

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §55.152.

If adopted, the amendments to §55.152(a)(2), (3), (6) and (7) will be submitted to the United States Environmental Protection Agency as revisions to the State Implementation Plan.

#### **Background and Summary of the Factual Basis for the Proposed Rule**

On February 25, 2016, Texas Aggregates and Concrete Association (TACA) submitted a petition requesting the commission conduct rulemaking to amend public notice rules applicable to initial registration requests for authorization under the Air Quality Standard Permit for Concrete Batch Plants. The petition requested amendments to 30 TAC §39.411(e)(11)(A)(iii) and §39.603(a) and (b) to provide for one 30-day public notice of initial registration. On April 6, 2016, the commission considered the petition and directed the executive director to examine the request and initiate rulemaking.

The TACA petition did not address the Air Quality Standard Permit for Concrete Batch Plants with Enhanced Controls authorized under Texas Clean Air Act (TCAA), Texas Health and Safety Code (THSC), §382.05198. The public notice requirements for that standard permit are listed within the permit, and registrations for that permit are not subject to the rules in 30 TAC Chapter 39. Therefore, public notice requirements for that permit would not be affected by this proposed rulemaking.

The commission is authorized to adopt standard permits under THSC, §382.05195, which prescribes the procedures the commission must follow to adopt a standard permit. The commission implemented THSC, §382.05195 by adopting rules in 30 TAC Chapter 116, Subchapter F. The rules in Chapter 116, Subchapter F provide that when the executive director drafts a new (or proposes amendments to an existing) standard permit, notice of the proposed permit is published in the *Texas Register* and in newspapers. In addition, TCEQ holds a public meeting to provide stakeholders an opportunity for discussion with TCEQ staff and for submittal of comments regarding the proposed permit. The responses to comments and any changes made to the proposed permit in response to the comments are presented to the commission for consideration in an open meeting, commonly referred to as Agenda. Once adopted, the conditions of the permit will be the same for all owners and operators that register to construct and operate under the standard permit. The standard permits are not designed to be amended to include tailored permit conditions applicable to an individual registration. The Air Quality Standard Permit for Concrete Batch Plants was last amended by the commission effective December 21, 2012.

Each individual registration is subject to the public participation requirements in Chapters 39 and 55. Since 1985, owners and operators registering for authorization to construct and operate a concrete batch plant (under what is known today as the Air Quality Standard Permit for Concrete Batch Plants) have been subject to specific notice

requirements for the proposed plant. These public notice requirements for initial registrations included the opportunity to request a contested case hearing on the individual registration. In 1999, the 76th Texas Legislature enacted House Bill (HB) 801, which made changes to notice requirements for initial registrations that were administratively complete on or after September 1, 1999. Since the rulemaking to implement HB 801 in 1999, and rule amendments adopted in 2010, have been in effect, the commission has required registrants for the concrete batch plant standard permit to publish a Notice of Receipt of Application and Intent to Obtain Permit (NORI) which solicits comments for a 15-day period; contested case hearing and public meeting requests are also solicited. At the same time the NORI is published in a newspaper of general circulation in the municipality or in the nearest municipality in which the plant will be located, the registrant is required to place a copy of the registration in a public place in the county, and to post signs at the proposed facility location. Alternative language publication and signs may also be required.

After TCEQ staff complete the technical review, registrants are required to publish Notice of Application and Preliminary Decision (NAPD), which solicits comments for a 30-day period; hearing requests are also solicited but only if at least one such request was timely made in response to the NORI. At the close of the comment period, the executive director prepares a written response to all timely-filed comments and files the response with the TCEQ's Office of Chief Clerk. Based on comments, registrants may update their registration representations as to how they will construct and

operate under the standard permit. Historically, this has been very uncommon. Also, because the permit conditions in the Air Quality Standard Permit for Concrete Batch Plants are established by the commission when the standard permit is adopted, the executive director cannot change any permit conditions for an individual registration in response to comments.

