

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §39.5, General Provisions; §39.21, Notice of Commission Meeting to Evaluate a Hearing on an Application; §39.105, Application for a Class 1 Modification of an Industrial Solid Waste, Hazardous Waste, or Municipal Solid Waste Permit; §39.107, Application for a Class 2 Modification of an Industrial or Hazardous Waste Permit; §39.403, Applicability; §39.405, General Notice Requirements; §39.411, Text of Public Notice; §39.419, Notice of Application and Preliminary Decision; §39.420, Transmittal of the Executive Director's Response to Comments and Decision; §39.421, Notice of Commission Meeting to Evaluate a Request for Reconsideration or Hearing on an Application; §39.603, Newspaper Notice; §39.604, Sign-Posting; and §39.705, Mailed Notice for Radioactive Material Licenses. Also proposed are new §39.27, Notice of Public Meetings and §39.427, Notice of Public Meeting. Certain provisions of the rules will constitute a revision to the Texas state implementation plan (SIP), specifically §§39.403(a) - (b); 39.411(b)(5); 39.411(b)(10); 39.411(d); 39.419(e); 39.420(c); 39.420(c)(3) - (5); 39.427; 39.603; 39.604.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The commission is proposing a number of changes to its procedural rules in this issue of the *Texas Register*. The changes include proposed revisions to Chapters 1, 35, 39, 50, 55, 80, 106, and 116. These chapters contain proposed changes to update and clarify agency rules, to facilitate permit processing and to more clearly set out the responsibilities of those involved in the permitting process. In addition, in part, the changes proposed in this issue of the *Texas Register* are intended to be responsive to comments received during the rulemaking proceedings implementing House Bill (HB) 801 during the summer and early fall of 1999 requesting that the adopted rules be subject to subsequent review to address any deficiencies which became apparent following adoption. (See the September 24, 1999 issue of the *Texas Register* (24 TexReg

8190).)

The rule changes proposed for Chapter 39 are intended to clarify as well as modify certain existing notice requirements and increase certainty in the public participation process for applicants and the general public. More specifically, the proposed changes to Chapter 39 would include the following: 1.) changes to the deadlines for filing a copy of published notices and publisher's affidavits; 2.) provisions setting out certain notice of public meeting requirements, including the timing and method for publishing notice; 3.) changes to allow the general counsel to modify commission agenda setting and document filing timeframes under certain circumstances; 4.) provisions to clarify certain notice requirements, including those notice requirements related to text, size, mailing and alternative language notice requirements; 5.) provisions related to the holding of multiple public meetings on a single permit application; 6.) changes to require that, for certain applications, the draft permit be made available in a public place in the county along with the application; 7.) revisions to clarify the circumstances triggering the inclusion of certain items in the chief clerk's transmittal of the executive director's response to comment; and 8.) changes to reflect that, for air applications, Notice of Application and Preliminary Decision is not required if no timely hearing request is filed in response to earlier notice.

#### SECTION BY SECTION DISCUSSION

Section 39.5 is proposed for amendment to modify timeframes for filing proof of published notice, require that original newspaper clippings, rather than copies, of the published notice be filed, require the filing of a publisher's affidavit, and to ensure that agency staff receive proof of published notice. These changes will facilitate timely commission staff verification of compliance with notice requirements, including timing

and text of notice requirements, and ensure appropriate processing of the application. The revisions to provide for filing of affidavits for public meetings and hearings five days before the scheduled date of the proceeding, rather than the day of a public meeting or two days before the hearing, will avoid unnecessary travel and expenditure of resources by all parties concerned for public meetings or hearings for which notice is defective. The proposed amendments also make clear that the effect of an affidavit is to create a rebuttable presumption of compliance with commission requirements. By providing that the effect of an affidavit is a rebuttable presumption and by requiring that an original newspaper clipping of the published notice be filed within ten business days after the last date of publication, and affidavits be submitted 30 days after last publication, this rule will be made consistent with the current requirements of §39.405 which applies to certain applications administratively complete on or after September 1, 1999.

Section 39.21 is amended to provide that the general counsel may modify the 30-day timeframe for notice of commission meetings for consideration of hearing requests if more expeditious action is necessary to address an imminent threat to public health, safety or the environment. This change would allow the commission more flexibility in setting hearing request matters for consideration on a more expeditious basis where the circumstances warrant. Similar changes are made in the proposed revisions to Chapter 55 in this rulemaking.

New §39.27 is proposed to set out general notice of public meeting requirements for applications subject to Chapter 39, Subchapters A - F. Although the existing rules set out public meeting notice requirements for particular types of applications (See, for example, §39.101(e) regarding notice of public meeting for certain municipal solid waste applications and §39.103(e) regarding notice of public meeting for certain

industrial or hazardous waste applications), these rules do not currently expressly address notice of public meeting requirements for applications not covered by those specific requirements. For applications not subject to specific notice of public meeting requirements in Chapter 39, Subchapters B - F, the notice of public meetings would now be addressed. Thirty days prior publication in a newspaper of general circulation in the county where the facility is located or proposed to be located would generally be required. It is proposed that where more than one public meeting is held for the same application, 30 days notice of any subsequent public meeting must be given.

The first public meeting that is held in connection with any application will require 30 days prior publication of notice. Only for any subsequent public meeting may the timing of notice be shortened to no less than 30 days. Prior notice of 30 days is sufficient to provide interested persons with the opportunity to attend the public meeting and is a longer notice period than the one established by the Administrative Procedures Act (APA) for contested case hearings (Texas Government Code, §2001.051). It also avoids undue delay in permit processing. In addition, expressly addressing notice of public meeting requirements for all applications will increase certainty regarding an applicant's obligations in the permitting process. An abbreviated notice of public meetings would be allowed for those applications for which more than one public meeting is held given the need to balance meaningful and effective timing of notice with the need for the application to proceed through the permitting process.

Section 39.105 is proposed to be amended to clarify that the notice requirements for Class 1 and Class I modifications for industrial solid waste, hazardous waste and municipal solid waste applications are not only contained in §305.69 (relating to Solid Waste Permit Modification at the Request of Permittee) and §305.70

(relating to Municipal Solid Waste Class I Modifications), but also in §39.403. Section 39.403 contains requirements for Class 2 Modifications with regard to text of notice and mailed notice.

