

The Texas Commission on Environmental Quality (TCEQ, commission, or agency) proposes new §§101.600 - 101.602.

Background and Summary of the Factual Basis for the Proposed Rules

Senate Bill (SB) 1756, 83rd Legislature, 2013, amended the Texas Health and Safety Code (THSC), Chapter 382, Texas Clean Air Act (TCAA), to provide TCEQ with the authority to accept a surcharge from the applicant to cover the expenses incurred by expediting the processing of an application. THSC, §382.05155, Expedited Processing of Application, allows applicants to request, and the executive director may grant, expedited processing of applications. The commission interprets THSC, §382.05155 to only apply to an application filed under 30 TAC Chapter 106, 116, or 122. The applicant must demonstrate that the purpose of the application will benefit the state or local economy and the executive director may expedite the processing of the application if it is determined that by expediting the processing it will benefit the economy of Texas. THSC, §382.05155 allows the commission to authorize the use of overtime or contract labor to process expedited applications, and to add a surcharge to cover expenses incurred by the expediting process. THSC, §382.05155 specifies that the overtime or contract labor used to process expedited applications is not included in the calculation of the number of full-time equivalent commission employees. Applicants must still comply with all applicable federal and state requirements, including the existing public notice requirements. These requirements will continue to include the opportunity,

where applicable, to submit comments, and request a public meeting, a notice and comment hearing, or a contested case hearing. In addition, when public notice is required, and the applicant pays a surcharge, the published notice must indicate that the application is being processed in an expedited manner.

Section by Section Discussion

§101.600, Applicability

The commission proposes new §101.600, to establish that owners and operators may request expedited processing of applications filed under 30 TAC Chapter 106, 116, or 122, and to establish the standard the executive director must use to determine whether an application may be processed under this section. Proposed new §101.600(a) requires the owner or operator to demonstrate that the application and project will benefit the economy of Texas. Proposed new §101.600(b) provides that the executive director may expedite the processing of an application if the executive director determines that expediting it will benefit the economy of Texas. In addition to this determination, proposed subsection (b) provides that the executive director must have the available financial and physical resources for this purpose. The number of applications that can be expedited will depend upon available permitting resources, such as availability of qualified personnel (commission employees or contract labor), office space, or computers. For the 2014 - 2015 biennium, the commission appropriation for the program is limited by Appropriation Rider authorized by General Appropriations Act,

Article IX, §18.57 (83rd Legislature, 2013). This rider limits the amount appropriated for this program to an amount not to exceed \$955,000 in fiscal year 2014 and not to exceed \$897,000 in fiscal year 2015. Expending the appropriation authorized under this rider is contingent on the agency collecting revenue from the expedited permit program.

§101.601, Surcharge

The commission proposes new §101.601 to provide for the executive director to add a surcharge for processing expedited applications and to provide for a refund or additional charge when applicable. Proposed new §101.601(a) requires this surcharge to be added in an amount sufficient to cover expenses incurred by expediting the processing of an application. Proposed new §101.601(b) requires applicants to pay a surcharge at the time an application, filed under 30 TAC Chapter 106, 116, or 122, is submitted or is under review. Only after the surcharge is received will TCEQ begin expediting the processing of the application. Proposed new §101.601(c) allows the executive director to collect additional surcharge(s) from an applicant to cover the expenses of expediting the application above the original surcharge amount. The requirement that the executive director include a surcharge to cover the expenses of expediting an application is statutory. Once a request for expedited permitting is received, the executive director will evaluate the resources necessary to expedite the processing of each application. The commission has included this provision allowing for

additional surcharge(s) to meet the intent of the statute if additional surcharge is necessary to cover expenses incurred by expediting the application. Proposed new §101.601(d) states that the executive director may refund any unused portion of the surcharge.

§101.602, Public Notice

The commission proposes new §101.602 to specify that for expedited applications where the applicant pays a surcharge, any required public notice, including that described in 30 TAC Chapters 39, 55, and 122, must also include a statement that the application is being processed in an expedited manner.

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, no significant fiscal implications are anticipated for the agency since any increase in agency revenue would be used to offset any additional agency costs. The proposed rules are not anticipated to have fiscal implications for other units of state or local government unless they request an expedited application review. Those that request the expedited process would be required to pay a surcharge. Surcharge amounts will vary based on the type and complexity of the application.

The proposed rules implement the requirements of SB 1756, 83rd Legislature, 2013, to develop a process to expedite applications filed under 30 TAC Chapter 106, 116, or 122. THSC, §382.05155 allows the commission to authorize the use of overtime or contract labor to process expedited applications, and to add a surcharge to cover expenses incurred by the expediting process if the owner or operator demonstrates that the purpose of the application will benefit the state or local economy. The 83rd Legislature, 2013, granted the agency the authority to spend up to \$955,000 in fiscal year 2014 and up to \$897,000 in fiscal year 2015 for the purpose of expediting applications, contingent upon the agency collecting sufficient revenue from the expedited permit program. The specific amount for the surcharge will vary based on the type and complexity of the application, but any surcharge amount must cover the agency's cost to expedite an application. Owners or operators would still be required to comply with all applicable federal and state requirements including public notice requirements.

