

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The TCEQ has been developing seven air quality standard permits, which if issued, would provide a new method of authorization for a variety of agricultural operations. These agricultural standard permits have been proposed under a separate action; more information concerning the proposed agricultural standard permits is available in the November 6, 2009, issue of the *Texas Register* (34 TexReg 7845). The proposed agricultural standard permits are intended to 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, which have typically been claimed by the types of agricultural facilities that could potentially be authorized by the proposed standard permits. The TCEQ identified two permits by rule (§106.283, Grain Handling, Storage, and Drying, and §106.302, Portable Pipe Reactor) that should be revised and repealed, respectively, to maximize the effectiveness of the proposed standard permits, maintain protectiveness, and eliminate redundancy. If the proposed standard permits are not issued by the commission, the proposed changes to Chapter 106 will be withdrawn.

SECTION BY SECTION DISCUSSION

§106.283, Grain Handling, Storage, and Drying

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

sources. The proposed standard permit is more flexible than §106.283(2) in terms of facility size and distance limitations, and the proposed standard permit would not require written approval and registration as does §106.283(2). The effect of the proposed change is that new grain handling, storage, or drying facilities in commercial use would not be able to claim §106.283 as authorization, and would be 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 proposed §106.283(2) to add grain storage capacity, as is currently allowed. Existing commercial sources which are already registered under §106.283 would 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 proposes the repeal of §106.302. The proposed standard permit for polyphosphate blending operations (also known as pipe reactors) contains more appropriate, up-to-date requirements for these types of facilities. The proposed standard permit would allow a wider range of operating configurations and a more flexible operating schedule compared to the PBR, while maintaining protectiveness. The effect of the repeal of this section is that new pipe reactors (polyphosphate blenders) would not be able to claim this PBR as authorization, and would be 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 that 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.

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 rules are in effect, agency revenue will increase, although the increase is not expected to be significant. No fiscal implications are anticipated for other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules affect portable pipe reactors used to produce liquid fertilizer, and grain handling, storage, and drying facilities. State agencies and local governments do not typically own or operate such facilities, and agency records indicate that no permits for these activities have been issued to local governments.

The proposed rules would amend Chapter 106 by repealing the PBR for portable pipe reactors, and by revising the PBR for grain handling, storage, and drying facilities so that its use would only be to authorize non-commercial facilities. PBRs issued for portable pipe reactors and commercial grain handling, storage, and drying facilities will be superseded by new standard permits, proposed in a separate action, that contain more appropriate requirements for these facilities.

The proposed repeal of the PBR for portable pipe reactors used to produce liquid fertilizer will require these facilities to obtain the proposed new standard permit for polyphosphate blending operations or a case-by-case permit. For the new polyphosphate blending (pipe reactor) standard permit, agency staff will be required to conduct more complex permit reviews compared to the pipe reactor PBR. However, the proposed revision to the PBR for commercial grain handling facilities, which requires registration and processing by agency staff, will allow a commercial facility owner or operator to claim the standard

permit without registration or staff review. The overall change in agency workload is not expected to be significant and will be managed with existing agency staff and resources.

Initially, the agency does expect to collect higher fees for the new standard permit for pipe reactors since the PBR for these facilities will be repealed, and the standard permit has a higher fee than the PBR.

However, fee increases are not expected to have a significant impact on agency revenue. New or modified pipe reactor facilities will pay a \$900 fee for the standard permit registration instead of the PBR registration fee, which is \$450 for a large business and \$100 for a small business. Staff estimates that 80% of pipe reactor facilities are owned by small businesses and 20% are owned by large businesses.

Typical annual fees from pipe reactor PBRs total \$1,700 statewide, with eight small businesses renewing at \$100 per PBR and two large businesses renewing at \$450 per PBR.