Section 39.107 is proposed to be amended to clarify that notice requirements for Class 2 Modifications of industrial or hazardous waste applications are not only contained in §305.69, but are also subject to the requirements of §39.403. Section 39.107 is also proposed to be amended to delete duplicative notice requirements. The requirements regarding text of notice, the deadline to file public comments, and mailed notice are contained elsewhere in the rules. Section 39.403 contains requirements for Class 2 Modifications with regard to text of notice and mailed notice.

Sections 39.403(a)(3) and 39.403(b) are proposed to be changed to reflect that certain air standard permits are also subject to the requirements of Chapter 39. In September of 1999, when §39.403 was adopted, the standard permit for concrete batch plant applications had not yet been issued by the commission and registrations or permits by rule were the only mechanisms by which a concrete batch plant could be authorized (other than by a new construction permit). While the rules governing these standard permits require compliance with Chapter 39 notice requirements, Chapter 39 does not currently include any references to standard permits for concrete batch plants. These changes adding references to air standard permits for concrete batch plants are proposed for clarity and consistency.

Section 39.403(c)(5) is amended to clarify that for certain concrete batch plants authorized as standard permits the requirements of Subchapters H - M of Chapter 39 do apply. While generally standard permits are not subject to notice and opportunity for contested case hearing, certain concrete batch plants are subject

to notice and opportunity for hearing. This is consistent with the requirements of Texas Health and Safety Code (THSC), §382.058 and the new authorization mechanism under THSC, §382.05195 enacted by the 76th Legislature.

Section 39.403(c)(8) is proposed to be changed to reflect that, consistent with statutory requirements set forth at THSC, §401.116 as well as the regulatory requirements in 39.703 and commission practice, minor amendment applications for radioactive material licenses are subject to notice and opportunity for contested case hearing and therefore, are not excluded from applicability of Subchapters H - M of Chapter 39.

Section 39.403(c)(9) and (c)(10) are proposed to be changed to clarify notice requirements applicable to Class 1 and Class I Modifications for industrial or hazardous waste permits and municipal solid waste permits. Specifically, for Class 1 Modifications of industrial or hazardous waste permits, the reference in §39.403(c)(9) to §39.105 is changed to §305.69. The reference to §39.105 is unnecessary as it only then refers to §305.69. Revisions to §39.403(c)(9) and (c)(10) are also proposed to clarify that, when mailed notice is required, the applicant shall mail notice to the persons listed in §39.413. For Class I Modifications of municipal solid waste permits, the reference to §39.105 in §39.403(c)(10) is changed to §39.70 to more directly reference the applicable notice requirements. Provisions regarding the requirements for mailed notice are also added.

Section 39.403(c)(11) is proposed to be revised to change a cross-reference from §39.107 to §305.69 as the requirements of §39.107 merely refer to the requirements of §305.69. Thus, this change is proposed for ease of locating applicable requirements. Also, since Class 2 Modifications of industrial or hazardous

waste permits are subject to notice and public comment, the proposed rule also sets forth a new requirement that the notice shall specify a deadline for filing public comment with the chief clerk. Mailed notice requirements are also included.

Section 39.405(e) is proposed to be revised to include changes consistent with the changes proposed for §39.5 as discussed earlier in this preamble.

Section 39.405(g)(2) is proposed to be modified to reflect that the practice of the commission is to reflect the executive director's decision in the technical summary or fact sheet that is prepared by the executive director's staff in connection with review of an application. Thus, this change should make clear to applicants and the general public in which document the executive director's decision is reflected. A requirement to make a copy of the draft permit available to the public is also proposed. The provisions of HB 801 {Texas Water Code (TWC), §5.551(e) and THSC, §382.056(e)} require that a copy of the application and the executive director's decision be made available in a public place in the county where the facility is located or proposed to be located. While the technical summary or fact sheet summarize the executive director's decision, the specific requirements and permit conditions deemed necessary by the executive director to ensure that a permit applicant meets all relevant regulatory requirements are reflected in the draft permit. Thus, the executive director's decision is supported by the provisions of the draft permit. Making the draft permit available locally to the general public will facilitate information-sharing regarding the application and clarify requirements to be imposed on the applicant.

Changes are also proposed to make clear that the requirement to make the executive director's decision and draft permit available locally arise after publication of Notice of Application and Preliminary Decision since

these documents would not be available at issuance of the Notice of Receipt and Intent to Obtain Permit.

Section 39.411(b) is proposed to be revised to reflect proper capitalization of the term Notice of Receipt of Application and Intent to Obtain Permit and to correct a typographical error.

Section 39.411(b)(5) is proposed to be modified to reflect that the text of notice is to include a statement that a public meeting will be held if there is substantial public interest in the application or if requested by a legislator who represents the area where the facility is to be located only where applicable because these circumstances do not trigger public meetings for all types of permit applications. For example, Class 2 modifications of hazardous waste permits are not subject to the HB 801 requirement that a meeting be held if requested by a legislator. Likewise, a radioactive materials license application is not subject to the opportunity for public meeting requirements imposed by HB 801. Thus, the text of notice for such applications would not be required to include these provisions.

Changes are proposed to §39.411(b)(10)(B)(iv) to provide that the text of notice for air applications subject to contested case hearing clearly identify that if a contested case hearing is granted, issues raised must not only be relevant and material issues raised during the comment period, but they must also be disputed issues of fact. This change would more clearly mirror the statutory language of HB 801.

Changes are proposed to §39.411(b)(10)(C) to add the requirement that the text of notice for concrete batch plant standard permits issued by the commission include notification that a person residing within 440 yards is an affected person entitled to request a hearing. While concrete batch plants have previously been

registered as exemptions or permits by rule, standard permits are the new mechanism for these authorizations.

Changes are also proposed for §39.411(c) to provide that Notice of Application and Preliminary Decision must include the listed items in the text unless otherwise specified by rule. These changes are proposed to appropriately reflect the provisions of HB 801 related to providing opportunities for filing hearing requests, to clarify that Notice of Application and Preliminary Decision may not under all circumstances contain the same text as Notice of Receipt and Intent to Obtain Permit, and to further reflect that other procedural rules may contain different text of notice requirements for Notice of Application and Preliminary Decision which govern certain types of applications. For example, Notices of Application and Preliminary Decision must generally contain the information required by §39.411(b)(1) - (12). However, while HB 801 requires that the Notice of Receipt and Intent to Obtain Permit solicit hearing requests and thus, include the information contained in §39.411(b)(10)(B), the purpose of the Notice of Application and Preliminary Decision is to solicit public comment only. For air matters for which Notice of Application and Preliminary Decision was required, the subsequent opportunity to request a hearing would follow the chief clerk's transmittal of the executive director's response to comment. Under HB 801, air applications subject to contested case hearing are not subject to three opportunities for filing contested case hearing requests. Rather, if a hearing request is filed in response to first notice, the application proceeds to second notice and then transmittal of the executive director's response to comment with an opportunity for additional hearing requests at that time.

