

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §39.402, Applicability to Air Quality Permit Amendments. This new section is adopted as part of the implementation of House Bill (HB) 2518 (an act relating to the issuance of certain permits for the emission of air contaminants), as passed by the 77th Legislature, 2001. The new section concerns public notice requirements for amendment applications to air quality preconstruction permits. Section 39.402 is adopted *with changes* to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6233).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

House Bill 2518 amended the Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.0518, Preconstruction Permit, which establishes new criteria for public participation in the approval process of proposed air quality permit amendments. As amended by HB 2518, TCAA, §382.0518(h) provides that public notice of proposed air permit amendments is not required for facilities affected by TCAA, §382.020, Control of Emissions from Facilities that Handle Certain Agricultural Products, if the total emission increases from all facilities authorized under the amended permit, including new facilities, is not significant as defined for public notice and the emissions will not change in character. Furthermore, §382.0518(h) provides that public notice for all other air permit amendment applications is not required if the total emission increases from all facilities authorized under the amended permit, including new facilities, will meet the public notice de minimis criteria defined by commission rule and the emissions will not change in character. The public notice procedures enacted under HB 801 by the 76th Legislature, 1999, and codified in Chapter 39, continue to be applicable to permit amendment applications to the extent that those procedures are not changed as

a result of HB 2518. In addition, HB 2518 does not affect the technical review of air permit amendment applications, including evaluation of best available control technology (BACT), off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention, to ensure that the public health and safety are protected. The changes in law made by HB 2518 apply to applications for a permit amendment pending before the commission on September 1, 2001 or filed with the commission on or after September 1, 2001.

The commission adopts new §39.402 to implement the public notice provisions of HB 2518. Under this adopted rule, the criteria for determining whether permit amendment applications concerning facilities affected by TCAA, §382.020 are subject to Chapter 39 public notice requirements differs from the criteria that will govern public notice applicability for all other permit amendment applications. The criteria, or thresholds, consist of emission rates for various air contaminants. Amended permits with total emission increases from all facilities authorized under the amended permit below these criteria could be reviewed and issued without Chapter 39 public notice. However, the commission by rule retains the executive director's ability to require public notice in certain circumstances, even where the total emission increases from all facilities authorized under the amended permit are below the threshold criteria.

SECTION DISCUSSION

General

New §39.402 is adopted with changes to the proposed text. The commission has reorganized the adopted section for clarity as well as in response to comments received during the comment period.

New §39.402(a) identifies when air permit amendments require public notice and §39.402(b) identifies the circumstances when air permit amendments are not required to publish notice.

Change in Character of Emissions

The commission adopts new §39.402(a)(1) to require public notice under Chapter 39 when the permit amendment application includes a change in character of emissions. Notice is required if the amendment includes any new air contaminant not previously emitted at the permitted facility. This requirement was originally proposed as a part of §39.402(b) but has been moved to §39.402(a)(1) because it applies to all amendments, regardless of emission increases or type of facility.

Agricultural Facilities and Public Notice Significance

The commission adopts new §39.402(a)(2) to address the applicability of Chapter 39 public notice requirements to permit amendment applications for facilities affected by TCAA, §382.020, which are facilities that handle grain, seed, legumes, or vegetable fibers and emit particulate matter (PM). To be subject to public notice requirements, the total emission increases from all facilities authorized under the amended permit must be greater than any one of the values defined as significant for public notice in §39.402(a)(2)(A) - (D). As required by HB 2518, consistent with TCAA, §382.05196, Permits by Rule, significant for public notice values are based on the annual emission rates outlined in 30 TAC §106.4(a)(1) - (3), and are included in adopted §39.402(a)(2).

Facilities and Public Notice De Minimis

The commission adopts new §39.402(a)(3) to address public notice requirements for all other permit amendment applications (i.e., those involving facilities not affected by TCAA, §382.020) by establishing public notice de minimis criteria to determine whether an air quality permit amendment application is subject to Chapter 39 public notice requirements. Permit amendment applications are subject to public notice if the total emission increases from all facilities authorized under the amended permit exceed any one of the public notice de minimis values, which are adopted as follows: for carbon monoxide (CO), 50 tons per year (tpy); for sulfur dioxide (SO₂), ten tpy; for lead (Pb), 0.6 tpy; and for all other air contaminants, including nitrogen oxides (NO_x), volatile organic compounds (VOC), PM, or any other air contaminant (except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen), five tpy.

The public notice de minimis criteria defined in §39.402(a)(3) are based on an evaluation of state and federal de minimis thresholds and annual emission rates for major source determinations, impact review, and other analyses of the criteria pollutants CO, VOC, SO₂, PM, Pb, and NO_x (the surrogate for nitrogen oxide (NO₂)). The commission has adopted de minimis for public notice values which are less than or equal to these federal or state definitions of “de minimis.” The concept of de minimis in the context of public notice is intended to focus the attention of the public and the commission on emission increases that could have a greater potential for public interest and questions regarding impacts to public health and welfare. This adoption does not change the requirements for the technical review of a permit application, which include a BACT and emissions impacts review. Rather, this adoption builds on an approach used by the United States Environmental Protection Agency’s (EPA’s) prevention

of significant deterioration (PSD) and national ambient air quality standards (NAAQS) assessment for determining federal major source de minimis thresholds for criteria pollutants.

