

The Texas Natural Resource Conservation Commission (commission) proposes new §106.50, Registration Fees for Permits by Rule.

New §106.50 is to be submitted to the United States Environmental Protection Agency (EPA) as a proposed revision to the state implementation plan.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 has not assessed a fee for review of a PBR registration.

The commission is proposing to 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 is proposing to increase emissions fees and inspection fees in a concurrent 30 TAC Chapter 101 rulemaking as well as proposing to increase air permit, air permit renewal, and air permit amendment fees in a concurrent 30 TAC Chapter 116 rulemaking.

The Clean Air 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 Clean Air 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 not reserved for other uses. 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 is proposing revisions to the emissions fee, inspection fee, permit, renewal, and amendment fees, as well as proposing a new fee for review of registrations for PBR.

SECTION DISCUSSION

Subchapter B, Registration Fees for New Permits by Rule

Proposed new §106.50, concerning registration fees for new PBR registrations, would 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. One fee would be assessed for each registration form submitted, regardless of the number of facilities at an account which are identified on the registration form. The proposed PBR fee is a two-tiered fee; small businesses would be assessed \$100 and all other entities would 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.

The commission recognizes that many types of businesses which relocate frequently may be subject to a fee with each relocation. The commission requests comments on ways to mitigate the costs to businesses which relocate frequently.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that the proposed rulemaking will generate approximately \$1,229,000 in additional revenue for the commission for each year of the first five-year period the new rule is in effect due to the introduction of a new fee for PBR registrations submitted for review by the commission. The commission does not anticipate significant fiscal implications for other units of state and local government affected by the proposed rulemaking.

PBR registrations are divided into approximately 75 different activity types. The most common registration submissions are for oil and gas production; temporary concrete batch plants; trench burners; stationary engines and turbines; surface coating facilities; water and soil remediation; and auto body refinishing. Some of these activities, such as trench burners and temporary concrete batch plants, require frequent PBR registrations with the commission. In contrast, approximately 2.5% of the PBR registrations received annually are not required by the commission; the most common unrequired registration submitted to the commission is for flares.

The new fee on PBR registrations is intended to help recover some of the commission's registration review costs and fund the commission's air related programs at appropriated levels. Of the estimated 6,000 permit applications reviewed annually by the commission, between 3,700 - 4,000 are estimated to be PBR registrations. Prior to this rulemaking, the commission has not assessed a fee for review of PBR registrations, though it does currently assess fees for review of other application types. The proposed rulemaking would implement a new fee for PBR registrations submitted for review by the commission of \$100 for small businesses and \$450 for all other entities. No fee would be assessed on PBR registrations received prior to November 1, 2002.

Although the commission does not maintain data to determine the average percentage of PBR registration submissions that originate from units of state and local government, the total number is estimated to not exceed approximately 5% (185) of the total number of PBR registrations received by the commission annually. Based on these numbers, the proposed fee is expected to cost affected units of state and local government approximately \$83,000 annually in aggregate. No single unit of state or local government is expected to be significantly affected by the new fee.

PUBLIC BENEFITS AND COSTS

Mr Davis also determined that for each of the first five years, the public benefit anticipated as a result of implementing the new fee will be the generation of revenue to help recover the commission's review costs and fund the commission's air programs, as well as a more direct relationship between commission workload and revenue sources.

The new fee on PBR registrations is intended to help recover some of the commission's registration review costs and fund the commission's air related programs at appropriated levels. Of the estimated 6,000 permit applications reviewed annually by the commission, between 3,700 - 4,000 are estimated to be PBR registrations. Prior to this rulemaking, the commission has not assessed a fee for review of PBR registrations, though it does currently assess fees for review of other application types. The proposed rule change would implement a new fee for PBR registrations submitted for review by the commission of \$100 for small businesses and \$450 for all other entities. No fee would be assessed on PBR registrations received prior to November 1, 2002.

Private businesses (not including small and micro-businesses) submit approximately 60% (2,258) of the total PBR registration reviewed annually by the commission. Based on these numbers, the proposed fee is expected to cost private business approximately \$1,016,000 annually in aggregate. No individual business is expected to be significantly affected by the new fee.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be adverse fiscal implications, which are not anticipated to be significant, for small and micro-businesses as a result of implementation of the proposed new PBR registration fee. The commission intends to reduce the effect on small and micro-businesses by reducing the rate for those entities.

Small businesses submit approximately 35% (1,300) of the total PBR registration reviewed annually by the commission. At the proposed small business rate of \$100 per PBR registrations, the new fee is expected to cost small businesses approximately \$130,000 annually. Small business PBR registrations are highly prevalent in many of the most common categories, including temporary concrete batch plants, trench burners, surface coating facilities, and auto body refinishing.

The following is an analysis of the costs per employee for small and micro-businesses that may be affected by the proposed rulemaking. Small and micro-businesses are defined as having fewer than 100 or 20 employees, respectively. The proposed fee for PBR registrations submitted for the commission's review would cost up to an additional \$1.00 per employee per registration for small businesses and up to an additional \$5.00 per employee per registration for micro-businesses.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission 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, 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 proposed 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 proposed 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. The new rule will not impact existing businesses which are currently operating under a PBR or standard exemption. Therefore, the proposed 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, 382.0622, and generally under TCAA, §§382.001 *et seq.*

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.

TAKINGS IMPACT ASSESSMENT

The commission prepared 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 proposed rulemaking and found the proposal is a rulemaking 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 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 amendments are 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 amendments will not violate (exceed) any standards identified in the applicable 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.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on August 12, 2002, 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 before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2002-041-116-AI. Comments must be received by 5:00 p.m., August 12, 2002. Comments received prior to this publication have been considered and will be formally addressed in the “RESPONSE TO COMMENTS” section of the adoption preamble publication and are not required to be resubmitted. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

SUBCHAPTER B: REGISTRATION FEES FOR NEW PERMITS BY RULE

§106.50

STATUTORY AUTHORITY

The new section is proposed 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 proposed 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; §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.

The proposed new section implements TCAA, §§382.011, 382.017, 382.062, 382.0622, and TCAA, §§382.001 *et seq.*

§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 small businesses, as defined in Texas Government Code, §2006.001; or

(2) \$450 for all other entities.

(b) This fee does not apply to 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).

(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 13087, MC 214, Austin, Texas 78711-3087. No fees will be refunded.