

The Texas Commission on Environmental Quality (commission or TCEQ) adopts an amendment to §106.283 and the repeal of §106.302.

The amendment to §106.283 and the repeal of §106.302 are adopted *without changes* as published in the March 26, 2010, issue of the *Texas Register* (35 TexReg 2503) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The TCEQ has issued seven air quality standard permits (35 TexReg 3092, April 16, 2010) which provide a new method of authorization for a variety of agricultural operations. These agricultural standard permits update and streamline the authorizations used for non-major agricultural facilities, and as part of this effort, the TCEQ also reviewed permits by rule (PBRs) in Chapter 106, Permits by Rule, which have typically been claimed by the types of agricultural facilities that could be authorized by the standard permits. The TCEQ identified two PBRs (§106.283, Grain Handling, Storage, and Drying, and §106.302, Portable Pipe Reactor) that needed to be revised and repealed, respectively, to maximize the effectiveness of the standard permits, maintain protectiveness, and eliminate redundancy.

SECTION BY SECTION DISCUSSION

§106.283, Grain Handling, Storage, and Drying

The commission adopts an amendment to §106.283, which deletes existing §106.283(2), concerning grain facilities in commercial use. The TCEQ is adopting this change because a review of agency records indicates that this section for commercial facilities is rarely used and the standard permit for grain handling facilities contains requirements that are more appropriate for these sources. The standard permit

is more flexible than §106.283(2) in terms of facility size and distance limitations and the standard permit does not require written approval and registration as does existing §106.283(2). The effect of the change to §106.283 is that new grain handling, storage, or drying facilities in commercial use cannot claim §106.283 as authorization and are required to be authorized in some other manner (such as a standard permit, case-by-case new source review permit, or some other applicable PBR). Commercial facilities would still be eligible to use §106.283(2) to add grain storage capacity, as is currently allowed. Existing commercial sources which are already registered under §106.283 remain authorized under the PBR unless there is a modification of the facility, in which case the owner or operator would be required to obtain another applicable authorization mechanism (such as the standard permit for grain handling facilities, or a case-by-case permit).

§106.302, Portable Pipe Reactor

The commission adopts the repeal of §106.302. The standard permit for polyphosphate blending operations (also known as pipe reactors) contains more appropriate, up-to-date requirements for these types of facilities. The standard permit also allows a wider range of operating configurations and a more flexible operating schedule compared to the PBR, while maintaining protectiveness. Repealing this section effectively eliminates new pipe reactors (polyphosphate blenders) from claiming this PBR as an authorization, and new pipe reactors are required to be authorized in some other manner (such as a standard permit, case-by-case new source review permit, or some other applicable PBR). Existing portable pipe reactors already registered under §106.302 can continue to operate at the authorized site under the PBR until the operating time allowed under the PBR has been exhausted (72 operating hours/four months). However, if a portable pipe reactor registered under §106.302 leaves the site at which

it is authorized, the PBR authorization at that site immediately expires.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, a "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 adopted rules more effectively focus commission resources by eliminating duplication and providing a clear regulatory structure. While aspects of this rulemaking are intended to protect the environment or reduce risks to human health from environmental exposure, the rules generally improve regulatory flexibility to regulated facilities and are therefore unlikely to adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. Because this rulemaking will not 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 rulemaking does not fit the Texas Government Code, §2001.0225 definition of "major environmental rule."

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because the adopted rules do not constitute a major environmental rule, a regulatory impact analysis is not required.

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 Section 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 governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The commission has determined that the promulgation and enforcement of the rules 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 rules 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 governmental action. The amendment is administrative and does not impose any new regulatory requirements. The amendment to §106.283 and the repeal of §106.302 are intended to ensure appropriate authorization for subject facilities, eliminate duplication, and provide a clear regulatory structure. This change does not impact

existing authorization under these sections. The rules are reasonably taken to fulfill requirements of state law. Therefore, the amendment to §106.283 and the repeal of §106.302 will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The adopted rulemaking will indirectly benefit the environment because the amendment to §106.283 and the repeal of §106.302 is expected to ensure appropriate authorization for subject facilities, eliminate duplication, and provide a clear regulatory structure. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31

TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Most facilities affected by this rulemaking are minor sources and not subject to the Federal Operating Permits Program. In addition, these rule changes do not directly affect existing authorized sources unless those sources are modified and require new authorization. Therefore, there should be no direct effect on most sites subject to the federal operating permits program. However, if a facility is authorized by §106.283(2) or §106.302 and is located at a site with a federal operating permit, the permit holder may need to conduct an evaluation and determine if a revision to a federal operating permit is needed to update the applicable requirements.

PUBLIC COMMENT

The commission held a public hearing on the proposed changes in Austin on April 19, 2010, at 10:00 am, in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on April 26, 2010. The commission received no comments on the rulemaking.

SUBCHAPTER L: FEED, FIBER AND FERTILIZER

DIVISION 1: FEED

§106.283

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities; and §382.057, concerning Exemption, which authorizes exemptions from permitting.

The adopted amendment implements Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

§106.283. Grain Handling, Storage, and Drying.

Any grain handling, storage, and drying facility which meets paragraphs (1) or (2) of this section is permitted by rule.

(1) The facility is in noncommercial use only--that is, used only to handle, dry, and/or store grain produced by the owner(s) of the facility if the following conditions are satisfied:

(A) the total storage capacity does not exceed 750,000 bushels;

(B) the grain handling capacity does not exceed 4,000 bushels per hour;

(C) the facility is located at least 500 feet from any recreational area or residence or business not occupied or used solely by the owner of the facility.

(2) The installation of additional grain storage capacity which satisfies the following conditions:

(A) there shall be no increase in hourly grain handling capacity;

(B) existing grain receiving and loadout facilities are utilized;

(C) grain shall be conveyed by closed conveying systems and air suction shall not be pulled on any conveying unit;

(D) written site approval shall be received from the executive director before construction begins for facilities utilizing existing grain receiving facilities when new gravity or auger loadout systems are to be installed.

SUBCHAPTER L: FEED, FIBER AND FERTILIZER

DIVISION 3: FERTILIZER

[§106.302]

STATUTORY AUTHORITY

The repeal of this section is adopted under Texas Water Code, §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also adopted under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities; and §382.057, concerning Exemption, which authorizes exemptions from permitting.

The adopted repeal implements Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.