The EPA uses emission rates to determine if a source must apply for a federal permit. Once it is determined that a federal permit is required, EPA uses de minimis impacts levels (concentration thresholds based on a percentage of each NAAQS, as applicable) to determine the scope of the air quality analysis (the impacts review). The commission reviewed the EPA report which was the basis for federal de minimis impacts evaluation for criteria air pollutants and PSD permitting procedures. Please refer to EPA-450/2-80-072, *Impact of Proposed and Alternative De Minimis Levels for Criteria Pollutants*; the August 7, 1980 issue of the *Federal Register* (45 FR 52706); and EPA's *New Source Review Workshop Manual*, October, 1990. The EPA evaluation determined impacts from single sources, as well as the cumulative effect on increment consumption of multiple sources. This latter analysis had the most influence on the choice of federal de minimis emissions levels. The EPA evaluation used a screening model and data on sources that had been permitted under the PSD program. Because of concerns about over-prediction of Pb concentrations, EPA used refined modeling results as a supplementary data base for the federal de minimis Pb evaluation. The commission used the federal de minimis concentrations and corresponding emission rates as a starting point to determine emissions rates for public notice de minimis and adjusted them to account for other limits associated with nonattainment, PSD, and federal operating permit major source definitions, and the general limits for permits by rule (PBR). In addition, because EPA established federal de minimis emission rates based on design concentrations of 2% or 4% of selected NAAQS averaging periods, the commission took into account all averaging periods and applicable levels for each NAAQS.

Specifically, the commission adopts §39.402(a)(3)(A) to set the public notice de minimis criterion for CO at 50 tpy. The commission adopts this threshold after consideration of the federal operating permit major source threshold for CO of 100 tpy (see 30 TAC §122.10(13)(C) and §116.12(10)). Based on the EPA de minimis assessment procedure described above, the commission believes that this rate is too high for public notice de minimis. While the commission agrees that the federal CO limit is reasonable and appropriate for its purpose, a more restrictive emission rate is appropriate for public notice.

Because EPA did not use a design concentration to set the 100 tpy rate, the commission applied the EPA process of using between 2% and 4% of the NAAQS for other criteria pollutants to determine the emission rate for CO. The federal air quality analysis de minimis level for both the one-hour and eight-hour CO NAAQS is set at 5% of the NAAQS, which corresponds to the federal emission rate of 100 tpy. Reducing the public notice de minimis criterion to a conservative 50 tpy would relate to a design concentration of 2.5% of both CO NAAQS. This public notice de minimis rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

The commission adopts §39.402(a)(3)(B) to set the public notice de minimis criterion for SO₂ at ten tpy based on consideration of the following facts: 1.) the lowest significance threshold for SO₂ is 25 tpy for PBR under TCAA, §382.057, as implemented by 30 TAC Chapter 106 (see §106.4(a)(1)); and 2.) the EPA federal de minimis evaluation was based on a concentration of 4% of the 24-hour NAAQS, which corresponds to approximately 40 tpy. The commission determined that a public notice de minimis emission rate of ten tpy (which is based on 1% of the 24-hour NAAQS) was more appropriate because

it is the lowest air quality analysis level to trigger a detailed air quality analysis for any of the three NAAQS for SO₂. This public notice de minimis rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

The commission adopts §39.402(a)(3)(C) to set the public notice de minimis criterion for lead at 0.6 tpy, which is the federal major modification threshold (see §116.12(10)) and is the amount at which a PSD air quality analysis must be conducted. Based on the refined evaluation conducted by EPA for Pb, the commission is adopting the public notice de minimis rate at the federal de minimis rate. This rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

The commission adopts §39.402(a)(3)(D) to set the public notice de minimis criteria for all other air contaminants, including NO_x, VOC, PM, or any other air contaminant (except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen) at five tpy.

For NO_x, the commission adopts a five tpy threshold based on consideration of the following facts: 1.) the EPA evaluation procedure would result in an emission rate of 20 tpy based on the current NAAQS air quality analysis significance level of 1% for a detailed air quality analysis for NO₂; and 2.) the lowest state or federal de minimis or significance level for NO_x is five tpy in nonattainment areas and is

the threshold test (netting) for major stationary sources (see 30 TAC §116.150(a)). The commission believes that a five tpy rate is reasonable to address NO_x and associated impact on ozone formation. This rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

For VOC, the commission adopts the five tpy threshold based on consideration of the following facts:

