review is typically less complex, thus requiring fewer resources,**

**the PBR fee was set much lower than the minimum permit fees. No changes have been made to the rule in response to this comment.**

*Comment*

CAP suggested reviewing each PBR which currently requires registration to determine whether that requirement could be deleted.

**RESPONSE**

**The commission may, in the future, reevaluate the PBRs and determine if it will continue requiring registration for all PBRs currently requiring registration, but such action would be independent of this rulemaking. The commission directed staff members to review current registration requirements for PBRs to determine whether registration is needed.**

*Comment*

COV commented that city government and local businesses are already burdened and a PBR fee would not be productive at this time. COV also commented that a PBR fee would not be an adequate return from the investment it would make by paying the fee.

**RESPONSE**

**The commission acknowledges that many city governments and local business are subject to multiple fees and regulations from various governmental agencies. However, the commission cannot control regulations placed on them by other sources. The new fee is necessary to help**

**provide sufficient funding for the commission's air programs. In recognition of the burden on smaller governmental entities, the commission modifies the proposed rule by treating municipalities, counties, and independent school districts with populations or districts of 10,000 or fewer residents the same as small businesses, and therefore, subject to the \$100 PBR fee instead of the \$450 PBR fee.**

*Comment*

TADA suggested that PBRs remain exempt from permitting fees because they, by nature, apply only to insignificant sources of air pollution and TADA suggested eliminating registration for all PBRs. TADA commented that the PBR fee is too high, especially for small businesses and particularly in comparison to the grandfather permit fee and the cost per ton scheme for most air permitting. TxOGA questioned the need for a steep PBR fee because those facilities have historically been considered to make insignificant contributions of air contaminants to the atmosphere. TxOGA commented that PBRs meet best available control technology (BACT) requirements, hence technical review is redundant. TxOGA stated that the commission is devoting too many people to the PBR permitting process instead of real air quality concerns and on facilities where significant emissions reductions can be achieved.

**RESPONSE**

**The commission disagrees with these comments. The purpose of the registration fee is to help the commission recover a portion of the registration review costs and is independent from the determination of whether or not registration is required for a PBR. As the commission adopts PBRs, a determination is made regarding the necessity of registration or site approval based on**

**air quality concerns. Although facilities permitted by rule will not make a significant contribution of air contaminants to the atmosphere, the executive director determined that a review is required to ensure that facilities are in compliance with the PBR. The technical review is not required to ensure that a facility meets BACT, but to ensure that a facility meets the construction and operational requirements of the PBR. No changes were made to the rule in response to these comments.**

*Comment*

HSC commented that there should not be an exemption for PI-7 registrations submitted to establish a federally enforceable emissions limit.

**RESPONSE**

**The commission excluded PI-7 registrants establishing a federally enforceable emissions limit from paying a fee. These registrations serve a different purpose than other PI-7 registrations used to obtain preconstruction authorizations for facilities. The fee exempt PI-7 registrations are used only to establish a federally enforceable emissions limitation, and are not used to seek authorization for new emissions. The registrations serve as a commitment from facilities to emit below the emission levels specified in Chapter 106 and are used by the commission staff members to enforce those emission limits. Hence, the commission does not believe it is appropriate to assess a fee. No changes were made to the rule in response to this comment.**

### **Small and Medium-Sized Businesses**

#### *Comment*

ACT stated that all of the proposed fees should be recalculated so that every entity in the regulated community pays its fair share and the current proposal puts too much of the financial burden on the small and medium-sized companies while both larger companies and grandfathered facilities have relatively low fees. HII and two individuals commented that they are opposed to any increases in air-related fees. HII stated the current fees are already excessive and burdensome for small businesses. PIA commented that the PBR fee is a harmful burden for small printing businesses.