Most pipe reactor facilities are expected to transition to the proposed standard permit during the first year the rules are in effect. As more pipe reactors transition to the standard permit in the second through fifth years, the annual increase in fee revenue received by the agency is expected to decline. Staff estimates that about 30 pipe reactor facilities will transition to the new standard permit during the first year and that about ten pipe reactor facilities per year will transition to the standard permit during the second through fifth years. The increase in agency revenue for the first year the rule is in effect could be as much as \$25,300 (\$900 x 30 standard permit registrations, totaling \$27,000 less \$1,700 typically received for pipe reactor PBRs). During the second through fifth years the proposed rules are in effect, the agency could see an annual revenue increase of \$7,300.

The agency expects revenue from commercial grain handling facilities to decrease since there will be no fee for the grain handling standard permit. However, since the agency receives few PBR requests for commercial grain holding facilities (approximately three per year), any revenue decrease for this transition will not have a significant impact on agency revenue. The current fee for a PBR for a commercial grain handling facility is \$450 for a large business and \$100 for a small business. The annual estimated decrease in agency revenue is estimated to range from \$300 to \$1,350.

Other state agencies and local governments are not expected to experience fiscal impacts as a result of the proposed rules since these entities do not tend to operate facilities that produce liquid fertilizer or conduct commercial operations for grain handling and storage. Agency records indicate that no permits for these activities have been issued to local governments.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be greater protection of public health and the environment due to more appropriate permitting of portable pipe reactor facilities and commercial grain handling facilities.

Individuals that purchase liquid fertilizer from pipe reactor facilities could experience cost increases if those facilities decide to charge more to cover costs of the proposed standard permit associated with emission testing and possible stack modification. The fiscal impact on individuals will depend on decisions made by owners and operators of pipe reactor facilities regarding cost recovery.

The proposed rules regarding grain handling facilities are not expected to have a significant fiscal impact on individuals since owners or operators of commercial facilities are expected to see a decrease, which is not expected to be significant, in permit fees. Grain handling facility owners or operators will make decisions on whether or not to pass on fee decreases to their customers depending on their particular situations. The proposed rules are not expected to require commercial grain handling facilities to use additional controls or modify practices to control emissions that would increase operating costs. Other rules, business practices, and safety practices are already in place to limit emissions, limit product loss, and reduce the risk of fire or explosion.

The current PBR for pipe reactor facilities is for temporary operations and is issued for a four-month period, with a maximum operating time of 72 hours within that period. Owners or operators that wish to continue operations after the expiration of their PBR will be required to get a new permit since the proposed rules repeal the PBR. The proposed repeal of the pipe reactor PBR will require businesses to transition to a standard permit or a case-by-case permit. Large businesses will pay \$450 more to obtain a standard permit, which is renewed every ten years. To comply with standard permit requirements, businesses that own or operate these facilities may incur increased costs for emission testing, but this testing will be a one time cost unless facility modification takes place. Pipe reactors will also be required to have at least a 12-foot stack, and those facilities having a shorter stack will incur increased costs to comply. Most owners or operators of pipe reactor facilities (approximately 80%) are small businesses. Large businesses that own or operate pipe reactor facilities will incur the same costs for equipment and emission testing as a small business to comply with the standard permit. The fiscal impact of those costs can be found in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT of this fiscal note.

Under the proposed rules, owners or operators of new or modified commercial grain handling facilities will be required to use the standard permit or a case-by-case new source review permit. The proposed rules do not impose a fee for the proposed grain handling standard permit as opposed to the current fee for a PBR of \$450 for a large business and \$100 for a small business. Commercial grain holding facilities are expected to see a decrease in permitting costs. The proposed rules are not expected to increase operating costs since grain handling facilities already use controls to comply with other emission and nuisance rules or to reduce product loss or the risk of fire or explosions.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for small or micro-businesses that own or operate pipe reactor facilities that are used to produce liquid fertilizer. The proposed rules repeal the PBR for pipe reactor facilities, which is issued for a four-month period and authorizes temporary facilities. The significance of the fiscal impact of the proposed rules will depend on the amount of revenue usually generated by these businesses. Small businesses owning or operating pipe reactors will be required to transition to the standard permit that will cost \$800 more in fees than a PBR for small businesses. The standard permit is renewable once every ten years, and this increase is not expected to have a significant fiscal impact. However, businesses owning or operating a pipe reactor will be required to have a 12-foot stack, which is estimated to cost \$5,000 to \$10,000 per facility, and emission testing for particulate matter (PM_{10}), ammonia, and fluorides will be required. Emission testing costs could range from \$10,000 to \$30,000 per facility, but unless a pipe reactor facility is modified, these testing costs would be one time costs.