1.) the EPA current significance level for a detailed air quality analysis for ozone is an emission rate of 100 tpy of VOCs; and 2.) the lowest federal or state de minimis or significance level for VOC is five tpy in nonattainment areas and is the threshold test (netting) for major stationary sources (see §116.150(a)). The commission believes that, in view of the link between VOC and NO_x in the formation of ozone, an emission rate of five tpy is reasonable. This rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

For PM, the commission adopts the five tpy threshold based on consideration of the following facts:

1.) the lowest federal de minimis or significance level is 15 tpy for a PSD major modification (see 30 TAC §101.1(22) and §116.12(10)); and 2.) based on EPA's federal de minimis assessment procedure, the commission determined that an emission rate based on 2% of the 24-hour NAAQS for PM (five tpy) was appropriate because 2% is the lowest air quality analysis significance level to require a detailed air quality analysis for either the 24-hour or annual NAAQS for PM. To ensure that the public health and

safety are protected, this rate will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

For all other air contaminant categories (such as hydrogen chloride, hydrogen sulfide, or other air contaminants not considered a part of a group under criteria pollutants), the commission adopts five tpy as a conservative threshold, which is less than the 25 tpy significance threshold for PBR under TCAA, §382.057, as implemented by Chapter 106 (see §106.4(a)(1)). While the commission did not evaluate species of pollutants, the commission believes that, for consistency and based on the analysis for VOC and PM, an emission rate of five tpy should apply for other contaminant categories as well. This rate and potential public notice requirements will not affect the technical review of air permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention.

Clarification of Total Emission Increases

For purposes of determining the total emission increases in an amended permit, the total emission increases would be the sum of emission increases and emissions decreases in the amendment application. For all cases, emission increases or reductions should be considered after the application of BACT or other additional voluntary control technology. The commission intends that the total emission increases for each pollutant category defined in the rule could include, but is not limited to: 1.) increases in emissions as a result of new facilities at an existing permitted site; 2.) changes to permitted allowable emission rates as a result of physical or operational changes and modifications to

existing facilities; 3.) changes to allowable emission rates as a result of incorporation of a previous authorization when actual emissions are above that authorization's current limitations or authorized actual emission rates; 4.) changes to allowable emission rates due to sampling when actual emissions are above that facility's current limitations or authorized allowable emission rates; and 5.) emissions due to routine maintenance, start-up, or shutdown at only the new or modified facilities when these emissions are required to be included in permits under commission policy or rule. The commission does not intend the total emission increases for each pollutant category defined in the rule to include: 1.) consolidation or incorporation of any previously authorized facility or activity (PBR, standard permits, existing facility permits, etc.); 2.) changes to permitted allowable emission rates when those changes are exclusively due to changes to standardized emission factors; or 3.) actual existing emissions due to routine maintenance, start-up, or shutdowns at permitted facilities, where those emissions were not previously listed on a Maximum Allowable Emission Rate Table (MAERT).

Authority of Executive Director

The commission adopts new §39.402(a)(4) to allow the executive director to require public notice of air permit amendment applications for reasons other than exceedance of the adopted criteria in §39.402(a)(1) - (3). Mirroring current §39.403(b)(8)(C), the new rule provides that the executive director may use his discretion to require public notice for any application when: 1.) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor; 2.) there is a reasonable likelihood of high nuisance potential from the operation of facilities; 3.) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process; or 4.)

there is a reasonable likelihood of significant public interest in a proposed activity. The commission intends to develop and make available guidelines for applications which may fall into these categories.

Conditions When Public Notice not Required

The commission adopts new §39.402(b) to clearly indicate that facilities which meet all the criteria set in §39.402(a) will not be required to publish notice.

FINAL 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 act. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and revises procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing, the rulemaking does not meet the definition of a “major environmental rule.”

In addition, even if the adopted rule is a major environmental rule, a regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal state agency procedures; as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the adoption is in direct response to HB 2518, and does not exceed the requirements of this bill. This adoption does not 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. This rulemaking does not adopt a rule solely under the general powers of the agency, but rather under specific state laws (i.e., Texas Government Code, §2001.004; and THSC, Chapter 382, Subchapter C). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rule is subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for public participation in certain air quality permitting proceedings as required by HB 2518. The adoption relates to procedures for providing public notice. As amended by HB 2518, TCAA, §382.0518(h)

provides that public notice of proposed air permit amendments is not required for facilities affected by TCAA, §382.020, Control of Emissions from Facilities that Handle Certain Agricultural Products, if the total emission increases from all facilities authorized under the amended permit, including new facilities, is not significant as defined for public notice and the emissions will not change in character. Furthermore, §382.0518(h) provides that public notice for all other air permit amendment applications is not required if the total emission increases from all facilities authorized under the amended permit, including new facilities, will meet the public notice de minimis criteria defined by commission rule and the emissions will not change in character as described in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE and SECTION DISCUSSION portions of this preamble. The adopted rule will substantially advance these stated purposes by providing specific procedural requirements. Promulgation and enforcement of the rule will not burden private real property. The adopted new section does not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, the adopted new section does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.) and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules

subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The adopted actions concern only the procedural rules of the commission, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 et seq.).