### **RESPONSE**

**The commission considered stakeholders' comments regarding the air program fee increases. While the commission generally disagrees that the proposed air-related fees put too much financial burden on small and medium-sized businesses, the commission considered the comments raised during the stakeholder process about a \$225 PBR fee for small businesses and instead proposed a \$100 PBR fee for small businesses. Additionally, in recognition of the burden on smaller governmental entities, the commission modifies the proposed rule by treating municipalities, counties, and independent school districts with populations or districts of 10,000 or fewer residents the same as small businesses, and therefore, subject to the \$100 PBR fee instead of the \$450 PBR fee. The commission anticipates that small businesses will typically pay the minimum fee rates. The commission regards the permit fee amounts as reasonable.**

*Comment*

SCI commented that, as of April 2002, there had not been any meaningful participation from small businesses in the decision-making process.

**RESPONSE**

**The commission disagrees with this comment. The commission developed a balanced stakeholder list that included representatives from small businesses prior to initiating this rule project. All stakeholders were notified in March of 2002 of an April 2002 meeting. The commission solicited input from all stakeholders, including small business stakeholders, at this meeting. The commission notes that the stakeholder meeting was the first of several opportunities to participate in this rulemaking process.**

*Comment*

SCI questioned how the proposed fee increases would improve the environment as they threaten the viability of small businesses.

**RESPONSE**

**The environment will benefit significantly from an adequately funded air quality program. The commission disagrees that the fees will threaten the viability of small businesses. Small businesses will pay \$100 for submission of a PBR registration. The commission regards the fee amount as reasonable for small businesses.**

*Comment*

TCGA commented that creating the PBR fee would create a significant burden on the cotton gin industry. TCGA opposes any fees for PBRs.

**RESPONSE**

**The commission considered the impact on all business and determined that the PBR fees would be reasonable. The commission also considered the financial burden on small and micro-businesses, resulting in the lower proposed and adopted fee assessment of \$100 for those entities. No further changes were made to the rule in response to this comment.**

*Comment*

CAP commented that small businesses create over 85% of new jobs and 90% of new growth in exporting, and therefore this PBR fee increase would be detrimental to the economy.

**RESPONSE**

**The commission acknowledges the importance of small businesses to the economy. Therefore, in order to mitigate the burden of the PBR fee, the commission proposed and now adopts a lower fee of \$100 for small business PBR registrations. No further changes were made to the rule in response to this comment.**

*Comment*

FWSBAC commented that TNRCC should avoid any negative affect on small business' entry and participation in the environmental management systems of the State. FWBAC suggested that the commission emphasize the benefits of PBRs through public awareness to encourage small businesses.

**RESPONSE**

**The commission encourages small businesses to develop and implement EMSs. To assist small businesses, the commission's Small Business and Environmental Assistance (SBEA) Division provides a small business model and technical assistance. The SBEA Division also conducts technical and compliance outreach on PBRs through its Small Business and Local Government Assistance (SBLGA) Section. No changes were made to the rule in response to this comment.**

*Comment*

SCI suggested that waiving the PBR fee for those small businesses who are working with the Small Business Assistance Division of the TNRCC would encourage compliance.

**RESPONSE**

**The commission appreciates and encourages small businesses to continue to work with the SBEA Division's SBLGA Section which conducts technical and compliance outreach on PBRs. Working with the SBLGA will benefit small businesses in many ways even without the incentive of an exemption from the PBR fee. However, the purpose of the rulemaking is to enable the**

**commission to recover a portion of its operating costs and collect sufficient revenue to support appropriated funding levels. No changes were made to the rule in response to this comment.**

*Comment*

TxOGA expressed concern about who will notify small businesses about the requirements of the PBRs.

**RESPONSE**

**This rulemaking and the implementation of a PBR fee does not effect the applicability of the PBR requirements that already exist for small businesses. However, the commission's SBLGA Section of the SBEA Division currently conducts technical and compliance outreach on PBRs to assist small businesses.**

*Comment*

AZZ commented, prior to proposal, that a \$225 fee for PBRs appears excessive for small businesses that previously had no fees for these types of permits.