During comment periods for previous concrete batch plant registrations, the public has expressed concerns that the 15-day period is often not enough time to review the registration, determine whether to comment, request a public meeting, or contested case hearing, and then to timely submit the information to the TCEQ. Specifically, with one notice instead of two, there will be more clarity regarding the restrictions on the timeframe to submit hearing requests, and the notice will specify that the draft permit has not changed (and cannot change) since the first notice (NORI) was published.

Proposed amended §55.152(a)(2) would provide for a 30-day notice period during which comments and requests for public meeting or contested case hearing can be submitted in response to the consolidated NORI and NAPD. The 30-day period begins on the last date of newspaper publication, and the public comment period is automatically extended to the close of any public meeting, as required by §55.152(b). As provided for in §55.201(c), which implements Senate Bill 709 (84th Texas Legislature, 2015), hearing requests must be based on the requestor's timely submitted comments.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to Chapter 39, Public Notice, to provide for a consolidated NORI and NAPD.

The public participation requirements for renewals of registrations under the Air Quality Standard Permit for Concrete Batch Plants are not affected by the proposed amendments in Chapters 39 and 55.

### **Section Discussion**

#### *§55.152, Public Comment Period*

Proposed amended §55.152(a)(2) is created by relocating some of the text of existing subsection (a)(2) to a proposed subsection (a)(3). Proposed subsection (a)(2) would provide that the close of the public comment period for standard permit registrations for concrete batch plants (without enhanced controls) would change from 15 days after the last publication of NORI, or 30 days after NAPD if a second notice is required, to 30 days after the last publication of the consolidated notice concurrently proposed in §39.603. Proposed §55.152(a)(2) would not apply to concrete batch plants temporarily located in or contiguous to the right-of-way of a public works project or to temporary concrete batch plants (without enhanced controls) operating under the standard permit that qualify for relocation.

Proposed amended subsection (a)(3) will continue to provide for the comment period applicable to air quality permit renewal applications. Existing paragraphs (3) - (6) in §55.152(a) are proposed to be re-numbered as paragraphs (4) - (7).

**Fiscal Note: Costs to State and Local Government**

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule in Chapter 55 would establish a 30-day public comment period for registrations under the Air Quality Standard Permit for Concrete Batch Plants.

Under the proposed rules in Chapters 39 and 55, the period for submitting public comments will change from the current 15 days under NORI and an additional 30 days for comments under NAPD, to one 30-day period for submitting comments and hearing requests. Currently, hearing requests may be submitted in response to the NORI, but not in response to the NAPD, unless hearing requests were timely submitted in response to the NORI. The purpose of the NAPD is to provide opportunity for comments on the draft permit. However, the permit conditions of a Standard Permit are adopted by the commission and cannot be changed in response to comments (unlike for case-by-case permits). Thus, the additional time in the current notice

process cannot result in any change to the draft permit and results in a longer period for the commission to approve the registration.

Concurrently with this proposal, the commission is proposing amendments to Chapter 39, for standard permits for concrete batch plants without enhanced controls. This amendment to Chapter 55 is proposed in order to maintain consistency with the proposed amendments in Chapter 39 and to address concerns with the current public comment periods for concrete batch plant standard permits. Fiscal implications, if any, with regard to the amendment proposed for the change to the public comment period are discussed in the Chapter 39 rulemaking. No fiscal implications are anticipated for the proposed amendment to Chapter 55.

### **Public Benefits and Costs**

Mr. Horvath also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be that the public will have a 30-day period, instead of an initial 15-day period, to submit comments and requests for public meetings or contested case hearings. The public will also generally benefit in that there will be one notice instead of two which will reduce confusion about the restrictions on the time to submit hearing requests, and clarify that the draft permit has not changed (and cannot change) since the first notice (NORI) was published.

No fiscal implications are anticipated for businesses or individuals due to implementation or administration of the proposed amendment to Chapter 55. The amendment to Chapter 55 is proposed in order to maintain consistency with the proposed amendments in Chapter 39 and to address concerns with the current public comment periods for concrete batch plant standard permits. Any fiscal implications with regard to the amendment proposed for the change to the public comment period are discussed in the Chapter 39 rulemaking.

#### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect. The amendment to Chapter 55 is proposed in order to maintain consistency with the proposed amendments in Chapter 39 and to address concerns with the current public comment periods for concrete batch plant standard permits. No fiscal implications are anticipated for small or micro-businesses due to implementation of the proposed amendment to Chapter 55.

#### **Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

### **Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to Chapter 55 is not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants, but instead would amend the public comment period for initial standard permit registrations for concrete batch plants (without enhanced controls), which are procedural in nature.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendment to Chapter 55 would amend the public comment period for initial standard permit registrations for concrete batch plants (without enhanced controls), which is procedural in nature. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was developed to meet the requirements for public participation in the TCAA as identified in the Statutory Authority section of this preamble.

Written comments on the Draft Regulatory Impact Analysis may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendment to Chapter 55 would amend the public comment period for initial standard permit registrations for concrete batch plants (without enhanced controls), which are procedural in nature. Promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed amendment does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

### **Consistency with the Coastal Management Program**

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendment affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed amendment is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this

preamble.

### **Effect on Sites Subject to the Federal Operating Permits Program**

The proposed rule will not require any changes to outstanding federal operating permits.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on August 10, 2016, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal

Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas

78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at:

*<http://www1.tceq.texas.gov/rules/ecomments/>*. File size restrictions may apply to

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

Rule Project Number 2016-030-039-LS. The comment period closes on August 22,

2016. Copies of the proposed rulemaking can be obtained from the commission's

website at *[http://www.tceq.texas.gov/rules/propose\\_adopt.html](http://www.tceq.texas.gov/rules/propose_adopt.html)*. For further

information, please contact Janis Hudson, Environmental Law Division, at (512) 239-

0466.

## **SUBCHAPTER E: PUBLIC COMMENT AND PUBLIC MEETINGS**

### **§55.152**

#### **Statutory Authority**

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper

control of the state's air; THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which prescribes the public participation requirements for certain applications filed with the commission; and THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption, which prescribes authorization requirements for certain concrete batch plants. In addition, the amendment is also proposed under Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and the Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements THSC, §382.056 and §382.058.

**§55.152. Public Comment Period.**

(a) Public comments must be filed with the chief clerk within the time period specified in the notice. The public comment period shall end 30 days after the last publication of the Notice of Application and Preliminary Decision, except that the time period shall end:

(1) 30 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), or 30 days after Notice of Application and Preliminary Decision if a second notice is required under §39.419 of this title (relating to Notice of Application and Preliminary Decision), for an air quality permit application not otherwise specified in this section;

(2) 30 days after the last publication of the consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision under §39.603 of this title (relating to Newspaper Notice) for a registration for a concrete batch plant without enhanced controls authorized by an air quality standard permit adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits), unless the plant is to be temporarily located in or contiguous to the right-of-way of a public works project;

(3) [(2)] 15 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title, or 30 days after Notice of Application and Preliminary Decision if a second notice is required under §39.419 of this title, for a permit renewal under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) [or a concrete batch plant without enhanced controls authorized by a air quality standard per TAC permit adopted by the commission under Chapter 116, Subchapter F of this

title (relating to Standard Permits), unless the plant is to be temporarily located in or contiguous to the right-of-way of a public works project];

(4) [(3)] 45 days after the last publication of the notice of Application and Preliminary Decision for an application for a hazardous waste facility permit, or to amend, extend, or renew or to obtain a Class 3 Modification of such a permit, or 30 days after the publication of Notice of Application and Preliminary Decision for Class 3 modifications of non-hazardous industrial solid waste permits;

(5) [(4)] 30 days after the mailing of the notice of draft production area authorization under Chapter 331 of this title (relating to Underground Injection Control);

(6) [(5)] the time specified in commission rules for other specific types of applications; or

(7) [(6)] as extended by the executive director for good cause.

(b) The public comment period shall automatically be extended to the close of any public meeting.