Section 39.411(d) is proposed for amendment and renumbered to clarify the text of notice requirements that apply to public meetings and hearings. The requirement that notices of hearing include contact information for the applicant is removed in this proposal. Notices issued prior to the referral of the matter for contested case hearing would already contain this information. Thus, interested persons would have had access to applicant contact information. Also, while providing applicant contact information may be helpful in giving interested parties an informal means to find out more about the application early in the process, when a matter is referred for hearing by the commission, this initiates a formal contested evidentiary process, and it may be more appropriate for parties to communicate through legal counsel. The text of notice of public meetings will continue to include applicant contact information since informal informational exchange is particularly helpful during the public comment portion of a permit proceeding. The proposed change is also intended to delete the requirement that notices of hearing reference the location of the public place in the county where the application is available. Section 39.405(g)(2) provides that the application must only remain available in the local area until the commission refers issues to SOAH. Thus, by the time notice of hearing is issued, the requirement to make the application available locally no longer applies.

Section 39.419(e)(1)(A) and (B) are proposed for revision to clarify that an applicant for certain air permits is not required to publish Notice of Application and Preliminary Decision if no timely hearing request is submitted in response to Notice of Receipt of Application and Intent to Obtain Permit or if a timely hearing request is submitted but then withdrawn prior to the issuance of the executive director's decision. This clarifies that late filed hearing requests do not trigger the requirement to proceed with publication of Notice of Application and Preliminary Decision for certain air permit applications. Also, this change is consistent with the provisions of §55.201(g) regarding the processing of late filed hearing requests.

Modifications are also proposed for §39.420 (relating to Transmittal of the Executive Director's Response to Comments and Decision). First, new subsection (c)(3) is proposed to provide that where no timely hearing requests have been filed in response to a Notice of Receipt of Application and Intent to Obtain Permit for air applications, then the chief clerk's transmittal will not include instructions for requesting a hearing or reconsideration of the executive director's decision. Under HB 801, where no timely hearing request is filed in response to issuance of the first notice, then the air application can be processed as an uncontested matter. Current subsection (c)(3) (now renumbered as subsection (c)(4)) implicitly leads to this result by providing that when a hearing request is filed and then withdrawn, the transmittal does not include instructions for requesting a hearing or reconsideration. It can thus be inferred that if there is no opportunity to request a hearing when a hearing request is filed but timely withdrawn, then there is no opportunity to request a hearing if a timely hearing request was not filed at all. However, the rules are now proposed to explicitly provide for this scenario where no timely hearing request is filed in response to Notice of Receipt of Application and Intent to Obtain Permit for air applications. If there are no timely hearing requests, but there are timely comments, the Executive Director's Response to Comments is required. However, there is no further opportunity to request a hearing. Subsection (c)(3) now renumbered as (c)(4) is also modified to expressly reflect that only those hearing requests that are timely are covered by this subsection. Subsection (c)(4) is renumbered as subsection (c)(5) due to the addition of a new subsection (c)(3).

Section 39.420(d) is proposed to describe the effect of withdrawal of all timely comments before the filing of the executive director's response to comments. This proposed rule makes clear that if all comments

received are withdrawn prior to the filing of the executive director's response to comment, then the transmittal of the executive director's response to comment will not provide an opportunity to request a hearing or reconsideration of the executive director's decision. Under §55.156(b)(1), the executive director must prepare a response to timely, relevant and material, or significant comment, whether or not withdrawn. Thus, under commission rules, the fact that a comment is withdrawn does not affect the responsibility of the executive director to prepare and file a response to comment. However, under §55.201(c), a request for contested case hearing may not be based on an issue that was raised solely in public comment withdrawn before the filing of the executive director's response to comment. Therefore, if all timely comments have been withdrawn before the response to comment is filed, then no hearing request may be granted by the commission. (See also §55.211(b)(3)(A) and (c)(2)(A).) If no hearing request may be granted by the commission, then providing for an opportunity for hearing requests to be filed with the transmittal of the executive director's response to comment serves no meaningful purpose. As stated in the preamble to the adoption of Chapter 55 rules implementing HB 801, "{t}he commission believes that only current, live disputed issues of fact should be the basis for a referral to SOAH." (See the October 15, 1999 issue of the *Texas Register* (24 TexReg 9026).) Under these circumstances, offering an opportunity to file a request for reconsideration also serves no meaningful purpose. Any person seeking commission review would be able to do so later by filing a Motion to Overturn under §50.139. Thus, the availability of a Motion to Overturn for interested persons may be used as a substantially equivalent procedural mechanism to raise issues concerning an application to the commission.

Further, under HB 801, the time period for filing requests for hearing and requests for reconsideration, where those opportunities exist, generally follows the transmittal of the executive director's response to

comment. (See TWC, §5.555(b).) But, there are circumstances where the opportunity to file requests for hearing or reconsideration after the transmittal of the executive director's response to comment do not exist. For example, if no timely hearing requests are received in response to Notice of Receipt of Application and Intent to Obtain Permit for an air application, then further notice is not required and the matter can be processed as an uncontested permit. (See THSC, §382.056(g).) Therefore, under that circumstance, the failure to file a hearing request in response to first notice not only removes the opportunity for filing hearing requests, but also results in no solicitation of requests for reconsideration. The opportunity to file requests for reconsideration does not occur independently of the opportunity to file hearing requests. Thus, if the nature of the comments or hearing requests received do not trigger the solicitation of hearing requests, then likewise no solicitation of requests for reconsideration is required.

Certain changes are proposed to §39.421 for clarity and to provide the commission with more flexibility in the processing of applications where expeditious action is necessary to avoid imminent threats to human health, safety or the environment. First, the notice required for commission meetings to consider requests for hearing or reconsideration is proposed to be changed from "no later than 30 days" to "at least 35 days" to mirror the language used in §55.209(c) which currently provides that the chief clerk shall mail notice "at least 35 days before the first meeting at which the commission considers the requests." In addition, a rule change is proposed to reflect the proposed new authority granted to the general counsel to modify notice and document filing deadlines under §55.254.

