

The Texas Natural Resource Conservation Commission (commission) adopts new §39.404, Applicability for Certain Initial Applications for Air Quality Permits for Grandfathered Facilities. The commission also adopts amendments to §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 Decisions; §39.603, Newspaper Notice; §39.604, Sign-Posting; and §39.606, Alternative Means of Notice for Voluntary Emission Reduction Permits. Sections 39.404, 39.411, 39.419, 39.420, 39.603, 39.604, and 39.606 are adopted *without changes* to the proposed text as published in the January 11, 2002 issue of the *Texas Register* (27 TexReg 353) and will not be republished. The new and amended sections of Chapter 39 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

During the 75th Legislature, 1997, House Bill (HB) 3019 directed the commission to develop a voluntary emissions reduction plan for the permitting of existing significant sources. These existing significant sources are commonly known as grandfathered facilities. A grandfathered facility is one that existed at the time the legislature created the Texas Clean Air Act (TCAA) in 1971. These facilities were not required to comply with (i.e., grandfathered from) the then new requirement to obtain permits for construction or modifications of facilities that emit air contaminants. If grandfathered facilities had not been modified since 1971, they continued to be authorized to operate without a permit. The intent of HB 3019 was to create a program that would encourage the remaining grandfathered facilities to voluntarily obtain permits that would reduce the emissions from those facilities. In response to HB

3019, the commission created the Clean Air Responsibility Enterprise (CARE) Committee to develop recommendations for the voluntary permitting of grandfathered facilities.

In 1999, the 76th Legislature used the CARE Committee's recommendation as the basis for Senate Bill (SB) 766, which directed the commission to develop rules containing incentives for the voluntary permitting of grandfathered facilities. This program is known as the Voluntary Emission Reduction Permit (VERP) program. The commission adopted rules to implement the VERP program on December 16, 1999. Since the VERP rules became effective, the owners and operators of a number of grandfathered facilities have taken advantage of the incentives offered by the VERP program and submitted VERP applications for their grandfathered facilities. Additionally, the owners and operators of other grandfathered facilities have submitted permit-by-rule registrations and other new source review permit applications to permit their grandfathered facilities. The deadline to apply for a VERP was August 31, 2001.

Additionally, the 76th Legislature, 1999 amended the Texas Utilities Code, Title 2, Public Utility Regulatory Act, Subtitle B, Electric Utilities, and created a new Chapter 39, Restructuring of Electric Utility Industry by adopting SB 7. SB 7 required the commission to implement the permitting and allowance requirements of new Texas Utilities Code, §39.264, concerning Emissions Reductions of "Grandfathered Facilities." SB 7 required the commission to develop a mass cap and trade system to distribute emission allowances for use by electric generating facilities (EGFs). Under SB 7, two categories of EGFs are eligible to use the proposed trading system. The first category consisted of EGFs in existence on January 1, 1999, which were not subject to the requirement to obtain a permit

under TCAA, §382.0518(g). These facilities are commonly referred to as grandfathered facilities. SB 7 also mandated that grandfathered EGFs apply for a permit on or before September 1, 2000, and obtain a permit by or cease operation after May 1, 2003. The second category of EGFs consisted of permitted EGFs that were not subject to the permitting requirements of SB 7, yet elected to participate in the allowance trading system.

Most recently, the 77th Legislature, 2001, amended Texas Health and Safety Code (THSC), TCAA to require that all grandfathered facilities obtain permits. The mandatory permitting requirements of HB 2912 are the culmination of legislative efforts, beginning in 1997, to permit or otherwise authorize all grandfathered facilities. HB 2912 created four new types of permits for grandfathered facilities: existing facility permits, small business stationary source permits, EGF permits, and pipeline facilities permits. HB 2912 also mandated the dates by which grandfathered facilities must apply for a permit and have controls operational or submit a shutdown notice. Grandfathered facilities that are addressed by an application for a VERP are not required to comply with the provisions of HB 2912 for grandfathered facilities. However, grandfathered facilities that withdraw their VERP applications and elect to submit a permit application for an authorization under HB 2912 will forfeit those incentives, including eligibility for amnesty from enforcement.