**RESPONSE**

**The commission considered the comments raised during the stakeholder process about the \$225 fee and instead proposed a \$100 PBR fee for small businesses. No further changes have been made to the rule in response to this comment.**

*Comment*

GTSBAC commented that it commends the action of the commissioners to lower the fee for PBRs from \$225 as originally drafted to the proposed \$100. GTSBAC was pleased that the commission took its comments under advisements during the decision making process and appreciated the opportunity to provide comments. TADA appreciated the commission's concern for small businesses as evidenced by the reduction of the PBR fee from \$225 as originally drafted to the proposed \$100.

**RESPONSE**

**The commission appreciates the support from GTSBAC and TADA on the lowering of the PBR fee for small businesses.**

**Disincentive**

*Comment*

GII, HTF, and SCI commented that the proposed fees will create a disincentive for businesses to comply with the commission's rules and to turn to the TNRCC for answers. TSC commented that an increase could be counterproductive and requested that the commission refrain from raising the fees for air permits. CAP commented that the proposed PBR fee increase would create a disincentive for small business to comply with TNRCC regulations. TADA noted that a PBR fee would provide a disincentive to registration. PIA commented that a PBR fee would provide a disincentive and punishment for compliance with TNRCC regulations and could cause many to ignore the requirements. TCGA and COV commented that the PBR fee would discourage compliance with commission rules. TxOGA stated the PBR fee will have the unintended consequence of promoting noncompliance.

FWSBAC contended that the costs to TNRCC associated with non-participation and noncompliance are much greater than the cost of administering the PBR program. SCI stated that the proposed fee could discourage the use of PBRs and compliance with the regulations. GHCLA commented that many small businesses will avoid claiming a PBR. DSBAC commented that a \$225 PBR fee, in addition to the other expenses of compliance with environmental regulations, will exacerbate the reluctance of many small businesses to comply and lead to a decision of noncompliance. FWSBAC commented that a \$225 PBR fee will have a negative effect on the efforts of many small businesses to comply.

#### **RESPONSE**

**The commission does not agree with these comments. Regulated entities must be responsible for their own decisions to either comply with or disregard the law based upon a fee associated with compliance. The commission cannot control businesses' decisions to comply or not comply with regulations, but only can enforce regulations and provide disincentives for noncompliance through the assessment of penalties. The commission will not refrain from assessing a fee solely because some regulated entities may disregard their obligation to comply with the law. The commission will continue to offer answers to any business that requests our assistance.**

**The commission is assessing a new fee for submission of PBR registrations to recover a portion of its review costs. The commission considered the comments raised during the stakeholder process about the \$225 fee and instead proposed and adopts a \$100 PBR fee for small businesses.**

**No further changes to the rule were made in response to these comments.**

*Comment*

GII, HTF, and SCI commented that fee increases would create an incentive to relocate outside Texas and would increase pollution elsewhere.

**RESPONSE**

**The commission disagrees with GII's, HTF's, and SCI's comments that the fees will create an incentive for businesses to relocate. The amended rules will require a one-time registration fee of \$450 or \$100, which is not retroactive. The commission cannot control businesses' decisions to relocate outside of Texas. Further, increased pollution in areas outside the State of Texas is not in the scope of this rulemaking. No changes were made to the rule in response to this comment.**

*Comment*

GHCLA commented that a PBR fee offers no incentive to reduce pollution.

**RESPONSE**

**The purpose of the rulemaking is to enable the commission to recover a portion of its operating costs, and to collect sufficient revenue to support appropriated funding levels, not necessarily to create incentives for pollution prevention. No changes were made to the rule in response to this comment.**

### **Streamlining**

#### *Comment*

AGC stated that the Air Permits Division is experiencing an inability to process permit applications and authorizations in a timely or reasonable manner, which results in a permit backlog as well as contractor delays and increased construction costs. AGC suggested a sliding schedule for fees relative to the processing time for the permit or authorization which would be due upon issuance. AGC suggested if a permit were issued in 16 - 30 days then the fee would be 50%; if a permit were issued in 31 - 44 days then the fees would be 25%; or if the permit were issued in 45 days or more then there would be no fee.

