

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §116.141, Determination of Fees; §116.143, Payment of Fees; §116.163, Prevention of Significant Deterioration Permit Fees; §116.313, Renewal Application Fees; §116.614, Standard Permit Fees; §116.750, Flexible Permit Fee; and §116.1050, Multiple Plant Permit Application Fee. The amendments to §§116.143, 116.313, 116.614, and 116.1050 are adopted *with changes* to the proposed text as published in the July 12, 2002 issue of the *Texas Register* (27 TexReg 6212). The amendments to §§116.141, 116.163, and 116.750 are adopted *without changes* to the proposed text and will not be republished.

The following sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan: §§116.141, 116.143, 116.163, 116.313, 116.614, and 116.750.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission assesses fees when an owner or operator applies for an air permit, air permit renewal, or air permit amendment. Assessment of these fees is required under Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.062, Application, Permit, and Inspection Fees, to recover the commission's cost of review.

The commission will adopt an increase to the fee rates and the minimum fees to generate sufficient revenue to recover application review costs and fund the commission's air programs. Additionally, the commission will adopt an increase to emissions fees and inspection fees in a concurrent 30 TAC

Chapter 101 rulemaking as well as will assess a new fee on new permit by rule (PBR) registrations received on or after November 1, 2002 in a concurrent 30 TAC Chapter 106 rulemaking published 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, 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 BY SECTION DISCUSSION

Section 116.141(b), concerning the fee schedule, will be revised to reflect the adopted increases to the minimum fee rate and to the capital cost assessment rate applied to projects that exceed the minimum capital cost threshold. The intent of this amendment is to increase the commission's revenue collection to recover application review costs and fund the commission's air programs.

Section 116.141(e), concerning applications for projects not involving capital expenditure, will be revised to reflect the increase in the minimum permit fee amount. The intent of this amendment is to ensure a consistent minimum fee for all permit or permit amendment applications under this section.

Section 116.143(a), concerning payment of fees, will be revised to reflect the new agency name and to provide the payment options of certified check and electronic funds transfer.

Section 116.143(a) is adopted with change to the proposed text to correct a typographical error in the mailing address for payment of fees submitted.

Section 116.163(a), concerning prevention of significant deterioration (PSD) permit fees, will be revised to increase the minimum fee. The intent of this amendment is to increase the commission's revenue collection to recover application review costs and fund the commission's air programs.

Section 116.163(b), concerning PSD permit fees, will be revised to reflect the increase in the capital cost assessment rate for projects that exceed the minimum. The intent of this amendment is to increase the commission's revenue collection to recover application review costs and fund the commission's air programs.

Section 116.313(a), concerning renewal application fees, will be revised to increase the various base fee rates, the incremental fee rates, and the minimum fee. The intent of this amendment is to increase the commission's revenue collection to recover application review costs and fund the commission's air programs. The maximum fee will be effective at a lower allowable emission tonnage. Finally, the example fee calculation will change to be consistent with the change in fee rates and thresholds.

Section 116.313(a) is adopted with change to the proposed text to reduce the minimum permit renewal fee from the proposed \$900 to \$600. It also increases the base rates and the incremental fees for higher emissions levels at the second and third tier of the incremental per ton fee rates. The commission makes these changes to maintain more consistency between the fee increases adopted for renewals and those fee increases adopted for other permit fees.

Section 116.313(b), concerning renewal application fees, will be revised to reflect the new agency name and to provide the payment options of certified check and electronic funds transfer.

Section 116.313(b) is adopted with change to the proposed text to correct a typographical error in the mailing address for payment of fees submitted.

Section 116.614, concerning standard permit fees, will be revised to reflect the increase in the flat fee amount. The intent of this amendment is to increase the commission's revenue collection to recover application review costs, fund the commission's air programs, and match the minimum permit fee under §116.141. Additionally, the revisions will reflect the new agency name and provide the payment options of certified check and electronic funds transfer.

Section 116.614 is adopted with change to the proposed text to correct a typographical error in the mailing address for payment of fees submitted.

Section 116.750(b), concerning the flexible permit fee, will be revised to reflect increases to the fee rate on allowable emissions and to the minimum fee amount. The intent of this amendment is to increase the commission's revenue collection to recover application review costs and fund the commission's air programs.

Section 116.750(c), concerning the flexible permit fee, will be revised to reflect the new agency name and to provide the payment options of certified check and electronic funds transfer.

Section 116.1050, concerning the multiple plant permit application fee, will be revised to reflect the increase in the fee amount. The intent of this amendment is to increase the commission's revenue collection to recover application review costs and fund the commission's air programs.