HEARING AND COMMENTERS

A public hearing on this rulemaking was held in Austin on September 20, 2001 at 10:00 a.m. at TNRCC in Building F, Room 2210, located at 12100 Park 35 Circle. No oral testimony or written comments were submitted at this hearing. Nine commenters submitted written comments during the comment period which closed at 5:00 p.m., September 24, 2001. Written comments were submitted by the American Electronics Association (AeA); Baker Botts L.L.P. on behalf of the Texas Industry Project (TIP); Brown McCarroll, L.L.P. (Brown); ExxonMobil Downstream Refining and Supply (ExxonMobil); Frederick-Law on behalf of the Lone Star Chapter of the Sierra Club, Environmental Defense, Public Citizen, law firm of Lowerre and Kelly, and law firm of Henry and Levin (Frederick); Texas Association of Business and Chambers of Commerce (TABCC); Texas Chemical Council (TCC); Texas Cotton Ginners' Association (TCGA); and Texas Oil and Gas Association (TxOGA).

RESPONSE TO COMMENTS

General

Brown raised concerns over the adequacy of the proposed rule notice and content of the preamble and commented that the proposal did not comply with the Texas Administrative Procedure Act, specifically

with regard to the fiscal note section. Brown commented that the fiscal note should have addressed an analysis of costs, or benefits, in several areas, including: 1.) the commission, including the potential costs of processing additional public notice authorizations, responses to comments, and participation in additional contested case hearings; 2.) the State Office of Hearings Examiners (SOAH) to address the potential increase in contested case hearings; 3.) applicants and commission to address the likely potential impact on processing times for air permit amendment applications due to an increase in the number of applications which would be subject to public notice; and 4.) applicant costs for additional publication and sign posting beyond *Notice of Intent to Obtain a Permit*, including *Notice of Application and Preliminary Decision*, public meetings, or contested case hearings which could potentially reach \$15,000.

The commission has not changed the rule or preamble in response to this comment and believes that the notice of the proposed rule change was sufficient to satisfy the requirements of Texas Government Code, §2001.024, Content of Notice, and provided adequate notice to solicit comments from interested persons. House Bill 2518 amended the law to reduce the number of applications required to undergo public notice when certain emission requirements are satisfied. This law, and the adopted rule, would not require notice in addition to the notice required by §39.603 and §39.604 (publication and sign posting), nor would it require additional processing, meetings, hearings or other actions. Thus, no additional cost assessment is required.

AeA, TABCC, and TCGA submitted comments in strong support of the proposed rule. They noted that the level of emission increases allowed in the rule as proposed would facilitate small changes at

permitted facilities (upgrading manufacturing processes, additional abatement and emissions controls, etc.) while ensuring effective public participation. Additionally, they commented that this rule will help streamline the permitting process while ensuring protection of the public health and welfare and establish explicit circumstances when public notice would be required for air permit amendments.

The commission acknowledges the comments and support of the proposed rule by AeA, TABCC, and TCGA.

TIP requested clarification on whether this rule, and subsequent notice requirements, applies to authorizations other than air permit amendments. Specifically, TIP requested assurances that if a project satisfies the requirements for a permit by rule or standard permit, public notice would not apply in any way.

The commission notes that §39.402 applies only to air permit amendments. If facilities or modifications can meet the requirements of another authorization mechanism such as permit by rule, standard permit (except for concrete batch plants), or changes to qualified facilities, this rule, and subsequent public notice requirements do not apply.

Frederick commented that the exemptions from public notice that will result from this rule are inconsistent with an important federal minor new source review requirement in Title 40 Code of Federal Regulations (CFR), §51.160, and with the Texas state implementation plan (SIP) and the SIP approval standard in 40 CFR, §51.161. The commenter noted the only exception from public notice in

the approved SIP was 30 TAC §116.10(a)(7) which allowed relocation or change of location of previously permitted facilities in certain circumstances. Frederick also commented that it appears the limitations on public notice and public participation opportunities authorized under HB 2518 are in conflict with the terms of EPA granting full delegation of the PSD program.

The commission has not revised the rule in response to this comment. This rule will be submitted to the EPA as a revision to the SIP in the near future. The delegation by EPA of the federal New Source Review Program, commonly referred to as PSD, applies only to major sources, or major modifications, of air contaminants. This adoption does not allow any major or significant increase in the amount of air contaminants to be emitted from a source or facility which must comply with PSD requirements without undergoing public notice. In addition, this rule is based on EPA's PSD NAAQS assessment for federal de minimis impacts reviews of criteria air pollutants and this adoption does not change the requirements for the technical review of a permit application, which includes a complete BACT and impacts review.

TCC and TxOGA requested that the commission consider removing notice requirements for all permit renewal applications. The commenters stated that notice should not be required when there will be no new air contaminants nor increased emissions as a part of a permit renewal and notice should be eliminated, at a minimum, for those facilities with good compliance history.