Proposed new §39.427 mirrors proposed new §39.27. This proposed new section will provide general notice of public meeting requirements for those applications subject to Chapter 39, Subchapters H - M. The basis for the proposed changes to §39.427 is the same as the basis for the proposed changes to §39.27.

A number of changes are proposed for Chapter 39, Subchapter K (relating to Public Notice of Air Quality Applications). The purpose of these changes is to correct cross-references, clarify existing requirements, establish specific notice of public meeting requirements for air applications, enhance consistency with other existing rule requirements, and modify sign-posting requirements.

More specifically, §39.603(b) is proposed to be changed to make the applicants' obligation to publish the Notice of Application and Preliminary Decision for air applications consistent with those timeframes given applicants in other permitting programs. Thus, the requirement to publish the Notice of Application and Preliminary Decision is proposed to be changed from 33 days to 45 days after the chief clerk has mailed the notice format to the applicant. In addition, text of notice requirements are clarified. The existing reference to §39.411(c)(1) - (6) is deleted to remove inapplicable text requirements and a reference to §39.411(b)(1) - (9), (10)(A) and (D), and (c)(2) - (6) is substituted.

Newspaper notice requirements for air applications are proposed for revision through changes to §39.603(c)(2). More specifically, the size requirements for newspaper notice are clarified to provide that so long as the notice has a vertical dimension of at least three inches and a total size of at least 12 square inches, the size requirements for notice are satisfied. The current language appears to have caused some confusion among applicants because of the varying dimensional units described in the existing rules. This

proposed rule change should make size of newspaper notice requirements easier to understand and follow. In addition, §39.603(c)(2)(A) is proposed to be revised to provide that not only the permit application number is to be included, but also the type of application is to be described. This change will clarify that newspaper notices should clearly identify the type of air permit for which authorization is sought and will be more informative for interested persons.

Alternative language newspaper notice requirements in §39.603(d)(1)(A) are proposed to be modified to clearly reflect that these requirements are triggered not by actual enrollment of students in a bilingual education program, but by the existence of such a program in the district and students who are eligible at the nearest elementary and middle school. This change is consistent with the provisions of THSC, §382.056(a) which state that alternative language newspaper notice is required “{i}f the elementary or middle school nearest to the facility or proposed facility provides a bilingual education program...” This proposed revision also reflects long-standing practice and implementation of this provision by the commission.

Section 39.603(e) (relating to Alternative Publication Procedures for Small Businesses) is proposed to be changed in this proposal to modify an incorrect cross-reference to subsection (a)(2), which does not exist, and substitute the appropriate cross-reference to subsection (c)(2). This change will make it clear that qualifying small business stationary sources must only publish in the public notice section of the newspaper.

Section 39.603(f) proposes specific notice of public meeting requirements for air applications. It provides for 30 days notice of a public meeting. It also provides for newspaper notice in a newspaper of general

circulation in the municipality or nearest municipality. In this way, the notice of public meeting will be published in the same newspaper required for Notice of Application and Preliminary Decision for air permits. Recognizing the authority to establish alternative newspaper publication for qualifying small businesses under THSC, §382.056 for other types of air notices, these rules allow for an abbreviated notice, and therefore, less costly, notice for those small businesses that qualify. In addition, because mailed notice is generally not required in connection with air applications, the notice of public meeting requirements for air applications do not include any proposal for mailed notice.

Section 39.603(g) is proposed to be changed to be consistent with the proposed revisions to §39.405(e) that provide for publishers' affidavits to be filed no later than five days before the scheduled date of a hearing.

Sign-posting requirements in §39.604 are proposed for change to appropriately reflect the required duration of sign-posting. Thus, the proposed rule provides that the signs must remain in place and legible during the comment period for the Notice of Receipt of Application and Intent to Obtain Permit. There is no requirement that the signs remain posted during the entire comment period because the comment period may last for several months, depending upon whether the Notice of Application and Preliminary Decision is required and a public meeting is held. This uncertainty as to the time the signs must be posted could pose hardships for companies who eventually would be required to post signs for a length of time. If the signs are damaged or removed by unauthorized persons, there could be considerable expense in repairing or replacing signs, as well as the resources associated with monitoring whether the signs are in place and legible. Further, sign-posting is not the only method used to inform the public of pending applications. Newspaper notice (in some cases, multiple newspaper notices) is provided. Thus, providing sign-posting

early in the permitting process should be sufficient to apprise the general public of the pending application. In addition, §39.604(a)(2) is proposed to be revised to provide information on the type of air application being sought. While the current rule lists two possible permit actions, there are numerous other possibilities for which action is requested of the TNRCC. This description should be more informative to the public as well as provide flexibility for various situations where sign posting and public notice are applicable.

Section 39.705 (relating to Mailed Notice for Radioactive Material Licenses) is proposed for revision to reflect the appropriate recipients of mailed notice for these applications.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed rulemaking is in effect there will be no anticipated significant fiscal implications for units of state and local government as a result of administration or enforcement of the proposed rulemaking.

The proposed rulemaking will make a number of procedural changes to the commission's public notice rules. The major changes include expressly providing requirements for the method or timing for notices of public meetings for certain permit applications (including concrete batch and new source review permits); provisions clarifying the notice requirements for Class 1 and 2 Industrial or Hazardous Waste and Class 1 Municipal Solid Waste Modifications; changes to allow for a shorter notice period for public meetings for any public meeting following the first public meeting related to an application; a requirement

to make available in a public place not only the application and the executive director's decision, but also the draft permit; deleting redundant references; and providing the general counsel authority to modify certain notice and document filing timeframes to avoid imminent threats to public health, safety or the environment.

The majority of units of state and local government applying for permits affected by the proposed rulemaking already provide notice of public meetings; however, there may be a small number that have not provided notice of public meetings in the past because there have been no express requirements in the commission's public notice rules. For those applicants, this rulemaking will implement new requirements for notices for public meetings for applications covered by Chapter 39 for which specific requirements are not contained elsewhere. Thirty days notice of public meetings will have to be provided unless otherwise provided by statute or rule. The approximate cost for notice of a public meeting in a newspaper of general circulation is \$500.

#### **PUBLIC BENEFITS AND COSTS**

Mr. Davis also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be to ensure that there will be consistency in the timing and method of notices for public meetings and there will be certainty for the regulated community and the general public regarding the responsibilities and requirements to be followed for the notice of public meetings. Additionally, making the draft permit available to the public is intended to facilitate information-sharing regarding the application and clarify requirements to be imposed on the applicant.