To implement these revisions to the TCAA, the commission adopts new and amended rules in 30 TAC Chapter 116, Subchapter A, Definitions; Subchapter H, Permits for Grandfathered Facilities; and Subchapter I, Electric Generating Facility Permits, which are published in this issue of the *Texas Register*.

Additionally, revisions to Chapter 39, Public Notice, were necessary to implement the provisions of HB 2912, §§5.02 - 5.05. The revisions to Chapter 39 are necessary to implement the public participation requirements of HB 2912.

THSC, TCAA, §382.05181(h) provides that applications for pipeline facility permits, existing facility permits, existing facility flexible permits, and EGF permits are subject to the public notice and hearing requirements of §382.05191. TCAA, §382.05191 provides that public participation for initial issuance of a permit under §§382.05183, 382.05185(c) or (d), 382.05186, or 382.0519 will be done in the manner of TCAA, §382.0561, concerning Federal Operating Permit; Hearing, and §382.0562, concerning Notice of Decision.

THSC, TCAA, §382.0561 requires the commission to provide a public comment period for an application, during which members of the public can submit written statements to the commission regarding the application. The initial issuance of a grandfather permit, with the exception of small business stationary source permits, is subject to notice and comment hearing procedures. Under these procedures, interested persons can request a hearing. The hearing is recorded, and oral comments are accepted. The commission will provide reasonable accommodations to any individual who may wish to comment on a permit but has difficulty providing those comments in writing, including assistance for those persons who are blind, deaf, or require interpreter assistance. The commission requests that such individuals notify the commission staff sufficiently early that arrangements can be made to afford these individuals the opportunity to participate in the permitting process. The commission requires notice of the public comment period, which must be at least 30 days, and may extend or reopen the comment

period if appropriate. The notice must meet the requirements of §382.056, which provides specifications relating to the specifics of the newspaper notice and sign-posting, and other requirements for notice.

THSC, TCAA, §382.0561 also requires that public hearings not be conducted under Texas Government Code, Chapter 2001, so they are not contested case hearings. The commission is required to hold a public hearing on an application, prior to granting the permit, if a person who may be affected by the emissions or a member of the legislature from the general area in which the facility is located requests a hearing. However, the commission is not required to hold a hearing if the basis of the request by a person who may be affected is determined to be unreasonable. The commission is required to consider all comments received during the comment period and hearing in determining whether to issue the permit and what conditions should be included if a permit is issued.

THSC, TCAA, §382.0562 provides for the mailing of notice of the commission's decision on an application to all persons who submitted comments, and to the applicant. The notice must include a response to all comments, and identify any changes to the conditions of the draft permit and the reasons for the change.

Additionally, TCAA, §382.05191 requires the opportunity for a motion for rehearing and judicial review under §382.032. The commission will utilize existing procedural rules concerning motions to overturn action by the executive director, found in 30 TAC Chapter 50 (relating to Actions on Applications and Other Authorizations), to give effect to the intent of the legislature to provide for the

intermediate review, by affected persons, of commission actions on applications for grandfathered facility permits. Therefore, the commission is not adopting new procedures for grandfathered facility permits in this chapter.