Small businesses that own or operate grain handling facilities should not experience any adverse fiscal impact as a result of the proposed rules since there is no fee for the proposed standard permit and because

they are already required to use controls to comply with other rules, to prevent loss of product, or to reduce the risk of fire or explosions.

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 rules are required to protect human health and the environment for the first five years that the proposed rules are in effect. However, the agency did consider controlling emissions from pipe reactor and grain handling facilities by establishing separate emission limits and control requirements in addition to the requirements of the existing PBRs. Staff believes that this alternative approach would be more confusing to a small business and that it would be easier for a small business to comply with regulations if all the requirements were codified in a standard permit or a case-by-case permit.

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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are 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 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 proposed rules are intended to more effectively focus commission resources by eliminating duplication and providing a clear regulatory structure. While aspects of this proposed rulemaking are intended to protect the environment or reduce risks to human health from environmental exposure, the proposed 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 this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required. 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 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 proposed 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 proposed rules are reasonably taken to fulfill requirements of state law. Therefore, the proposed rules 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 proposed 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(l)). The proposed 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. Written comments on the consistency of the proposed 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

Most facilities affected by this rule change are minor sources and not subject to the Federal Operating Permits Program. In addition, these rule changes would not directly affect existing authorized sources

unless those sources are modified and require new authorization. Therefore, there should be no direct effect on sites subject to the federal operating permits program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal 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 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 prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, 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 being submitted via the eComments system. All comments should reference Rule Project Number 2009-025-106-PR. The comment period closes April 26, 2010. Copies of the proposed rulemaking 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 Michael Wilhoit, Air Permits Division, at (512) 239-1222.

SUBCHAPTER L: FEED, FIBER AND FERTILIZER

DIVISION 1: FEED

§106.283

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §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 amended section is also proposed 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 proposed 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) [- (3)] 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 facility is in commercial use and the following conditions are satisfied:]

[(A) the total storage capacity of the new and any existing facility or facilities does not exceed 1.5 million bushels;]

[(B) the facility shall be located at least 1/4 mile from any recreational area or residence or other structure not occupied or used solely by the owner or operator of the facility or the owner of the property upon which the facility is located;]

[(C) before construction of the facility begins, written site approval shall be received from the executive director and the facility shall be registered with the commission using Form PI-7.]

(2) [(3)] 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 proposed under Texas Water Code, §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 proposed 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 proposed repeal implements Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.051, 382.05196, and 382.057.

[\S106.302. Portable Pipe Reactor.]

[Portable pipe reactor facilities used to process liquid fertilizer that operate according to the following conditions of this section are permitted by rule.]

[(1) Before construction begins, the facility shall be registered with the commission's Office of Permitting, Remediation, and Registration in Austin using Form PI-7.]

[(2) All valves, piping, flanges, hoses, and disconnects must be free of leaks.]

[(3) Opacity from any process vent shall not exceed 20% except for those periods of start-up described in §111.111(a)(1)(E) of this title (relating to Requirement for Specified Sources).]

[(4) Emissions from the facility shall not cause or contribute to a condition of air pollution as defined in Texas Health and Safety Code, §382.003(3).]

[(5) The operating schedule must not exceed 72 hours within a four-month period.]