### **RESPONSE**

**The commission does not agree with these comments. The purpose of the rulemaking is to ensure that sufficient funds are deposited to Fund 151. Collecting fees based on the processing time for a PBR registration could result in unstable funding levels and will not help ensure that sufficient funds will be collected. No changes were made to the rule in response to these comments.**

#### *Comment*

SCI commented that the TNRCC needs to streamline its permit and registration review process to reduce the fees. TxOGA stated that streamlining and reducing program costs should be done before increasing fees. TPF suggested that the commission should cut costs. PIA suggested simplifying the PBR permitting process.

**RESPONSE**

**The commission is always seeking methods to streamline the permitting process and reduce operating costs. Additionally, the commission directed staff members to review current registration requirements for PBRs to determine whether registration is needed. However, the revenue estimates for Fund 151 reveal that there are insufficient funds to support the FY 2003 appropriated levels at current fee rates. Consequently, fee increases are necessary to provide sufficient funding for the commission's air programs.**

*Comment*

SCI commented that attaching fees on PBRs for small businesses is in conflict with the Sunset Bill, which required TNRCC to provide incentives for enhanced environmental performance.

**RESPONSE**

**The commission does not agree with this comment. The purpose of this rulemaking is to ensure that Fund 151 contains sufficient funds. The commission is currently developing rules independent of this rulemaking to develop incentives for enhanced environmental performance in accordance with House Bill (HB) 2912. HB 2912 in no way prohibits charging a fee for PBR registrations. No changes to the rule were made in response to this comment.**

**Billing Process/Timing**

*Comment*

TCC commented that it wanted to insure that fees paid to the commission's budget actually pay for the targeted programs.

**RESPONSE**

**The commission uses dedicated fees to fund the intended programs in compliance with statutory requirements. No changes to the rule were made in response to this comment.**

*Comment*

TCC proposed that the commission add any fees for PBRs to the annual fee statement and allow an entity to write one check versus multiple checks during the year. TCC recommended that the commission bill on an annual basis for all fees incurred during the previous year for permits, renewals, and amendments as well as emission and inspection fees.

**RESPONSE**

**The commission currently does not process air permits, amendments, or renewals until payment is received and adopts a similar process for PBRs. Because a change in this process would require substantial operational changes and involves many issues for which comments were not solicited, the commission determined that this issue could not be adequately and appropriately addressed in this rulemaking. However, agency staff members will continue to discuss this issue to determine if**

**such a change would be appropriate in a future rulemaking. No changes to the rule were made in response to this comment.**

*Comment*

TCC appreciated the added alternative method of payment, but strongly encouraged the commission to add the ability to process credit cards.

**RESPONSE**

**The commission entered into a pilot program with Texas Online to accept credit card payments for two (non-air) fees, but the pilot program was terminated due to operational issues.**

**Consequently, acceptance of credit cards may become an option in future years, but it is not something that can be made operational quickly. The commission notes that it can accept payment electronically by wire or automated clearing house, and suggests that payees contact the commission for instructions. No changes to the rule were made in response to this comment.**

**PBR Fee Structure or Specific Amount**

*Comment*

TADA supports that the fee would not be retroactive to apply to current registrations.

**RESPONSE**

**The commission appreciates TADA's support that the fee is not retroactive.**

*Comment*

HSC suggested that the PBR fee be retroactive for year 2002.

**RESPONSE**

**The commission disagrees with this suggestion. The commission determined that it would be unfair to assess a retroactive fee on registrations that were submitted with no fee requirements. Additionally, making PBR fees retroactive was not included in the proposal for this rulemaking, therefore it cannot now be adopted. No changes to the rule were made in response to this comment.**

*Comment*

COV commented that a PBR fee would not be a fair means of collecting funds.