SECTION BY SECTION DISCUSSION

Subchapter H, Applicability and General Provisions

The adopted new §39.404, Applicability for Certain Initial Applications for Air Quality Permits for Grandfathered Facilities, is necessary to implement requirements of HB 2912, §§5.02 - 5.05. The existing §39.403, Applicability, was not available to be opened to propose and adopt changes to include applicability of public notice procedures for the new grandfathered facility permits. The commission believes that the requirements of HB 2912, §§5.02 - 5.05 should be implemented expeditiously, and therefore adopts new §39.404 to specify the applicability of Chapter 39 to the new grandfathered facility permits. HB 2912, §5.03 created a new THSC, §382.05185, which established a new EGF permit for certain facilities located at a site for which the owner or operator has already applied for a permit under SB 7 and for the permitting of additional criteria pollutants at grandfathered coal-fired EGFs for which the owner or operator has already applied for a permit under SB 7. Section 382.05185 also provided that the permit application for such a permit be subject to notice and hearing requirements as provided by THSC, §382.05191, as revised by HB 2912. The adopted new §39.404 implements this requirement by specifying the portions of Chapter 39, Subchapters H and K, that apply to applications for an EGF permit.

HB 2912 also created new THSC, §382.05183 and §382.05186, which established existing facility permits and pipeline facilities permits, respectively, and §382.05181, which required that the permit applications for grandfathered facilities permits were subject to notice and hearing requirements as provided by THSC, §382.05191. The adopted new §39.404 implements this requirement by specifying the portions of Chapter 39, Subchapters H and K, that apply to applications for existing facility permits and pipeline facilities permits.

The adopted amendments to §39.411, Text of Public Notice, are necessary due to the addition of new §39.404, which adds existing facility permits and pipeline facilities permits. The existing §39.411(b)(10)(B) specifies the requirement to include a statement in the public notice concerning the right to request a notice and comment hearing in the text of the public notice for air applications described in §39.403(b)(11) or (12). The adopted §39.411(b)(10)(B) specifies requirements for applications described in §39.403(b)(11) or (12), or §39.404 to include existing facility, pipeline facility, and EGF permits.

The adopted amendments to §39.419, Notice of Application and Preliminary Decision, are necessary due to the addition of new §39.404, which adds existing facility permits and pipeline facilities permits. The existing §39.419(e)(1)(D) refers to an application for initial issuance of a permit described in §39.403(b)(11) or (12). The adopted §39.419(e)(1)(D) refers to an application for initial issuance of a permit described in §39.403(b)(11) or (12), or §39.404. Applicants for initial issuance of existing facility permits and pipeline facilities permits will not be required to publish Notice of Application and Preliminary Decision.

Additionally, revisions are adopted for §39.419(e)(3). The existing §39.419(e)(3) specifies publication requirements for a Notice of Application and Preliminary Decision for permits that are not exempt under §39.419(e)(1)(A) - (C) from publication requirements. The exemptions from publication in §39.419(e)(1) also include a subparagraph (D). The adopted §39.419(e)(3) correctly refers to exemptions under §39.419(e)(1)(A) - (D).

The adopted amendments to §39.420, Transmittal of the Executive Director's Response to Comments and Decision, are necessary to indicate that the transmittal is not required to include instructions for reconsideration of the executive director's decision or for requesting a contested case hearing for existing facility permits, EGF permits, and pipeline facilities permits, in addition to VERPs, because permits for grandfathered facilities are not subject to the contested case hearing process. The adopted rules include a reference to THSC, §§382.05183, 382.05185, and 382.05186 in §39.420(c)(1). The existing §39.420(c)(1) only refers to applications for initial issuance of VERPs under THSC, §382.0519. Additionally, the adopted revisions delete the words "voluntary emission reduction" since multiple permit types are referenced in the adopted language.

Subchapter K, Public Notice of Air Quality Applications

The adopted amendments to §39.603, Newspaper Notice, are necessary to correct a subsection reference. The existing §39.603(e)(1) specifies that a small business applicant does not have to comply with subsection (a)(2) if certain conditions are met. The reference to (a)(2) is incorrect. The adopted §39.603(e)(1) corrects this reference to subsection (c)(2), which specifies the requirements for the publication in the newspaper other than the legal section of the newspaper.

The adopted amendments to §39.604, Sign-Posting, are necessary to correct a typographical error in the existing rule.