Section 116.1050 is adopted with change to the proposed text to be consistent with a previous rulemaking.

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 amendments to Chapter 116 are not, themselves, intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants. Therefore, the commission finds that they are not major "environmental" rules. The permit, amendment, and renewal fees collected under the revisions to Chapter 116 will raise significant amounts of revenue, but are generally a one-time cost that is insignificant based upon the capital costs of the project itself. Therefore, the amendments 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.”

Specifically, the permit, amendment, and renewal fees are required by state law to be sufficient to support a portion of commission activities related to the overall air quality program (THSC, TCAA, §382.062). 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 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 these rules in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to raise the permit,

amendment, and renewal fees in order to maintain funding sufficient to support a portion of the overall air quality program.

Promulgation and enforcement of the rules will not burden private, real property because they are fee rules which support the commission's air quality programs. Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, the permit, amendment, and renewal fees are required by state law to be sufficient to support a portion of commission activities related to the overall air quality program (THSC, TCAA, §382.062). Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by state law. Therefore, this rulemaking action will not constitute a takings under Texas Government Code, Chapter 2007.

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 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 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); EPA, Region 6; Gull Industries Incorporated (GII); Harwood Industries, Inc. (HII); High Tech Finishing (HTF); Houston Sierra Club (HSC); Schumacher Company, Inc. (SCI); Texas Chemical Council (TCC); Texas Cotton Ginners' Association (TCGA); Texas Independent Automobile Dealers Association (TIADA); 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 16 commenters for Chapter 116, 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 all permits.

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 increase fees 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, 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 these fee increases are 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 fee increases are necessary to 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 this comment 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 this comment.

Comment

AGC commented that the proposed fees will represent a significant and increased financial burden and that an increase in air fees or the creation of new fees is not justified. SCI commented that it is not convinced that the air related fees are justified.

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.

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.

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. ACT stated that the increases in the air permits, air permit amendments, and air permit renewal fees may represent an undue burden for small and medium-sized businesses. HII and two individuals commented that they are opposed to any increases in air-related fees. HII stated that the current fees are already excessive and burdensome for small businesses. One individual suggested that the fees are too high.

RESPONSE

The commission considered stakeholders' comments regarding the air program fee increases.

While the commission generally disagrees that the air-related fees as proposed put too much financial burden on small and medium-sized businesses, the commission modifies the proposed rules by reducing the minimum permit renewal fee from the proposed \$900 to \$600. Further, while the commission is increasing the base and incremental fees for permit renewals, it adopts

greater increases to the incremental fees for high emissions levels than for lower emissions levels. Consequently, renewal fees for permitted facilities with lower emissions will generally not increase as much as renewal fees for permitted facilities with higher emissions levels. 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. The commission 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. Moreover, the commission anticipates that small businesses would pay the minimum fee rates of \$900 for a New Source Review (NSR) permit or NSR permit amendment and \$600 for an NSR permit renewal. The commission regards the fee amounts as reasonable for small businesses.

Comment

TCGA commented that raising the minimum fees would create a significant burden on the cotton gin industry. TCGA commented that although it understands the need for the commission to maintain a fee structure that recovers reasonable costs, it stated that small businesses pay more per amount of capital spent. TCGA advocates lowering the minimum fee and project costs for amendments and construction permits. For example, if the minimum project costs were lowered to \$50,000, with a minimum fee of \$150, the same ratio would be achieved.

RESPONSE

The commission considered the impact on all businesses. When compared to the new \$100 or \$450 fees for PBR registrations, which require much less review, the commission determined that a \$900 fee is appropriate for the level of review necessary for an NSR permit. No changes to the rule were made in response to these comments.

Disincentive

Comment

GII, HTF, and SCI commented that the proposed fees would 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.

RESPONSE

The commission disagrees with GII's, HTF's, and SCI's comments that the fees will create a disincentive for businesses to comply with the commission's regulations. 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. No changes were made to the rule 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 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 these comments.

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 this comment. 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 permit 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 commission 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.

RESPONSE

The commission is always seeking methods to streamline the permitting process and reduce operating costs. However, the revenue estimates for the Fund 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.

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 encourages 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.

NSR Permit, Permit Amendment, and PSD Permit

Comment

ACT suggested using a capital assessment rate of .20% (.75% for PSD) to generate minimum fees of \$600 for NSR permit and permit amendments and \$2,250 for PSD actions. ACT further suggested that the revenue can be replaced by increasing the PBR and grandfather permit fees.