**RESPONSE**

**The commission disagrees with this comment. The commission determined that a two-tiered fee of \$100 for small businesses and \$450 for other entities is a reasonable distribution of costs to businesses seeking a PBR and also helps ensure that sufficient funds are collected to help recover costs. No changes were made to the rule in response to this comment.**

*Comment*

COV and SCI commented that it would be difficult to enforce and would discourage voluntary compliance.

**RESPONSE**

**The commission notes that it is a regulatory requirement (not voluntary) for every facility to have authorization prior to construction. The commission developed PBRs as a streamlined methodology for businesses to comply with its requirements. The commission cannot control businesses' decisions to comply or not comply with regulations, but only can enforce regulations and provide disincentives for noncompliance through the assessment of penalties. No changes were made to the rule in response to this comment.**

*Comment*

CAP recommended exempting small businesses from the PBR fee if that is the only air authorization held by the small business because these are less likely to have an environmental impact.

**RESPONSE**

**The commission does not agree with this comment. Although facilities permitted by rule will not make a significant contribution of air contaminants to the atmosphere, the executive director determined that a review for certain types of facilities, even if the small business only has one air authorization, is required to ensure that facilities are in compliance with certain permits by rule. The purpose of the registration fee is to help the commission recover a portion of the registration review costs. No changes have been made to the rule in response to this comment.**

*Comment*

TADA commented that changes in operations may require a new registration and note that some businesses require multiple PBRs and therefore \$100 seems unduly high. TADA suggested consolidating certain permits by rule to lessen the regulatory burden and cost on both the commission and industry, citing the example of consolidating the eight PBRs related to the automotive repair industry to create one industry-specific PBR.

#### **RESPONSE**

**The commission does not agree with this comment. Multiple PBRs for a site can be submitted on a single registration form and only one fee will be assessed. Therefore, it is not necessary to combine PBRs to mitigate registration costs. It is important to note, however, that multiple PBRs may be assessed one fee if those multiple PBRs are submitted at the same time on the same registration form and that multiple PBRs for facilities at different sites will be assessed more than one fee. No changes to the rule were made in response to this comment.**

#### *Comment*

CAP recommended that the commission could base registration and fee requirements on emission-based thresholds to allow lower emitting facilities out of the fee and registration altogether. PIA suggested that there should be a distinction between small businesses operating with less than one ton per year of emissions and companies that emit much larger amounts.

**RESPONSE**

**The commission does not agree with these comments. The commission determined that certain PBRs require registration based on factors that include, but are not limited to, the amount of emissions at a facility. A review needs to be conducted to ensure that a facility meets the construction and operational requirements of the PBR. Once a review is required, the amount of emissions does not significantly impact the review costs to the agency. Moreover, it is necessary to collect fees to allow the commission to recover a portion of the costs associated with the PBR registration review. No changes were made to the rule in response to this comment.**

*Comment*

COV suggested charging a fee at the time of purchase of equipment that fell under the PBR criteria.

**RESPONSE**

**The commission does not agree with this comment. The commission currently has no feasible mechanism to collect a fee at the time of equipment purchase. Additionally, since the purpose of the fee is to recover a portion of the costs of the review, collection of the fee should be relatively close in time to that review for planning and funding purposes. No changes have been made to the rule in response to this comment.**

*Comment*

AZZ suggested a PBR fee of \$50. CAP and HII expressed concern about a \$225 fee for PBRs and suggested that if there is a fee, a PBR fee of \$50 would be reasonable. DSBAC and FWBAC suggested

a PBR fee of \$50 or less. TADA stated that the \$100 PBR fee seems arbitrary. TCC commented that a \$100 fee for all entities seems more appropriate for PBR review. TPF commented that the PBR fee is too high for agricultural operations and suggest a level of \$50. GHCLA suggested different fees for big businesses and small businesses. One individual suggested that the fees are too high and suggested a flat rate of \$100.