The adopted amendments to §39.606, Alternative Means of Notice for Voluntary Emission Reduction Permits, are necessary to ensure that alternative means of notice are available for all small businesses who apply to permit their grandfathered facilities.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the changes to this chapter needed to implement the procedural aspects of HB 2912, §§5.02 - 5.04 do not meet the definition of a “major environmental rule” as defined in that statute. The 77th Legislature, 2001, amended THSC to require that all grandfathered facilities obtain permits. The adopted rules implement the procedural requirements associated with the permitting system created by HB 2912, including four different types of permits which will cover all grandfathered facilities, and provide for potential emission reductions. The substantive requirements of the permitting system created by HB 2912 are contained in the 30 TAC Chapter 116 rulemaking, also adopted in this issue of the *Texas Register*.

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. Although the Chapter 116 rules adopted to implement the HB 2912

sections concerning the substantive permitting requirements are intended to protect the environment or reduce risks to human health from environmental exposure and may have adverse effects on the economy, productivity, competition, or jobs of the state or a sector of the state, the adopted new sections of Chapter 39 are merely procedural. Furthermore, the analysis required by Texas Government Code, §2001.0225(c) does not apply because the adopted rules do not meet any of the four applicability requirements of a major environmental rule. The adopted rules do 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. The rules are adopted specifically to comply with HB 2912, and do not exceed the requirements of that bill.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the adopted rules. The purpose of the adopted rules is to create the procedural provisions necessary for the implementation of the substantive permitting requirements of HB 2912, and the adopted rules advance this purpose by supporting the permitting system created by HB 2912. This system includes four different types of permits which cover all grandfathered facilities, and provide for potential emission reductions.

The commission evaluated the adopted rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicated that Texas Government Code, Chapter 2007 does not apply to the adopted rules because this action qualifies for two exceptions to the application of Chapter 2007. First, this action is reasonably taken to fulfill an obligation mandated by federal law, and is therefore exempt under Texas Government Code,

§2007.003(b)(4). The action is mandated by federal law because the rules will be submitted for EPA approval as part of the SIP, which is mandated by 42 United States Code (USC), §7410. Also, the adopted rules are a necessary component of the permitting program created by HB 2912 and implemented by the changes to Chapter 116, and implement requirements of 42 USC, §7410. Second, §2007.003(b)(13) states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety. The revisions also significantly advance the health and safety purpose. The reductions in nitrogen oxides and volatile organic compounds that will occur through the implementation of the permitting program created by HB 2912 significantly advance a health and safety purpose by assisting the state's efforts to attain the ozone national ambient air quality standards set by the EPA under 42 USC, §7409 for nonattainment areas of the state, and maintain the quality of the state's air in attainment areas. Because any reductions required by these rules are no greater than those required by HB 2912 to implement the procedural requirements specified by the legislature, this action does not impose a greater burden than is necessary to achieve the health and safety purpose. In conclusion, this action is taken in response to a real and substantial threat to public health and safety, designed to significantly advance the health and safety purpose, and does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt from the application of Texas Government Code, Chapter 2007 under §2007.003(b)(4) and §2007.003(b)(13).

Finally, adoption and enforcement of these rules will not burden private real property. The adopted rules do 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 rules do not meet the definition of a taking under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Although commission rules governing air pollutant emissions are subject to the Texas Coastal Management Program (CMP), the adopted actions concern only the procedural rules of the commission; do not govern or authorize any actions subject to the CMP; and are not themselves capable of adversely affecting a coastal natural resource area. Therefore, the adopted rulemaking is not subject to the CMP.

HEARING AND COMMENTERS

Public hearings on this rulemaking were held at the following times and locations: January 22, 2002, 7:00 p.m., Tyler Junior College Regional Training and Development Center, Room 104, 1530 South Southwest Loop 323, Tyler; January 23, 2002, 7:00 p.m., City of Houston City Council Chambers, 2nd Floor, 901 Bagby, Houston; January 24, 2002, 7:00 p.m., City of Odessa City Council Chambers, 5th Floor, 411 West 8th Street, Odessa; January 28, 2002, 6:30 p.m., City of Irving Central Library Auditorium, 801 West Irving Boulevard, Irving; and January 29, 2002, 2:00 p.m., Texas Natural Resource Conservation Commission, 12100 North I-35, Building F, Room 2210, Austin.