The commission has not revised the rule in response to this comment. Changes to public notice requirements for permit renewal applications are beyond the scope of this rulemaking. In

addition, TCAA, §382.056(a) specifically requires public notice and opportunity for participation for permit renewals under TCAA, §382.055, Review and Renewal of Preconstruction Permit.

Change in Character of Emissions

Frederick disagreed with the proposed rule in that emissions thresholds are established on categories of air contaminants, particularly non-criteria pollutants. The commenter noted that HB 2518 did not include this exception and release of any new individual air contaminant should require public notice. Frederick noted that the 77th Legislature directed the TNRCC to adopt procedures and policies that are more protective of the public and democratic principles. Thus the commission should not broadly interpret HB 2518 requirements and instead should implement this legislation in a way that limits its scope and impact.

The commission has revised the rule in response to this comment. The requirement for public notice in all cases where there is a change in character of emissions was originally proposed as a part of §39.402(b), but has been moved to §39.402(a)(1) because it applies to all amendments, regardless of the amount of emission increases or type of facility. By changing the organization of the rule, the commission is emphasizing that public notice is required if an amendment includes emissions of any air contaminant not previously emitted at the permitted facility.

Brown objected to the requirement that a change in character of emissions requires public notice. The commenter stated that the “total increase in emissions” includes the possibility of public notice de

minimis emissions of new air contaminants and that “HB 2518 contains no limitation on a change in character of emissions” as proposed in the commission’s rule.

The commission has not revised the rule in response to this comment. House Bill 2518 amended TCAA, §382.056(h) to specifically require public notice when emissions “change in character.” House Bill 2518 amended the TCAA to allow certain facilities to avoid public notice when emissions do not exceed public notice “de minimis” or “significant” levels and where emissions will not change in character. The converse of this is that if emissions change in character, public notice is required.

Agricultural Facilities and Public Notice Significance

Frederick objected to the proposed public notice insignificant threshold values as proposed and stated the proposed emissions thresholds for public notice did not include sufficient rationale or explain the relationship between air contaminant annual increases below federal major modification thresholds and values proposed for public notice by noting that the proposal did not address the “universe that is ‘significant,’ though not ‘major.’ ”

The commission has not changed the rule in response to this comment. House Bill 2518 requires that “a finding that a total emissions increase is not significant must be made as provided under Section 382.05196 for a finding under that section.” The public notice significance thresholds adopted for agricultural facilities are consistent with TCAA, §382.05196, Permits by Rule, and are based on the annual emission rates outlined in 30 TAC §106.4(a). All PBR must meet the

general quantity limits of §106.4(a)(1) - (3), and have emission quantities less than the most restrictive of 250 tpy for CO or NO_x; 25 tpy of any other air contaminant; or any applicable major source threshold. This adoption mirrors these PBR emission limits, which are not exclusively based on major source thresholds.

Facilities and Public Notice De Minimis

ExxonMobil recommended that the rule include the term “de minimis” to ensure clear and understandable regulatory language.

The commission has revised the rule language in response to this comment. To ensure clarity, §39.402(a)(2) and (3) has been revised to include the statutory terms “significant” and “de minimis” for public notice purposes.

Frederick objected to the proposed public notice de minimis threshold values as proposed because the proposed emissions thresholds for public notice did not include sufficient rationale for the relationship between air contaminant annual increases below federal major modification thresholds and de minimis values proposed for public notice.

The commission has not changed the rule in response to this comment. The SECTION DISCUSSION portion of this preamble has been further clarified for the public notice de minimis thresholds adopted by the commission. The public notice de minimis criteria in §39.402(a)(3) are based on an evaluation of state and federal de minimis and annual emission rates for criteria

pollutants (CO, NO_x, VOC, SO₂, PM, and Pb) and are less than or equal to these federal or state definitions of “de minimis.” The concept of public notice de minimis is intended to focus the attention of the public and the commission on emission increases that could have a potential for public interest where there may be questions regarding effects to public health and welfare.

Brown, ExxonMobil, TCC, TIP, and TxOGA commented that the values for public notice de minimis were too low, had little or no justification, and should be increased. ExxonMobil commented that the proposed public notice de minimis thresholds are overly conservative, resulting in public notices “with little resultant benefit to the environment.” TCC and TxOGA stated that the proposed criteria will have little value in terms of significantly reducing the number of amendments that must go through public notice. The commenters all noted that the proposed levels are arbitrarily based on approximately 2% of a NAAQS with no explicit justification as to why this value should be used. TIP noted that the values differed between pollutants (1% - 2.5%) without a clear explanation. Brown commented that the rule proposal lacked justification, recited facts without logic, and failed to explain the significance of why the values presented would be of any concern whatsoever. Brown also noted confusion over which NAAQS had been used for the determination of the proposed values. Brown, TCC, TIP, and TxOGA recommended that the public notice de minimis values should be increased to the levels at which PSD and nonattainment significance is determined. Brown also suggested that these values be set at the federal PSD de minimis modeling and impacts review levels.