## **RESPONSE**

**The commission considered the comments raised during the stakeholder process about the \$225 fee and proposed the PBR fee as \$100 for small entities. The commission determined a two-tiered fee of \$100 for small businesses and \$450 for large entities is a reasonable distribution of costs for PBR registrations and also helps ensure that sufficient funds are collected to help recover costs. Therefore, no further changes were made to the rule in response to these comments.**

### *Comment*

ACT stated that it supported the commission adopting a fee for PBR registrations but suggested the PBR rule be based on a \$100 minimum fee plus a flat per-ton emissions fee with a maximum of \$1,000 and suggested this should be based upon allowable or actual emissions.

## **RESPONSE**

**The commission disagrees with this comment. The commission determined that a \$1,000 PBR registration fee would be too burdensome for small businesses. In addition, the commission does not agree that it is appropriate to assess a \$1,000 fee for PBRs since that is more costly than the**

**\$900 minimum permit fee, which would require a more complex review. Moreover, based on the complexity of PBR registration and New Source Review permit reviews, the commission considers the \$100 and \$450 PBR fees to be appropriate and does not agree that a flat per-ton emissions fee should be added to a base PBR fee. No changes were made to the rule in response to this comment.**

*Comment*

COL commented that not-for-profit tax-supported entities, local and other governmental agencies should not be charged the same PBR fees as large for-profit businesses. COL suggested that local and other governmental agencies be placed in the lowest PBR fee category or be exempted from the fee. TML commented that the PBR fee is too high for municipalities. TML suggested that cities be charged the same as small businesses stating that the fees will come from public money. TML also suggested a two-tiered PBR fee for cities based on population size of the cities, and provided examples of 5,000 and 10,000 as logical populations to separate large cities from small cities.

**RESPONSE**

**The commission agrees in part with this comment and changes §106.50(a). In recognition of the burden on smaller governmental entities, the commission modifies the proposed rule by treating municipalities, counties, and independent school districts with populations or districts of 10,000 or fewer residents the same as small businesses, and therefore, subject to the \$100 PBR fee instead of the \$450 PBR fee. With this change, the commission regards the permit fee amounts as reasonable.**

*Comment*

TxOGA notes that many oil and gas facilities register for PBRs although they are not required to do so and states that a fee on such a registration would hinder getting this useful information to the TNRCC.

TADA supports a fee that would only be applied to PBRs requiring registration.

**RESPONSE**

**The commission disagrees with these comments. Registrations that are voluntarily submitted to the commission still require a review by agency staff members. The purpose of the rulemaking is to enable the commission to recover a portion of its review costs. The commission assumes that many entities will continue to register voluntarily, even with a fee, to assure compliance with the PBR requirements.**

**SUBCHAPTER B: REGISTRATION FEES FOR NEW PERMITS BY RULE**

**§106.50**

**STATUTORY AUTHORITY**

The new section is adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The new section is also adopted under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.062, concerning Application, Permit, and Inspection Fees, which requires the commission to collect fees for inspections, applications for permit, permit amendment, and renewal, and authorizes the commission to collect fees for permits by rule; §382.0622, concerning Clean Air Act Fees, which restricts the use of Clean Air Act fees; and the entire TCAA (§§382.001 *et seq.*), which provides authority for all of the air quality programs which the fees are necessary to support.

**§106.50. Registration Fees for Permits by Rule.**

(a) A registrant who submits a permit by rule (PBR) registration for review by the commission shall remit one of the following fees with the PI-7 registration form:

- (1) \$100 for:

(A) small businesses, as defined in Texas Government Code, §2006.001; and

(B) municipalities, counties, and independent school districts with populations or districts of 10,000 or fewer residents, according to the most recently published census; or

(2) \$450 for all other entities.

(b) This fee does not apply to:

(1) a PI-7 registration submitted solely for the purpose of establishing a federally enforceable emissions limit under §106.6 of this title (relating to Registration of Emissions); or

(2) a remediation project conducted under §106.533 of this title (relating to Water and Soil Remediation) which is reimbursable by the commission.

(c) This fee is for PBR registrations that are received on or after November 1, 2002.

(d) All PBR fees 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) and submitted concurrently with the registration to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3087. No fees will be refunded.