The commission received comments from the following organizations and companies: Southeast Coalition of Civic Clubs (SCCC); St. Francis Xavier Catholic Church (St. Francis); Sierra Club Houston Regional Group (HSC); Texas Campaign for the Environment (TCE); and Galveston-Houston Association for Smog Prevention (GHASP).

In addition, the commission received comments from, or on behalf of, the following elected officials:

Mr. Larry Green representing the Honorable Sheila Jackson Lee, U.S. House of Representatives, Eighteenth District of Texas; the Honorable Lon Burnam, District 90, Fort Worth, Texas House of Representatives; and the Honorable Ada Edwards, Council Member, District D, City of Houston.

Representative Lon Burnam expressed support for the comments submitted by the Houston Sierra Club.

All commenters suggested changes to the proposed rules.

RESPONSE TO COMMENTS

HSC and GHASP commented that the commission should not require comments to be made in writing at a public meeting, since there are circumstances where individuals may prefer to make oral statements instead. HSC and GHASP also stated that the commission should always record public statements so it can use them later in the comment consideration process. GHASP stated that requiring comments to be in writing may be a violation of the federal Clean Air Act. Representative Lon Burnam strongly opposed the requirement to submit all comments in writing.

The commission has made no change in response to these comments. The commission does accept oral comments made at formal public hearings. The commission will provide reasonable accommodations to any individual who may wish to comment on a permit but has difficulty providing those comments in writing, including assistance for those persons who are blind, deaf, or require interpreter assistance. The commission requests that such individuals notify the commission staff sufficiently early that arrangements can be made to afford these individuals the opportunity to participate in the permitting process. Public meetings that may be held in conjunction with a specific air permit are recorded and oral comments are accepted. The initial issuance of a grandfather permit, with the exception of small business stationary source permits, will be subject to notice and comment hearing procedures. Under these procedures, interested persons can request a hearing. The hearing is recorded, and oral comments are accepted. The commission is unaware of any prohibition in the federal Clean Air Act relating to the requirement for submission of written comment.

SCCC, St. Francis, Larry Green, and Council Member Edwards commented on the need for the public to be notified of facilities applying for permits. SCCC and Larry Green suggested a 60- to 90-day notice period. Council Member Edwards suggested six months to one year for notification of a facility applying for a permit.

The commission has made no changes to the rule in response to these comments. The commission agrees that it is important for the public to be notified of pending permit applications, and included adequate notice provisions in the proposed rules. The suggested notice periods of six

months to one year would not provide adequate permit review and processing time because THSC, §382.05181(f) requires the commission to take final action on grandfather permit applications within one year of receiving an administratively complete application. Sections 39.418 and 39.603 require all facilities except for facilities qualifying for a small business stationary source permit to publish notice in a newspaper of general circulation in the municipality in which the facility is located or in the municipality nearest the location of the facility. The newspaper notice must be published no later than 30 days after the executive director declares an application administratively complete. This notice is followed by a 30-day public comment period and is intended to give notification early in the permitting process that an application is under review. The 30-day comment period is not a notice that a permit is going to be issued in 30 days. If a hearing is requested and granted during this comment period, the comment period is actually extended beyond 30 days to the end of the hearing. Additionally, §39.604 requires applicants to place signs at the site of the facility declaring the filing of an application for the permit and stating the manner in which the commission may be contacted for further information. Small business stationary source permits are exempted from the requirement to publish newspaper notice by THSC, §382.05184(f).

TCE requested clarification of the commission's determination that the changes to public notice requirements in Chapter 39 implementing HB 2912 §§5.02 - 5.04 do not meet the definition of a major environmental rule.