The commission has not changed the rule in response to these comments. The SECTION DISCUSSION portion of this preamble has been clarified in response to these comments. The

concept of public notice de minimis is intended to focus the attention of the public and the commission on emission increases that could have a potential for public interest or questions on impacts to public health and welfare.

Brown, Frederick, and TIP commented that the public notice de minimis values should consider the location of the proposed or modified facilities. They suggested that, instead of a single standard throughout Texas, the public notice de minimis values should be different based on geographic location of the proposed facility, especially between attainment and nonattainment areas in the state. Frederick noted that in nonattainment areas, it would be likely that facility construction or modification would have higher public interest, and thus the trigger for public notice should be different for facilities in attainment areas. Brown and TIP suggested that facility proximity to the public and nearest off-site sensitive receptors should also be a consideration in determining public notice de minimis values.

The commission has not revised the rule in response to these comments. While the commission recognizes that it is important to ensure that any specific permit or permit amendment application complies with SIP strategies and does not cause or contribute to a condition of air pollution, each permit review includes a case-by-case determination of impacts and BACT to ensure protection of the public health and welfare. Specifically, although VOCs are ozone precursors, they are also individual compounds and constituents which require a toxicity and impacts evaluation, and have corresponding questions from the perspective of public interest. In addition, public notice requirements under current statute and regulations do not distinguish geographic location for determinations of public notice and HB 2518 did not direct or contemplate the commission to

adopt rules for public notice de minimis using a geographic distinction. The commission also considered the complex technical review and implementation procedure, and potentially frequent rulemaking for unforeseen future changes concerning the criteria pollutants across the state that would be required if geographic location is included in this rule. The commission also recognizes that public interest is not limited solely based on location. Therefore, the commission is adopting this rule without consideration of location of a facility.

Clarification of Total Emission Increases

Brown commented that the determination of total emission increases is outside the scope of public notice requirements and should instead be addressed in 30 TAC Chapter 116.

The commission has not revised the rule or preamble in response to this comment. The commission is clarifying total emission increases as a part of this adoption because HB 2518 specifically includes this phrase and, for purposes of determining public notice applicability, it is necessary to provide information on the scope of implementation.

Frederick suggested that the rule include provisions paralleling concepts in §106.4(a)(4) and limit the total amount of emission increases at a site which may occur without public notice. The current proposal may allow different amendment applications to avoid public notice, but the proposal may also allow overall emissions at the site to increase above the levels of public notice de minimis or insignificant as defined in rule, thus circumventing the opportunity for public notice and participation.

The commission has not revised the rule in response to this comment. The purpose of Chapter 106 provisions are to ensure that at a certain point, emissions will be subject to permit review. Since all amendments are subject to the technical permit review requirements, and the public notice de minimis criteria are less than the general requirements of Chapter 106, there is no need for a site-wide emissions cap. In addition, HB 2518 and TCAA, §382.056 do not address site-wide emissions, but only “all facilities authorized under the amended permit.”

TCC and TxOGA suggested clarification was needed when determining “total emission increases,” specifically when referring to consideration of emission rates after the application of control technology.

The commission has revised the SECTION DISCUSSION preamble language to clarify and emphasize that total emission increases should be determined by evaluating emission increases, or reductions, after the application of controls, consistent with the commission’s long-standing practice of emissions increase determinations for amendments. All amendment reviews require the use of BACT. The commission encourages additional control of air pollution beyond BACT where the applicant wishes to propose additional reductions by providing abatement, recycling, or other control beyond the level of BACT. The commission will allow applicants to take credit for these additional voluntary reductions when considering whether the amendment should be subject to public notice.

Brown commented that the description of emission increases as a result of construction of new facilities was confusing and may inappropriately lead to the conclusion that construction-related emissions should

be included in the permit application as well as determination for public notice. Brown requested clarification on this point.

The commission has revised the SECTION DISCUSSION preamble language to reduce confusion caused by referring to “construction.”

Brown requested clarification that the emission increases related to facility modifications are limited to increases in permitted allowables due to the change, rather than the entire value of the new allowable permit limit.

Only emission increases resulting from facility modification, and not the entire allowable emission limit, shall be considered for determination of public notice.

Brown expressed concerns over the incorporation of previous authorizations and requested clarification to ensure that the commission would only consider the emission increases which are in excess of the previous authorization.

When reviewing incorporation of previously authorized facilities, the commission will consider only emission increases in excess of the previous authorization, and not the entire allowable emission limit, for purposes of determining the total emission increases.

Brown expressed confusion over the situations when sampling results in a change in allowable emissions. Brown requested clarification regarding whether this circumstance referred to a situation when a facility needed authorization to conduct sampling or when sampling demonstrates that a facility emits more than the current authorized limits.