The proposed rules would not have a significant fiscal impact for the agency since the amount of surcharge revenues are expected to offset any increased costs to process expedited requests. Surcharge fees would cover the expenses for the use of overtime, contract labor, and other costs when an expedited process is requested and approved. Other state agencies or units of local government would not experience any significant fiscal impacts since they are not expected to request an expedited process unless it would be beneficial for them to pay the surcharge.

Public Benefits and Costs

Ms. Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be in compliance with state law for an expedited process for applications filed under 30 TAC Chapter 106, 116, or 122 that demonstrate a benefit for the state or local economy.

The proposed rules would not have a significant fiscal impact on individuals or large businesses. All owners or operators would have a choice to request to use the expedited process for their application filed under 30 TAC Chapter 106, 116, or 122 and pay a surcharge. Owners or operators are not expected to make this expedited request unless it would be beneficial for them to pay the amount of the surcharge. The specific amount for the surcharge will vary based on the type and complexity of the application.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses since those that choose to expedite their application filed under 30 TAC Chapter 106, 116, or 122 and pay a surcharge are not expected to do so unless it would be economically beneficial for them to do so. The specific amount for the surcharge will vary based on the type and complexity of the application.

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 by state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are 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 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 impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

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 specific purpose of this proposed rulemaking, as discussed elsewhere in this preamble, is to implement SB 1756 by developing a process to expedite the processing of an application filed under 30 TAC Chapter 106, 116, or 122.

Additionally, even if the rules met the definition of a major environmental rule, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only 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.

The proposed new rules were not developed solely under the general powers of the agency, but are authorized by specific sections of THSC, Chapter 382 (also known as the TCAA), and the Texas Water Code, which are cited in the Statutory Authority section of

this preamble, and is specifically required by state law. Further, the rules do not exceed a standard set by federal law or 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. Therefore, this proposed rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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 Texas Constitution §17 or §19, Article I; 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 analysis for the proposed rulemaking

under the Texas Government Code, §2007.043. The specific purpose of this proposed rulemaking, as discussed elsewhere in this preamble, is to implement SB 1756 by developing a process to expedite the application process.

The proposed rules will not create any additional burden on private real property. The proposed 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 proposal 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. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

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 Advisory

Committee 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.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 24, 2014, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to

comments being submitted via the eComments system. All comments should reference

Rule Project Number 2013-042-116-AI. The comment period closes June 30, 2014.

Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information,

please contact Becky Southard, Operational Support Section, Air Permits Division, at

(512) 239-1638.

SUBCHAPTER J: EXPEDITED PERMITTING
§§101.600 - 101.602

Statutory Authority

The new rules are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The rulemaking is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §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; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.05155, concerning Expedited Processing of Application,

which authorizes the commission to develop a process for expediting applications and charging a surcharge; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under THSC, §382.0518 to publish notice of intent to obtain a permit. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The proposed rulemaking implements Senate Bill 1756 (83rd Legislature, 2013), THSC, §§382.002, 382.011, 382.012, 382.051, 382.05155, and 382.056; and Texas Government Code, §2001.004 and §2001.006.

§101.600. Applicability.

(a) An owner or operator may request the expedited processing of an application filed under Chapter 106, 116, or 122 of this title (relating to Permits by Rule; Control of Air Pollution by Permits for New Construction or Modification; and Federal Operating Permits Program, respectively) if the applicant demonstrates that the purpose of the application will benefit the economy of Texas.

(b) Subject to the availability of commission resources for expediting permit applications, the executive director may expedite the processing of an application filed under Chapter 106, 116 or 122 of this title if the executive director determines that expediting it will benefit the economy of Texas.

§101.601. Surcharge.

(a) The executive director may add a surcharge for an expedited application filed under Chapter 106, 116, or 122 of this title (relating to Permits by Rule; Control of Air Pollution by Permits for New Construction or Modification; and Federal Operating Permits Program, respectively) in an amount sufficient to cover the expenses incurred by expediting it, including overtime, contract labor, and other costs.

(b) Any surcharge 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 to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3088. Applications filed under Chapter 106, 116, or 122 of this title as described in this subchapter will not be considered for expedited processing until the surcharge is received.

(c) If the cost of processing an expedited application under this subchapter

exceeds the collected surcharge amount, the executive director may assess and collect additional surcharge(s) from the applicant to cover the additional costs of expediting the permit. The executive director will not grant final approval under Chapter 106, 116, or 122 of this title if an outstanding surcharge amount is due.

(d) The executive director may refund any unused portion of the surcharge.

§101.602. Public Notice.

When existing public notice requirements must be met and the applicant pays a surcharge as described in §101.601 of this title (relating to Surcharge), the applicable public notice must indicate that the application is being processed in an expedited manner.