RESPONSE

The commission does not agree with the comment. The purpose of the rulemaking is to recover a portion of permit review costs and the commission determined that it is appropriate to roughly base fees on the complexity of the review. The commission determined that a capital assessment rate of .30% (1.0% for PSD) is necessary to generate sufficient revenue to help fund the commission's air programs. The commission determined that it is appropriate to have higher fees for NSR and PSD actions because these reviews are complex. Further, the commission does not agree that the revenue should be replaced with increased PBR fees, since those reviews are much simpler. The commission did not propose an increase for grandfather permit fees and, according to Texas administrative law, the commission cannot introduce new requirements at adoption. No changes to the rule were made in response to this comment.

NSR Renewal Permit

Comment

ACT suggested changing the permit renewal fee structure from incremental fees based on emissions level categories to a fee of \$600 plus \$15 or \$20 per ton of emissions (to provide an incentive for pollution prevention). In conjunction, ACT suggests an increase to the fee cap from \$10,000 to \$25,000.

RESPONSE

The commission agrees in part with this comment. The commission revises the minimum renewal permit fee rate from the proposed \$900 to \$600. The commission does not incorporate the suggested flat per ton emissions rate, but rather revises the incremental per ton rates. While the commission is increasing the base and incremental fees for permit renewals, it adopts greater increases to the incremental fees for high emissions levels than for lower emissions levels. Consequently, renewal fees for permitted facilities with lower emissions will generally not increase as much as renewal fees for permitted facilities with higher emissions levels. Raising the fees for those sources at the cap was not included in the proposal for this rulemaking, therefore it cannot now be adopted.

Standard Permit, Multiple Plant Permit, and Flexible Permit

Comment

ACT suggested a \$600 flat fee for standard permits and multiple plant permits instead of \$900. ACT recommended setting the minimum fee for flexible permits at \$600 instead of \$900.

RESPONSE

The commission determined that \$900 is an appropriate fee to help recover review costs associated with the issuance of these permits. These fees require a comparable dedication of resources as the minimum NSR permit, which is also increasing to \$900. Reducing all Chapter 116 minimum fee increases as suggested would not ensure adequate funding to support appropriated funding levels. The commenter also suggested alternative funding methods to compensate for these reductions; however, the commission does not agree with these suggested funding methods as described in this rulemaking and the concurrent Chapter 101 and Chapter 106 rulemakings. No changes were made to the rule in response to these comments.

Grandfather Permit

Comment

ACT commented that the grandfather permit fee adopted by the commission May 22, 2002 is too low and the commission should reconsider its decision by making that fee equal to the flexible permit cost per ton rate, \$32/ton with a \$75,000 maximum because ACT stated that the flexible permit and the grandfather permit programs share many similarities. ACT expressed concern that the grandfather permit fee is too low to support the amount of work the reviews will require. ACT stated that the rationale for the commission originally setting the grandfather permit fees so low was that the program was voluntary and the commission wanted to encourage participation; however, now that the program is mandatory, ACT stated that the fees should be increased. ACT stated that the grandfather permitting fee as adopted in another rulemaking on May 22, 2002 is too low and suggests that the minimum fee be \$600 plus a cost per ton similar to the flexible permit fee.

RESPONSE

The commission considered an increase to the grandfather permit fee during this rulemaking. Chapter 116 contained a Voluntary Emission Reduction Permit (VERP) fee of \$100 for small businesses or \$450 for other entities. For consistency with statutory changes, in June 2002, the commission adopted revisions to Chapter 116 that no longer offered VERP permitting, but instead specified permitting requirements for grandfathered facilities. After much consideration, the executive director did not recommend that the commission propose an increase to the fee since the review for a grandfather permit is similar to the review of a VERP. Therefore, the commission did not believe it was appropriate to assess a higher fee for existing facilities permits. According to Texas administrative law, the commission cannot introduce new requirements at adoption. Since the commission did not propose an increase for grandfather permit fees, it cannot increase the fee at adoption. No changes to the rule were made in response to this comment.

Miscellaneous

Comment

The EPA commented that the TNRCC should clarify in its final rulemaking whether it intends to include §101.24 and §116.1050 in its SIP submittal as those sections have not previously been submitted to the EPA.

RESPONSE

The commission appreciates the EPA's comment and wishes to maintain consistency with prior SIP submittals. The commission did submit §101.24 to the EPA in the Fall of 1985, with a most

recent revision in November of 1997. Therefore, the commission does intend to submit §101.24 of this package as a SIP revision. However, the EPA is correct that §116.1050 has not previously been submitted, so the commission is not now submitting that portion of the rulemaking as a SIP submittal.

Comment

TCC strongly disagreed with the proposal to double the permit amendment fee for amendments that do not involve capital expenditure and recommends leaving §116.141(e) as is. TxOGA stated that there is no reasonable justification for the proposal to double the permit amendment fee for amendments that do not involve capital expenditure and recommends leaving §116.141(e) as is.