The proposed rulemaking will make a number of procedural changes to the commission's public notice rules, including expressly providing requirements for the method or timing for notices of public meetings for permit applications for which there are currently no explicit notice of public meeting requirements (including concrete batch and new source review permits). The majority of individuals and businesses applying for permits affected by the proposed amendments already provide notice of public meetings; however, there may be a small number that have not provided notice of public meetings in the past because there has been no express requirements in the commission's public notice rules.

For those applicants that have not provided notice of public meetings in the past, this rulemaking will implement new requirements for notices for public meetings for applications covered by Chapter 39 for which specific requirements are not contained elsewhere. Thirty days notice of public meetings will have to be provided for applications. The approximate cost for notice of a public meeting in a newspaper of general circulation is \$500.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be adverse fiscal impacts, which are not anticipated to be significant, for small or micro-businesses as a result of this proposed rulemaking. These proposals to the agency's rules are procedural in nature and will have minimal fiscal impacts on small or micro-businesses.

The proposals will make a number of procedural changes to the commission's public notice rules, including expressly providing requirements for the method or timing for notices of public meetings for permit

applications for which there are currently no explicit notice of public meeting requirements (including concrete batch and new source review permits). The majority of small and micro-businesses applying for permits affected by the proposals already provide notice of public meetings; however, there may be a small number that have not provided notice of public meetings in the past because there has been no express requirements in the commission's public notice rules.

For those applicants that have not provided notice of public meetings in the past, this rulemaking will implement new requirements for notices for public meetings for applications covered by Chapter 39 for which specific requirements are not contained elsewhere. Thirty days notice of public meetings will have to be provided for applications. Affected businesses qualifying as small or micro-businesses will have the option to publish an abbreviated notice, which should keep the cost of publishing the notice below \$500.

#### DRAFT 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 is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the 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 rulemaking is procedural in nature and is intended to clarify existing procedural requirements, increase certainty in the public participation process for both applicants

and the general public, allow greater flexibility in procedural requirements, and expressly provide requirements for the method or timing for notices of public meetings. Therefore, the rulemaking does not meet the definition of “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rulemaking pursuant to Texas Government Code, §2007.043. The specific purpose of the rulemaking is to clarify existing procedural requirements, increase certainty in the public participation process for both applicants and the general public, allow greater flexibility in procedural requirements, and expressly provide requirements for the method or timing for notices of public meetings. The rulemaking contains procedural rule changes only and does not affect private real property. Therefore, the rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposals and found that the rulemaking is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP) nor does it affect any action or authorization identified in §505.11. The rulemaking concerns only the procedural rules of the commission. Therefore, the rulemaking is not subject to the CMP.

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal on March 6, 2001 at 10 a.m., Building F, Room 2210, Texas Natural Resource Conservation Commission Complex, 12100 Park 35 Circle, Austin, Texas. The hearings are 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 hearings; however, agency staff members will be available to discuss the proposal 30 minutes before each hearing and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Duron, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-016-035-AD. Comments must be received in writing by 5:00 p.m., March 12, 2001. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

#### STATUTORY AUTHORITY

The amendments and new section are proposed under TWC, Chapter 5, Subchapter M, and Texas Health and Safety Code (THSC), §382.056, which establishes the commission's authority concerning certain environmental permitting procedures, including the authority for the commission to establish notice

requirements by rule; TWC, §5.103, which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule; TWC, §5.110, which establishes the office of general counsel and the duties of the general counsel; TWC, §5.115, which establishes the commission's authority to set rules for notices of application; THSC, §361.024, which establishes the commission's authority to establish rules for the control of solid waste; THSC, §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; THSC, §382.017, which establishes the commission's rulemaking authority under the Texas Clean Air Act, THSC, §382.056, which establishes the commission's authority to adopt rules regarding notice and public comment; THSC, §401.051, which establishes the commission's authority to adopt the rules for control of radiation; and Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules.

There are no other statutes, articles, or codes implemented by the proposed amendments and new section.

**SUBCHAPTER A: APPLICABILITY AND GENERAL PROVISIONS**

**§39.5, §39.21, §39.27**

**§39.5. General Provisions.**

(a) - (e) (No change.)

(f) When this chapter require an applicant to publish notice, the applicant must file an original newspaper clipping of the published notice and a publisher's affidavit with the chief clerk certifying compliance with the requirement. Filing an affidavit certifying compliance creates a rebuttable presumption of compliance with the requirements to publish notice. [When this chapter requires an applicant to publish notice, the applicant must file an affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file the affidavit is the day of the public meeting for notice of public meeting, two days before a public hearing for notice of a public hearing, and 30 days after the last publication for other published notices. For notice of a public meeting, the applicant must also submit the affidavit to the executive director no later than the day of the public meeting. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice.]

(1) The deadline to file an original newspaper clipping of the published notice which shows the publication date and the newspaper name is ten business days after the last date of publication, except

that for public meetings and hearings the copy of the published notice shall be filed no later than the deadline to file an affidavit.

(2) The deadline to file the affidavit is five days before the scheduled date for a public meeting or hearing and 30 days after the last publication for other notices.

(3) The applicant must submit a copy of the affidavit and published notice of public meeting to the executive director and Office of Public Assistance on the date those documents are filed with the chief clerk.

(4) The applicant must submit a copy of the affidavit and published notice of public hearing to the executive director and Office of Public Interest Counsel on the date those documents are filed with the chief clerk.

(5) When the chief clerk publishes notice under subsection (a) of this section, the chief clerk shall make available at the Office of Chief Clerk an original newspaper clipping of the published notice and publisher's affidavit.

(g) - (h) (No change.)

**§39.21. Notice of Commission Meeting to Evaluate a Hearing Request on an Application.**

If, under Chapter 55 of this title (relating to Request for Contested Case Hearings), a hearing request on an application is set for consideration during a commission meeting, the chief clerk shall mail notice to the applicant, executive director, public interest counsel, and the persons making the request no later than 30 days before the first meeting at which the commission considers the hearing request, unless the general counsel has modified notice and document filing deadlines under §55.26 of this title (relating to Hearing Request Processing).

**§39.27. Notice of Public Meeting.**

(a) Published notice. If a public meeting is required, the applicant shall publish notice of the public meeting. Unless otherwise specified, notice of the public meeting shall be published in a newspaper of general circulation in the county where the facility is located or proposed to be located no later than 30 days before the date of the public meeting. If more than one public meeting is required to be held, less than 30 days notice may be given for any subsequent public meeting provided that no less than 30 days notice shall be given in all cases.

