

The Texas Commission on Environmental Quality (TCEQ or commission) proposes an amendment to §116.315.

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission proposes revisions to Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, §116.315, Permit Renewal Submittal, as a result of passage of Senate Bill 1673 (SB 1673), 80th Legislature, Regular Session, 2007. This legislation amended Texas Health and Safety Code, §382.055, Review and Renewal of Preconstruction Permit. Senate Bill 1673 allows the commission to process a renewal application at the same time as an amendment for a preconstruction permit, provided the amendment application is filed not more than three years before the date the permit is scheduled to expire and is subject to notice requirements under Texas Health and Safety Code, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing. In order for the commission to process a renewal application concurrently with such an amendment application, the applicant must not object. The changes to Texas Health and Safety Code, §382.055 became effective May 9, 2007.

SECTION DISCUSSION

§116.315. Permit Renewal Submittal.

The commission proposes to modify the language in this section to account for applications that will be submitted earlier than 18 months prior to the expiration of the permit. The commission proposes to add a description of the SB 1673 limitations for submitting a renewal application concurrently with an

amendment application. The commission also proposes to delete a reference to the May 1, 2004, effective date, as it is no longer needed.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rule.

The proposed rule would amend Chapter 116 to implement the provisions of SB 1673, 80th Legislature, Regular Session, which make it possible to process certain renewal applications at the same time as an amendment for preconstruction permits under the Clean Air Act. Under the proposed rule, an amendment application must be filed not more than three years before the date the permit is scheduled to expire. Submitting the renewal application in conjunction with an amendment application is optional for the applicant, and the amendment application must be subject to notice requirements required by Texas Health and Safety Code, §382.056. The proposed rule does not impose any new fees or change the amount of current fees.

The proposed rule provides applicants with more flexibility and convenience during the renewal process. If an applicant chooses to process a renewal application at the same time as an amendment for a preconstruction permit, the applicant would be required to pay the existing renewal and amendment fees concurrently. Staff is unable to estimate the number of local governments that might choose the combined application process.

Amendment fees for preconstruction permits can range from \$900 to \$75,000 depending on the capital size of the project. Renewal fees can range from \$600 to \$10,000 based on a facility's total allowable emissions. If a local government chooses to process a renewal application along with an amendment for a preconstruction permit, combined fees could be as much as \$1,500 to \$85,000. By submitting a combined renewal and amendment application, local governments would only have to track one instead of two application packages and would also only be required to publish one public notice instead of two. The cost savings for not publishing an additional public notice could be as much as \$6,000 depending on the rates charged by newspapers in the surrounding area.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be the addition of an optional, more efficient air permitting process that continues to protect the environment and public health and safety.

Under the proposed rule, applicants could choose to process a renewal application at the same time as an amendment for a preconstruction permit. Staff is unable to estimate the number of businesses that would choose to utilize the combined application process.

Instead of tracking two separate applications as is done under current rule, applicants would have to track only one application if they choose this option. Although permit fees for these applications are not changing, applicants would have to pay both fees if they submit the combined package. Combined fees could range from \$1,500 to \$85,000 depending on capital requirements and the amount of a facility's

emission limits. Cost savings associated with publishing one instead of two public notices could be as much as \$6,000 depending on the rates charged by newspapers in the surrounding area. Since submitting a combined application is an option for permit holders and merely changes the timing of paying permit fees, the proposed rule is not expected to have a significant fiscal impact on individuals and large businesses.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule does not change the amount of fees paid and gives small or micro-businesses the option of choosing a more efficient permitting process regarding amendments to preconstruction permits and permit renewals. If a small business chooses the optional application process, it would incur the same combined application fees and experience the same savings regarding public notices as those incurred by local governments and large businesses.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed amendment does not meet the definition of a “major environmental rule” as defined in that statute. According to Texas Government Code, §2001.0225(g)(3), a “major environmental rule” is a rule which is specifically intended 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 intent of this proposed rulemaking is to implement SB 1673, passed during the 80th Legislature, Regular Session, 2007. This legislation allows the commission to process a renewal application at the same time as an amendment provided the amendment application is filed not more than three years before the date the permit is scheduled to expire, is subject to notice requirements under Texas Health and Safety Code, §382.056, and the applicant does not object. In addition, the regulatory analysis requirements of Texas Government Code, §2001.0225, only apply to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. Specifically, the proposal will amend the commission rule regarding permit renewal application submittals that will allow renewal applications be processed by the commission concurrently with amendment applications provided certain conditions

are met. The proposed amendment would implement changes to rule as a result of passage of SB 1673 in the 80th Legislature, Regular Session, 2007. This proposal therefore does not exceed an express requirement of federal law. The amendment is needed to implement state law but does not exceed those new requirements. The proposed rule does not involve a delegation agreement or contract between the state and federal government to implement a state and federal program. Finally, this proposed rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.0518, 382.055, and 382.056. 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

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

The commission completed a takings impact assessment for the proposed rule. Promulgation and enforcement of the rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposed rule also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the government action. Therefore, the proposed rule will not cause a "taking," as defined under Texas Government Code, §2007.002(5).

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 rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies. 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.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The amended sections are applicable requirements under the Federal Operating Permits Program, but no revisions to operating permits will be required as a result of this rulemaking.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 29, 2008, 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. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing. Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services, at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808.

Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments submitted via the e Comments system. All comments should reference Rule Project Number 2007-024-116-PR. The comment period closes February 4, 2008. Copies of the proposed rule can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Becky Southard, Air Permits Division, at (512) 239-1638.

SUBCHAPTER D: PERMIT RENEWALS

§116.315

STATUTORY AUTHORITY

The amendment 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 Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA. The amendment is also proposed under THSC, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.0518, which authorizes the commission to issue permits for modification to an existing facility that may emit air contaminants; §382.055, which authorizes the commission to review and renew preconstruction permits according to a specific schedule; and §382.056, which authorizes the commission to require applicants for a permit amendment or permit renewal to publish notice of intent to obtain the authorization.

The proposed amendment implements TWC, §5.103, THSC, §§382.011, 382.012, 382.017, 382.0518, 382.055, and 382.056, and SB 1673, 80th Legislature, Regular Session, 2007.

§116.315. Permit Renewal Submittal.

(a) With the exception of subsections (b) and (c) of this section, an [An] application for renewal must be submitted at least six months, but no earlier than 18 months, prior to expiration of the permit or the permit will expire. [This subsection will be effective on May 1, 2004.]

(b) With executive director approval, the application may be submitted before or after the time period specified in subsection (a) of this section.

(c) A renewal application with appropriate fee may be submitted at the same time as an amendment application to modify an existing facility as long as it is submitted not more than three years before the permit's expiration date and the amendment is subject to public notice requirements under Texas Health and Safety Code, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing.

(d) [(c)] Any permit issued:

(1) before December 1, 1991, is subject for review 15 years after the date of issuance;

(2) on or after December 1, 1991, is subject for review every ten years after the date of issuance; or

(3) at non-federal sources on or after December 1, 1991, may, for cause, contain a provision requiring renewal between five and ten years.