RESPONSE

The commission determined that it is necessary to increase the amendment fee to recover a portion of the costs associated with processing permit amendments. While capital costs of a project could be indicative of the complexity of the review required, it does not necessarily follow that projects with no capital cost will require less review than a permit which would pay the minimum fee. No changes to the rule were made in response to this comment.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 4: PERMIT FEES

§116.141, §116.143

STATUTORY AUTHORITY

The amendments are adopted under 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 amendment 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.

§116.141. Determination of Fees.

(a) The estimated capital cost of the project is the estimated total cost of the equipment and services that would normally be capitalized according to standard and generally accepted corporate financing and accounting procedures.

(b) The following fee schedule shall be used by a permit applicant to determine the fee to be remitted with a permit application.

(1) If the estimated capital cost of the project is less than \$300,000 or if the project consists of new facilities controlled and operated directly by the federal government and the federal regulations for Prevention of Significant Deterioration (PSD) Review do not apply, the fee is \$900. The provisions of subsections (c) and (d) of this section do not apply to a project consisting of new facilities controlled and operated directly by the federal government.

(2) If the estimated capital cost of the project is \$300,000 or more and the PSD regulations do not apply, the fee is 0.30% of the estimated capital cost of the project. The maximum fee is \$75,000. For determination of fees for projects applicable to PSD regulations, see §116.163 of this title (relating to Prevention of Significant Deterioration Permit Fees).

(c) If the estimated capital cost of the project is less than \$50 million, the permit applicant shall include a certification that the estimated capital cost of the project is correct. Certification of the estimated capital cost of the project may be spot-checked and evaluated for reasonableness during permit processing. The reasonableness of project capital cost estimates used as a basis for permit fees shall be determined by the extent to which such estimates include fair and reasonable estimates of the capital value of the direct and indirect costs listed as follows.

(1) Direct costs are as follows:

(A) process and control equipment not previously owned by the applicant and not currently authorized under this chapter;

(B) auxiliary equipment, including exhaust hoods, ducting, fans, pumps, piping, conveyors, stacks, storage tanks, waste-disposal facilities, and air pollution control equipment specifically needed to meet permit and regulation requirements;

(C) freight charges;

(D) site preparation (including demolition), construction of fences, outdoor lighting, road, and parking areas;

(E) installation (including foundations), erection of supporting structures, enclosures or weather protection, insulation and painting, utilities and connections, process integration, and process control equipment;

(F) auxiliary buildings, including materials storage, employee facilities, and changes to existing structures;

(G) ambient air monitoring network.

(2) Indirect costs are as follows:

(A) final engineering design and supervision, and administrative overhead;

(B) construction expense (including construction liaison), securing local building permits, insurance, temporary construction facilities, and construction clean-up;

(C) contractor's fee and overhead.

(d) A fee of \$75,000 shall be required if no estimate of capital project cost is included with a permit application.

(e) An applicant for a permit or permit amendment not involving any capital expenditure shall be required to remit the minimum permit fee of \$900.

§116.143. Payment of Fees.

All permit 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) or TCEQ and delivered with the application for permit or amendment to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3087. Required fees must be received before the agency will begin examination of the application.

(1) Single fee. The executive director shall charge only one fee for multiple permits issued for one project if it is determined that the following conditions are met:

(A) all the component or separate processes being permitted are integral or related to the overall project;

(B) the project is under continuous construction of the component parts;

(C) the permitted facilities are to be located on the same or contiguous property; and

(D) applications for all permits for the project must be submitted at the same time.

(2) Return of fees. Fees must be paid at the time an application for a permit or amendment is submitted. If no permit or amendment is issued by the agency or if the applicant withdraws the application prior to issuance of the permit or amendment, one-half of the fee will be refunded except that the entire fee will be refunded for any such application for which an exemption under Chapter 106 of this title (relating to Exemptions from Permitting) is allowed. No fees will be refunded after a deficient application has been voided or after a permit or amendment has been issued by the agency.

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

DIVISION 6: PREVENTION OF SIGNIFICANT DETERIORATION REVIEW

§116.163

STATUTORY AUTHORITY

The amendment is adopted under 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 amendment 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.

§116.163. Prevention of Significant Deterioration Permit Fees.

(a) If the estimated capital cost of the project is less than \$300,000 or if the project consists of new facilities controlled and operated directly by the federal government for which an application is submitted after January 1, 1987, and the federal regulations for Prevention of Significant Deterioration (PSD) of Air Quality are applicable, the fee is \$3,000.