The commission's analysis regarding the regulatory impact analysis determination is fully discussed elsewhere in this preamble. The commission provides the following discussion to supplement that determination.

Implementing HB 2912, §§5.02 - 5.04 required changes to Chapter 39. However, the substantive rule changes required by these HB 2912 sections are found in Chapter 116. The changes in Chapter 39 are procedural support for the permitting changes in Chapter 116. Whether or not the rules are characterized as a major environmental rule, a regulatory impact analysis is required only if the rulemaking meets any of the four applicability requirements in Texas Government Code, §2001.0225(a). By applying these four factors to the adopted rules, the commission determined that the rules do not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The rules are adopted specifically to comply with HB 2912 and do not exceed the requirements of that bill. The Chapter 39 adopted rules do not meet any of the applicability requirements in Texas Government Code, §2001.0225(a), and for this reason the adopted rules are not subject to a regulatory impact analysis under Texas Government Code, §2001.0225.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§§39.404, 39.411, 39.419, 39.420

STATUTORY AUTHORITY

The amendments and new section are adopted under THSC, TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.0365, which authorizes and governs the commission's small business stationary source program; §382.0518, which authorizes the commission to issue permits for construction of new facilities or modifications of existing facilities; §382.05181, which requires grandfathered facilities to apply for a permit and comply with its conditions by certain dates, and requires certain actions of the commission; §382.05182, which requires notices for the shutdown of certain grandfathered facilities; §382.05183, which requires certain grandfathered facilities to obtain an existing facility permit; §382.05184, which requires certain grandfathered facilities to obtain a small business stationary source permit; §382.05185, which requires certain EGFs to obtain a permit; §382.05186, which requires certain reciprocating internal combustion engines to obtain a permit; §382.05191, which requires applications for certain permits to publish notice consistent with the procedures for federal operating permits; §382.05192, which requires that certain permits to be renewed in accordance with §382.055; §382.055, which authorizes the commission to establish procedures for review or renewal of a permit; §382.056, which authorizes the commission to require public notice of certain permit applications and procedures for requesting hearings and responding to comments; §382.0561, which authorizes hearing procedures for federal

operating permits; §382.0562, which requires notices of decision; and Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules.

§39.404. Applicability for Certain Initial Applications for Air Quality Permits for Grandfathered Facilities.

(a) Notwithstanding §39.403(a)(1) of this title (relating to Applicability), Subchapters H - M of this chapter also apply to:

(1) applications for permits for electric generating facilities under Texas Health and Safety Code, §382.05185(c) and (d);

(2) applications for existing facility permits under Texas Health and Safety Code, §382.05183; and

(3) applications for pipeline facilities permits under Texas Health and Safety Code, §382.05186.

(b) Applications for initial issuance of permits under Texas Health and Safety Code, §§382.05183, 382.05185(c) and (d), and 382.05186 are subject only to §39.401 of this title (relating to Purpose), §39.405 of this title (relating to General Notice Provisions), §39.407 of this title (relating to Mailing Lists), §39.409 of this title (relating to Deadline for Public Comment, and for Requests for

Reconsideration, Contested Case Hearing, or Notice and Comment Hearing), §39.411 of this title, §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), §39.420 of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision), §39.601 of this title (relating to Applicability), §39.602 of this title (relating to Mailed Notice), §39.603 of this title (relating to Newspaper Notice), §39.604 of this title (relating to Sign-Posting), §39.605 of this title (relating to Notice to Affected Agencies), and §39.606 of this title (relating to Alternative Means of Notice for Voluntary Emission Reduction Permits), except that any reference to requests for reconsideration or contested case hearings in §39.409 of this title or §39.411 of this title shall not apply.

§39.411. Text of Public Notice.

(a) Applicants shall use notice text provided and approved by the agency. The executive director may approve changes to notice text before notice being given.

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

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures, including:

(A) a statement that the executive director will respond to comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any permit application for which there is an opportunity for a contested case hearing, that only disputed factual issues that are relevant and material to the commissions's decision that are raised during the comment period can be considered if a contested case hearing is granted.