(b) Mailed notice. Unless otherwise specified, the chief clerk shall mail notice of the public meeting to the persons listed in §39.13 of this title.

**SUBCHAPTER B: PUBLIC NOTICE OF SOLID WASTE APPLICATIONS**

**§39.105, §39.107**

**STATUTORY AUTHORITY**

The amendments are proposed under Texas Water Code (TWC), Chapter 5, Subchapter M, and Texas Health and Safety Code (THSC), §382.056, which establishes the commission's authority concerning certain environmental permitting procedures, including the authority for the commission to establish notice requirements by rule; TWC, §5.103, which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule; TWC, §5.115, which establishes the commission's authority to set rules for notices of application; THSC, §361.024, which establishes the commission's authority to establish rules for the control of solid waste; THSC, §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; THSC, §382.017, which establishes the commission's rulemaking authority under the Texas Clean Air Act, THSC, §382.056, which establishes the commission's authority to adopt rules regarding notice and public comment; and Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules.

There are no other statutes, articles, or codes implemented by the proposed amendments.

**§39.105. Application for a Class 1 Modification of an Industrial Solid Waste, Hazardous Waste, or Municipal Solid Waste Permit.**

[(a)] Notice requirements for Class 1 modifications are in:

(1) §305.69 [of this title] (relating to Solid Waste Permit Modification at the Request of the Permittee) and §39.403 (relating to Applicability) of this title for industrial solid waste or hazardous waste permits; or

(2) §305.70 [of this title] (relating to Municipal Solid Waste Class I Modifications) and §39.403 of this title for municipal solid waste permits.

[(b)] The text of required notice shall follow the requirements of §39.11 of this title (relating to Text of Public Notice). If the application is for modification of an industrial solid waste or hazardous waste permit, the additional requirements in §305.69 of this title apply.]

[(c)] When mailed notice is required, the applicant shall mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice).]

**§39.107. Application for a Class 2 Modification of an Industrial or Hazardous Waste Permit.**

The notice requirements for Class 2 modifications are in §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee) and §39.403 of this title (relating to Applicability) of this title. [, except that the text of notice shall comply with §305.69 of this title and §39.11 of this title (relating to Text of Public Notice). The notice shall specify the deadline to file with the chief clerk public comment. The deadline is specified in §305.69 of this title. When mailed notice is required, the applicant shall mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice).]

**SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS**

**§39.403, §39.405, §39.411, §§39.419 - 39.421, §39.427**

**STATUTORY AUTHORITY**

The amendments and new section are proposed under Texas Water Code (TWC), Chapter 5, Subchapter M, and Texas Health and Safety Code (THSC), §382.056, which establishes the commission's authority concerning certain environmental permitting procedures, including the authority for the commission to establish notice requirements by rule; TWC, §5.103, which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule; TWC, §5.110, which establishes the office of general counsel and the duties of the general counsel; TWC, §5.115, which establishes the commission's authority to set rules for notices of application; THSC, §361.024, which establishes the commission's authority to establish rules for the control of solid waste; THSC, §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; THSC, §382.017, which establishes the commission's rulemaking authority under the Texas Clean Air Act, THSC, §382.056, which establishes the commission's authority to adopt rules regarding notice and public comment; THSC, §401.051, which establishes the commission's authority to adopt the rules for control of radiation; and Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules.

There are no other statutes, articles, or codes implemented by the proposed amendments and new section.

**§39.403. Applicability.**

(a) Permit applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapters H - M of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications, Public Notice of Air Quality Applications, Public Notice of Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses). Permit applications that are declared administratively complete before September 1, 1999 are subject to Subchapters A - F of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Air Quality Applications, Public Notice of Other Specific Applications, and Public Notice for Radioactive Material Licenses). All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits).

(1) - (2) (No change.)

(3) Types of Applications. Unless otherwise provided in Subchapters H - M of this chapter or Subchapter G of this chapter, public notice requirements apply to applications for new permits, concrete batch plant air quality exemptions from permitting, [or] permits by rule or standard permits, and applications to amend, modify, or renew permits.

(b) As specified in those subchapters, Subchapters H - M of this chapter apply to notices for:

(1) - (9) (No change.)

(10) concrete batch plants registered under Chapter 106 of this title (relating to Exemptions from Permitting) or authorized under Chapter 116, Subchapter F of this title (relating to Standard Permits) unless the facility is to be temporarily located in or contiguous to the right-of-way of a public works project;

(11) - (13) (No change.)

(c) Notwithstanding subsection (b) of this section, Subchapters H - M of this chapter do not apply to the following actions and other applications where notice or opportunity for contested case hearings are otherwise not required by law:

(1) - (4) (No change.)

(5) applications under Chapter 116, Subchapter F of this title (relating to Standard Permits), other than concrete batch plants specified in §39.403(b)(10) of this title (relating to Applicability);

(6) - (7) (No change.)

(8) applications for minor amendments under §305.62(c)(2) of this title (relating to Amendment), except for applications for minor amendments of radioactive material licenses. Notice for

minor amendments shall comply with the requirements of §39.17 of this title (relating to Notice of Minor Amendment) without regard to the date of administrative completeness;

(9) applications for Class 1 modifications of industrial or hazardous waste permits under §305.69(b) (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice for Class 1 modifications shall comply with the requirements of §305.69 [§39.105] of this title (relating to Solid Waste Permit Modification at the Request of the Permittee) [Application for a Class 1 Modification of an Industrial Solid Waste, Hazardous Waste, or Municipal Solid Waste Permit, without regard to the date of administrative completeness, except that] and the text of notice shall comply with §39.411(b)(1) - (3), and (6) - (7) [§39.411] of this title (relating to Text of Public Notice) and §305.69(b) of this title[;]. When mailed notice is required, the applicant shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice);

(10) applications for Class I modifications of municipal solid waste permits under §305.70 of this title (relating to Municipal Solid Waste Class I Modifications). Notice for Class I modifications shall comply with the requirements of §305.70 [§39.105] of this title [without regard to the date of administrative completeness, except that] and the text of notice shall comply with §39.411(b)(1) - (3) and (6) - (7) [§39.411] of this title[;]. When mailed notice is required, the applicant shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice);

(11) applications for Class 2 modifications of industrial or hazardous waste permits under §305.69(c) (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice for Class 2 modifications shall comply with the requirements of §305.69 [§39.107] of this title [(relating to Application for a Class 2 Modification of an Industrial or Hazardous Waste Permit), without regard to the date of administrative completeness, except that] and the text of notice shall comply with §39.411(B)(1) - (4)(A), (5) - (7) and (9) of this title and §305.69(c) of this title. The notice shall specify the deadline to file public comment with the chief clerk. When mailed notice is required, the applicant shall mail notice to the persons listed in §39.413 of this title;

(12) - (14) (No change.)