(b) If the estimated capital cost of the project is \$300,000 or more and the PSD regulations are applicable, the fee is 1.0% of the estimated capital cost of the project. The maximum fee is \$75,000.

(c) Whenever a permit application is submitted under PSD requirements, there shall be no additional fee for the state new source review permit application.

(d) Certification of the estimated capital cost of the project shall be provided in accordance with §116.141(c) and (d) of this title (relating to Determination of Fees).

(e) A fee of \$75,000 shall be required if no estimate of capital project cost is included with a permit application.

SUBCHAPTER D: PERMIT RENEWALS

§116.313

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under 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 amendment 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.

§116.313. Renewal Application Fees.

(a) The fee for renewal is based on the total annual allowable emissions from the permitted facility to be renewed, according to the following table.

Figure: 30 TAC §116.313(a)

RENEWAL FEE TABLE*

X = TOTAL ALLOWABLE (TONS/YEAR)	BASE FEE	INCREMENTAL FEE
$X \leq 5$	\$600	-
$5 < X \leq 24$	\$600	\$35/ton
$24 < X \leq 99$	\$1,265	\$28/ton
$99 < X \leq 651$	\$3,365	\$12/ton
$X > 651$	\$10,000	--

Minimum fee: \$600
 Maximum fee: \$10,000

* To calculate the fee, multiply the number of tons in excess of the lower limit of the appropriate category by the incremental fee, then add this amount to the base fee. For example, if total emissions of all air contaminants are 50 tons per year, the total fee would be \$1,993 (base fee of \$1,265, plus incremental fee of \$28 x 26 tons or \$728).

(b) Fees are due and payable at the time the renewal application is filed. No fee will be accepted before the permit holder has been notified by the commission that the permit is scheduled for review. All permit review fees shall be remitted by check, certified check, electronic funds transfer, or money order payable to the Texas Commission on Environmental Quality (TCEQ) and mailed to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3087. Required fees must be received before the agency will consider an application to be complete.

SUBCHAPTER F: STANDARD PERMITS

§116.614

STATUTORY AUTHORITY

The amendment is adopted under 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 amendment 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.

§116.614. Standard Permit Fees.

Any person who registers to use a standard permit or an amended standard permit, or to renew a registration to use a standard permit shall remit, at the time of registration, a flat fee of \$900 for each standard permit being registered, unless otherwise specified in a particular standard permit. No fee is required if a registration is automatically renewed by the commission. All standard permit 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 delivered with the permit registration to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3087. No fees will be refunded.

SUBCHAPTER G: FLEXIBLE PERMITS

§116.750

STATUTORY AUTHORITY

The amendment is adopted under 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 amendment 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.

§116.750. Flexible Permit Fee.

(a) Fees required. Any person who applies for a flexible permit or for an amendment to an existing flexible permit shall remit, at the time of application for such permit, a fee as set forth in subsection (b) of this section. Fees will not be charged for flexible permit alterations, changes of ownership, or changes of location of permitted facilities.

(b) Fee amounts. The fee to be remitted with a flexible permit application shall be based on the total annual allowable emissions from the permitted facility, group of facilities, or account for which the flexible permit is being sought. The fee shall be \$32 per ton with the minimum fee being \$900 and the maximum fee \$75,000. For flexible permit amendments, the fee shall be calculated based on \$32 per ton for the incremental emission increase with the minimum fee being \$900 and the maximum fee being \$75,000.

(c) Payment of fees. All permit fees for a flexible permit shall 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 and delivered with the application for flexible permit or flexible permit amendment to the commission's New Source Review Permits Division. Required fees must be received before the agency will begin examination of the application.

(d) Return of fees. Fees must be paid at the time an application for a flexible permit or flexible permit amendment is submitted. If the applicant withdraws the application prior to issuance of the flexible permit or flexible permit amendment, one-half of the fee will be refunded, except that the entire fee will be refunded for any such application for which a permit by rule under Chapter 106 of this title (relating to Permits by Rule) is allowed. No fees will be refunded after a deficient application has been voided, denied, or after a flexible permit or flexible permit amendment has been issued by the agency.

SUBCHAPTER J: MULTIPLE PLANT PERMITS

§116.1050

STATUTORY AUTHORITY

The amendment is adopted under 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 amendment 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.

§116.1050. Multiple Plant Permit Application Fee.

Any person who applies for a multiple plant permit (MPP) shall remit, at the time of application for such permit, a fee of \$900.

(1) Fees will not be charged for MPP alterations, changes of ownership, or changes of location of permitted facilities.

(2) Fees must be paid at the time an application for a permit is submitted. No fees will be refunded after a deficient application has been voided.