The commission included this criterion to cover the latter situation, where a facility has performed sampling and has determined that the actual emissions exceed the authorized allowables. The commission intends only to consider emission increases in excess of the previous emission limits, and not the entire allowable emission limit, for purposes of determining the total emission increases.

Brown, TCC, and TxOGA expressed concerns regarding the inclusion of maintenance, start-up, and shutdown emissions and requested clarification on when the associated emissions would be counted in the estimation of total emission increases. TIP requested that the commission clarify that emissions due to routine maintenance, start-up, and shutdown at new or modified facilities are considered as a part of total emission increases only if the emissions are “new.” In addition, TIP asked the commission to verify that if a facility was modified, but the routine maintenance, start-up, and shutdown would remain unchanged, and were not previously included in the permit, they should not be counted as an emission increases. Brown also noted that the incorporation of maintenance, start-up, and shutdown emissions that exist, but are not currently listed in a permit, should not be considered for purposes of total emission increases. ExxonMobil noted that the netting process for determining total emission increases includes the commission’s encouragement for facilities to include routine maintenance, start-up, and

shutdown emissions in permits and is providing renewed emphasis to reduce these emissions where safe and technically feasible. Brown also objected to the current policy for incorporation of any maintenance, start-up, and shutdown emissions into permits and stated that before these emissions are included, the commission must address this issue in rulemaking under Chapter 116. ExxonMobil requested that the commission develop additional regulations to allow a permit applicant to develop a netting strategy that would provide emission reduction credits for these activities when reduction benefits can be demonstrated.

The commission has revised the SECTION DISCUSSION portion of this preamble to clarify that the emissions from routine maintenance, start-ups, and shutdowns should only be considered for purposes of determining public notice applicability and “total emission increases” when there are new emissions directly associated with new or modified facilities needing authorization under the permit amendment application. Actual emissions from routine maintenance, start-ups, and shutdowns for any other facilities covered by the permit which are not being modified as a part of the amendment action should not be considered for purposes of public notice applicability, as these emissions already exist and are not changing as a result of the amendment application. In addition, any other maintenance, start-up, or shutdown emissions for facilities not directly associated with the amendment application which the applicant requests to be incorporated into the permit will not be considered for purposes of total emission increases. Currently, the executive director is requesting certain routine maintenance, start-up, and shutdown emissions to be considered for controls and potential impacts during all new permit and permit amendment reviews. The commission is expected to propose rules in Chapter 116 in the near future to require

routine maintenance, start-up, and shutdown emissions to be incorporated into all permit actions as appropriate.

Brown and TIP supported three specific categories of emissions identified as being outside the scope of the rule for determining public notice: changes in standardized emission factors; inclusion of previously existing routine maintenance, start-up, and shutdown emissions; and incorporation of previously authorized facilities.

The commission acknowledges the comments and has not changed the rule or justification.

TIP requested that the commission provide specific examples of determining “total emission increases” because the proposal justification was not clear.

The commission has revised the SECTION DISCUSSION portion of this preamble to address this comment. In addition, the commission is providing the following examples to demonstrate how total emission increases are determined. These examples, and the list of parameters provided in this adoption, are not exclusive. The commission will continue to develop additional parameters and guidance as additional circumstances and questions arise.

Example A

An amendment application requests to: 1.) increase gas usage for an existing permitted gas-fired boiler, resulting in an additional 1.5 tpy VOC, 1.0 tpy NO_x, 2.0 tpy CO, 0.5 tpy PM, and 1.2 tpy SO₂; and 2.) replace three existing small fixed-roof gasoline tanks permitted for 5.0 tpy VOC with

a single larger gasoline tank with a floating roof at 2.5 tpy VOC. Because the NO_x, CO, PM, and SO₂ increases are already permitted contaminants and the total increases are below the public notice de minimis thresholds, they would not trigger public notice. The tank replacement will continue to handle gasoline and the character of VOC would not change. The total increase in VOC emissions associated with this example would be the following: + 1.5 tpy (boiler) + 2.5 tpy (new tank) - 5.0 tpy (remove existing tanks) = -1.0 tpy VOC. Based on this information, public notice would not be required.

Example B

An amendment application requests to: 1.) construct a new storage tank and include associated maintenance emissions, resulting in an additional 8.5 tpy VOC for process emissions and 1.2 tpy for maintenance; 2.) incorporate an existing storage tank currently registered under a PBR, certified for 3.5 tpy VOC; 3.) add voluntary emission controls to an existing permitted storage tank, resulting in reduction of 12.5 tpy VOC; and 4.) quantify maintenance emissions from a permitted thermal oxidizer at 6.0 tpy VOC. Assuming all VOC compounds associated with this amendment are currently permitted and there is no change in character of emissions, the total increase in VOC emissions associated with this example would be the following: + 9.7 tpy (new tank) - 12.5 tpy (remove existing tanks) + 0.0 tpy (PBR tank and existing actual maintenance of thermal oxidizer) = -2.8 tpy VOC. Based on this information, public notice would not be required.