(d) - (e) (No change.)

**§39.405. General Notice Requirements.**

(a) - (d) (No change.)

(e) Notice and Affidavit. When Subchapters G - L of this chapter require an applicant to publish notice, the applicant must file an original newspaper clipping of the published notice and a publisher's affidavit with the chief clerk certifying compliance with the requirement. Filing an affidavit certifying compliance creates a rebuttable presumption of compliance with the requirement to publish notice. [When

Subchapters H - L of this chapter or Subchapter G of this chapter require an applicant to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice which shows the date of publication and the name of the newspaper is 10 business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (a) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.]

(1) The deadline to file an original newspaper clipping of the published notice which shows the publication date and the newspaper name is ten business days after the last date of publication, except that for public meetings and hearings the copy of the published notice shall be filed no later than the deadline to file an affidavit.

(2) The deadline to file the affidavit is five days before the scheduled date of a public meeting or hearing and 30 days after the last publication for other notices.

(3) The applicant must submit a copy of the affidavit and published notice of public meeting to the executive director and Office of Public Assistance on the date those documents are filed with the chief clerk.

(4) The applicant must submit a copy of the affidavit and published notice of public hearing to the executive director and Office of Public Interest Counsel on the date those documents are filed with the chief clerk.

(5) When the chief clerk publishes notice under subsection (a) of this section, the chief clerk shall make available at the Office of Chief Clerk a copy of the published notice and a publisher's affidavit.

(f) (No change.)

(g) The applicant shall make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located. If the application is submitted with confidential information marked as confidential by the applicant, the applicant is required to indicate in the public file that there is additional information in a confidential file. The copy of the application shall comply with the following:

(1) (No change.)

(2) A copy of the complete application (including any subsequent revisions to the application), the [and] executive director's [preliminary] decision as set out in the technical summary or fact sheet, and the draft permit must be available for review and copying beginning on the first day of newspaper publication of the Notice of Application and Preliminary Decision [required by this section] and

remain available until the commission has taken action on the application or the commission refers issues to SOAH.

**§39.411. Text of Public Notice.**

(a) (No change.)

(b) When [notice of receipt of application and intent to obtain permit] Notice of Receipt of Application and Intent to Obtain Permit by publication or by mail is required by Subchapters H - L of this chapter (relating to Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Air Quality Applications, and Public Notice of Injection Well and Other Specific Applications), Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits), or [for] Subchapter M of this chapter (relating to Mailed Notice for Radioactive Material Licenses), the text of the notice must include the following information:

(1) - (4) (No change.)

(5) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting, contested case hearing, reconsideration of the executive director's decision, a notice and comment hearing, or a statement that later notice will describe

procedures for public participation, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. If applicable, the [The] notice shall [should] include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is a substantial public interest in the proposed activity;

(6) - (9) (No change.)

(10) for notices of air applications:

(A) (No change.)

(B) if notice is for applications described in §39.403(b)(11) or (12) of this title (relating to Applicability), a statement that any person is entitled to request a notice and comment hearing from the commission. If notice is for any other air application the following information which must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice:

(i) - (iii) (No change.)

(iv) and that only relevant and material disputed issues of fact raised during the comment period can be the subject of [considered if] a contested case hearing request is granted; and

(C) notification that a person residing within 440 yards of a concrete batch plant under an exemption from permitting, [or] permit by rule, or a standard permit adopted or issued by the commission is an affected person who is entitled to request a contested case hearing;

(D) (No change.)

(11) - (14) (No change.)

(c) Unless mailed notice is otherwise provided for under this section, the chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.413 of this title (relating to Mailed Notice). Unless otherwise specified, Notice of Application and Preliminary Decision [When notice of application and preliminary decision] by publication or by mail is required by Subchapters G - L of this chapter, and the text of the notice must include the following information:

(1) - (7) (No change.)

(d) When notice of a public meeting or notice of a hearing by publication or by mail is required by Subchapters G - L of this chapter, the text of the notice must include the following information:

(1) the information required by subsections (b)(1), (3), (6), (7) and (12) [subsections (b)(1) - (3), (6) - (8), and (12)] of this section;

(2) (No change.)

(3) for notices of public meetings only, the following additional information:

(A) the information required by subsection (b)(2) of this subsection; and

(B) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material disputed issues of fact raised during the comment period can be considered if a contested case hearing is granted.

**§39.419. Notice of Application and Preliminary Decision.**

(a) - (d) (No change.)

(e) For air applications:

(1) the applicant is not required to publish Notice of Application and Preliminary Decision,

if:

(A) no timely hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit;

(B) a timely hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and the request is withdrawn before the date the preliminary decision is issued;

(C) (No change.)

(D) (No change.)

(2) - (3) (No change.)

**§39.420. Transmittal of the Executive Director's Response to Comments and Decision.**

(a) - (b) (No change.)

(c) For air applications which meet the following conditions, items listed in subsection (a)(3) and (4) of this section are not required to be included in the transmittals:

(1) (No change.)

(2) (No change.)

(3) applications for which no timely hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain a Permit;

(4) [(3)] applications for which [where] a timely hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and the request is withdrawn before the date the preliminary decision is issued; or

(5) [(4)] the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(d) For applications for which all timely comments and requests have been withdrawn before the filing of the executive director's response to comments, the chief clerk shall transmit only the items listed in subsection (a)(1) and (2) of this section.

**§39.421. Notice of Commission Meeting to Evaluate a Request for Reconsideration or Hearing on an Application.**

If, under Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), a request for reconsideration or hearing on an application is set for consideration during a commission meeting, the chief clerk shall mail notice to the applicant, executive director, public interest counsel, all persons who commented (or a representative of a group or association), and the persons making the request, at least 35 [no later than 30] days before the first meeting at which the commission considers the request, unless the general counsel has modified notice and document filing deadlines under §55.254 (relating to Hearing Request Processing).

**§39.427. Notice of Public Meeting.**

(a) Published notice. If a public meeting is required, the applicant shall publish notice of the public meeting. Unless otherwise specified by statute or rule, notice of the public meeting shall be published in a newspaper of general circulation in the county where the facility is located or proposed to be located no later than 30 days before the date of the public meeting. If more than one public meeting is required to be held, less than 30 days, notice may be given for any subsequent public meeting provided that no less than ten days, notice shall be given in all cases.

(b) Mailed notice. Unless otherwise specified, the chief clerk shall mail notice of the public meeting to the persons listed in §39.413 of this title.

**SUBCHAPTER K: PUBLIC NOTICE OF AIR QUALITY APPLICATIONS**

**§39.603, §39.604**

**STATUTORY AUTHORITY**

The amendments are proposed under Texas Water Code (TWC), Chapter 5, Subchapter M, and Texas Health and Safety Code (THSC)§382.056 which establishes the commission's authority concerning certain environmental permitting procedures, including the authority for the commission to establish notice requirements by rule; TWC, §5.103 which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties; TWC, §5.105 which establishes the commission's authority to set policy by rule; TWC, §5.115 which establishes the commission's authority to set rules for notices of application; Texas Health and Safety Code,§382.017 which establishes the commission's rulemaking authority under the Texas Clean Air Act, THSC,§382.056 which establishes the commission's authority to adopt rules regarding notice and public comment; and Texas Government Code, §2001.004 which requires state agencies to adopt procedural rules.

There are no other statutes, articles, or codes implemented by the proposed amendments.

**§39.603. Newspaper Notice.**

(a) (No change.)

(b) Notice of Application and Preliminary Decision under §39.419 of this title (relating to Notice of Application and Preliminary Decision) is required to be published within 45 [33] days after the chief clerk has mailed the preliminary decision concurrently with the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(b)(1) - (9), (10)(A) and (D), and (c)(2) - (6) [§39.411(c)(1) - (6)] of this title (relating to Text of Public Notice).

(c) General newspaper notice. Unless otherwise specified, when this chapter requires published notice of an air application, the applicant shall publish notice in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility, as follows.

(1) (No change.)

(2) Another notice with a total size of at least six [6] column inches or at least 12 square inches, with a vertical dimension of at least three [3] inches [and a horizontal dimension of at least 2 column widths, or a size of at least 12 square inches,] shall be published in a prominent location elsewhere in the same issue of the newspaper. This notice shall contain the following information:

(A) permit application number and type of application;

(B) - (E) (No change.)

(d) Alternative language newspaper notice.

(1) This subsection applies whenever notice is required to be published under §39.418 of this title, §39.419 of this title, and this section and either the elementary or middle school nearest to the facility or proposed facility is required to provide a bilingual education program as required by Texas Education Code, Chapter 29, Subchapter B, and 19 TAC §89.1205(a) (relating to Required Bilingual Education and English as a Second Language Programs) and one of the following conditions is met:

(A) students are entitled to be enrolled in a program at that school;

(B) - (C) (No change.)

(2) - (7) (No change.)

(e) Alternative publication procedures for small businesses.

(1) The applicant does not have to comply with subsection (c)(2) [(a)(2)] of this section if all of the following conditions are met:

(A) - (B) (No change.)

(2) (No change.)

(f) Notice of public meeting.

(1) If a public meeting is required, the applicant shall publish Notice of Public Meeting 30 days prior to the public meeting.

(2) The Notice of Public Meeting shall be published at least once in the public notice section of a newspaper of general circulation in the municipality or nearest municipality to the facility or proposed facility.

(3) The text of notice shall be as required by §39.411(d) of this title (relating to Text of Notice), except that a small business which meets the requirements of subsection (e)(1) of this section may publish an abbreviated Notice of Public Meeting that includes only the following information:

(A) the date, time, and place of the meeting;

(B) a brief description of the nature and purpose of the meeting;

(C) a brief description of the location and nature of the proposed activity and any application or permit number; and

(D) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information.

(4) Mailed notice shall not be required.

(g) [(f)] If an air application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings), the applicant shall publish notice once in a newspaper as described in subsection (c)(1) [(c)] of this section, containing the information under §39.411(d) of this title. This notice shall be published [and affidavits filed with the chief clerk] no later than 30 days before the scheduled date of the hearing and affidavits shall be filed with the chief clerk no later than five days before the scheduled date of the hearing.

**§39.604. Sign-Posting.**

(a) At the applicant's expense, a sign or signs shall be placed at the site of the existing or proposed facility declaring the filing of an application for a permit and stating the manner in which the commission may be contacted for further information. Such signs shall be provided by the applicant and shall substantially meet the following requirements:

(1) (No change.)

(2) Signs shall be headed by a description of the type of air quality permit that is the subject of the application. [the words listed below:]

[(A) "PROPOSED AIR QUALITY PERMIT" for new permits and permit amendments; or]

[(B) "PROPOSED RENEWAL OF AIR QUALITY PERMIT" for permit renewals.]

(3) - (6) (No change.)

(b) The sign or signs must be in place by the date of publication of the Notice of Receipt of Application and Intent to Obtain Permit and must remain in place and legible throughout [that public comment period] 30-day public comment period for this notice. [The applicant must provide a] The applicant must provide a verification that the sign posting was conducted according to this section.

(c) - (e) (No change.)

## **SUBCHAPTER M: PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES**

### **§39.705**

#### **STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapter M, and Texas Health and Safety Code (THSC), §382.056, which establishes the commission's authority concerning certain environmental permitting procedures, including the authority for the commission to establish notice requirements by rule; TWC, §5.103, which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule; TWC, §5.115, which establishes the commission's authority to set rules for notices of application; THSC, §382.056, which establishes the commission's authority to adopt rules regarding notice and public comment; THSC, §401.051, which establishes the commission's authority to adopt the rules for control of radiation; and Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules.

There are no other statutes, articles, or codes implemented by the proposed amendments.

#### **§39.705. Mailed Notice for Radioactive Material Licenses.**

When notice by mail is required under this subchapter, the chief clerk shall mail notice under only §39.413(2), (3), (4), (8), (9), (11), (12) and (14) [§39.413(2), (3), (8), (9), and (12)] of this title (relating to Mailed Notice), and to each owner of property adjacent to the proposed site. For purposes of

determining the ownership of property adjacent to the proposed site under this subchapter, the applicant shall provide the chief clerk with the names of the landowners from the county tax rolls that are available no more than 30 days before the date of newspaper publication of the notice.