Example C

An amendment application requests to: 1.) increase production through a manufacturing line by physically changing several pieces of equipment, resulting in an additional 6.2 tpy PM for process

emissions and 1.2 tpy for associated maintenance; and 2.) incorporate the maintenance emissions of the existing manufacturing line, resulting in 4.1 tpy PM. Assuming all PM compounds associated with this amendment are currently permitted and there is no change in character of emissions, the total increase in PM emissions associated with this example would be the following:

+ 7.4 tpy (new process and maintenance) + 0.0 tpy (existing maintenance) = +7.4 tpy PM.

Based on this information, public notice is required.

Authority of Executive Director

Frederick supported the proposed §39.402(a)(3), renumbered as §39.402(a)(4) in this adoption, regarding discretionary authority of the executive director to require public notice in situations when total emission increases are less than the proposed public notice de minimis or significant thresholds.

The commission acknowledges the comment and support of the rule.

Brown commented that the factors proposed in §39.402(a)(4)(A) - (C) for use by the executive director in determining the need for public notice were supported by statute and are appropriate. However, Brown also noted that the §39.402(a)(4)(D) factor, “likelihood of public interest” is not appropriate as it is vague and arbitrary. Brown asked who would make this determination and how the commission would distinguish between the interest of the public in general and the interest of the public for a particular application.

The commission acknowledges Brown’s comment and support of §39.403(a)(4)(A) - (C). The “likelihood of public interest” factor is not a new rule requirement and is currently codified in §39.403(b)(8)(C)(iv) as adopted by commission in September, 1999. The commission explained its opinion on the “likelihood of public interest” factor in the HB 801 adoption as follows: “The TCAA, §382.056(a) states ‘the commission may require publication of additional notice’ which is implemented by this rule. The commission believes that the general public should have the opportunity to comment on actions which are likely to affect ambient air quality, public health and welfare, or actions where it would be in the public interest to provide notice. This requirement addresses the concerns of the TCAA as noted in §382.0526(a) and §382.002. This rule establishes guidance for the foreseeable circumstances when notice would be required to ensure meaningful public participation. Particularly the factor of ‘likelihood of public interest’ covers situations in which the executive director has received inquiries on an application or has some other reason to believe that an application will generate significant public interest.” The commission believes this continues to be a valuable criteria in providing the executive director with the necessary flexibility to require public notice when circumstances warrant.

STATUTORY AUTHORITY

The new section is adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC. The new section is also adopted under THSC, TCAA, §382.011, which authorizes the commission to control the quality of the state’s air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.020, which authorizes the commission to adopt rules to control the

emissions of PM from plants which handle certain agricultural products; §382.051, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; §382.0518, which authorizes the commission to issue preconstruction permits; §382.056, which requires an applicant for a permit issued under §382.0518 to publish notice of intent to obtain a permit; and §382.05196, which authorizes the commission to adopt PBR for certain types of facilities that will not make a significant contribution of air contaminants to the atmosphere.

The new section is also adopted under HB 2518, as passed by the 77th Legislature, 2001.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§39.402

§39.402. Applicability to Air Quality Permit Amendments.

(a) Air quality permit amendment applications under §116.116(b) of this title (relating to Changes to Facilities) or amendment applications to flexible permits under §116.710(a)(2) and (3) of this title (relating to Applicability) must comply with this subchapter and Subchapter K of this chapter regarding notices when the amendment involves:

(1) a change in character of emissions or release of an air contaminant not previously authorized under the permit;

(2) a facility affected by TCAA, §382.020, where the total emissions increase from all facilities to be authorized under the amended permit exceeds significant levels for public notice by being greater than any of the following levels:

(A) 250 tons per year (tpy) of carbon monoxide (CO) or nitrogen oxides (NO_x);

(B) 25 tpy of volatile organic compounds (VOC), sulfur dioxide (SO₂), particulate matter (PM), or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen;

(C) a new major stationary source or major modification threshold as defined in §116.12 of this title (relating to Nonattainment Review Definitions); or

(D) a new major stationary source or major modification threshold, as defined in 40 Code of Federal Regulations (CFR), §52.21, under the new source review requirements of the FCAA, Part C (Prevention of Significant Deterioration); or

(3) a facility not affected by TCAA, §382.020, where the total emissions increase from all facilities to be authorized under the amended permit exceeds public notice de minimis levels by being greater than any of the following levels:

(A) 50 tpy of CO;

(B) ten tpy of SO₂;

(C) 0.6 tpy of lead; or

(D) five tpy of NO_x, VOC, PM, or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen; or

(4) any amendment when the executive director determines that:

(A) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor;

(B) there is a reasonable likelihood of high nuisance potential from the operation of the facilities;

(C) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process; or

(D) there is a reasonable likelihood of significant public interest in a proposed activity.

(b) Except as provided in subsection (a) of this section, air quality permit amendment applications are not required to comply with this subchapter and Subchapter K of this chapter.