(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. The notice 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 substantial public interest in the proposed activity;

(6) the application or permit number;

(7) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(8) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(10) for notices of air applications:

(A) at a minimum, a listing of criteria pollutants for which authorization is sought in the application which are regulated under national ambient air quality standards (NAAQS) or under state standards in Chapters 111, 112, 113, 115, and 117 of this title (relating to Control of Air

Pollution from Visible Emissions and Particulate Matter, Control of Air Pollution from Sulfur Compounds, Control of Air Pollution from Toxic Materials, Control of Air Pollution from Volatile Organic Compounds, and Control of Air Pollution from Nitrogen Compounds);

(B) if notice is for applications described in §39.403(b)(11) or (12) of this title (relating to Applicability), or §39.404 of this title (relating to Applicability for Certain Initial Applications for Air Quality Permits for Grandfathered Facilities), 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) a statement that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission;

(ii) a statement that a contested case hearing request must include the requester's location relative to the proposed facility or activity;

(iii) a statement that a contested case hearing request should include a description of how the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity; and

(iv) and that only relevant and material issues raised during the comment period can be 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 adopted by the commission is an affected person who is entitled to request a contested case hearing;

(D) the statement: "The facility's compliance file, if any exists, is available for public review in the regional office of the Texas Natural Resource Conservation Commission;" and

(11) for notices of municipal solid waste applications, a statement that a person who may be affected by the facility or proposed facility is entitled to request a contested case hearing from the commission. This statement must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice; and

(12) any additional information required by the executive director or needed to satisfy public notice requirements of any federally authorized program; or

(13) for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted.

(14) for Class 3 modifications of hazardous industrial solid waste permits the statement "The permittees compliance history during the life of the permit being modified is available from the agency contact person."

(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). When notice of application and preliminary decision 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 subsection (b)(1) - (12) of this section;

(2) 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, or a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(3) if the application is subject to final approval by the executive director under Chapter 50 of this title (relating to Action on Applications), a statement that the executive director may issue final approval of the application unless a timely contested case hearing request or a timely request

for reconsideration (if applicable) is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit; and

(5) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the complete application and the executive director's preliminary decision are available for review and copying;

(6) the deadline to file comments or request a public meeting. The notice 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 substantial public interest in the proposed activity;

(7) for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted.

(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 subsection (b)(1) - (3), (6) - (8), and (12) of this section;

(2) the date, time, and place of the meeting or hearing, and a brief description of the nature and purpose of the meeting or hearing, including the applicable rules and procedures;

(3) for notices of public meetings only, 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 issues raised during the comment period can be considered if a contested case hearing is granted.

§39.419. Notice of Application and Preliminary Decision.

(a) After technical review is complete, the executive director shall file the preliminary decision and the draft permit with the chief clerk, except for air applications under subsection (e)(1) of this section. The chief clerk shall mail the preliminary decision concurrently with the Notice of Application and Preliminary Decision. Then, when this chapter requires notice under this section, notice shall be given as required by subsections (b) - (e) of this section.

(b) The applicant shall publish Notice of Application and Preliminary Decision at least once in the same newspaper as the Notice of Receipt of Application and Intent to Obtain Permit, unless there

are different requirements in this section or a specific subchapter in this chapter for a particular type of permit.

(c) Unless mailed notice is otherwise provided 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).

(d) The notice must include the information required by §39.411(c) of this title.

(e) For air applications:

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

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

(B) a 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) 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; or

(D) the application is for initial issuance of a permit described in §39.403(b)(11) or (12) of this title (related to Applicability) or §39.404 of this title (relating to Applicability for Certain Initial Applications for Air Quality Permits for Grandfathered Facilities);

(2) If notice under this section is required, the agency shall mail notice according to §39.602 of this title (relating to Mailed Notice); and

(3) Notice of Application and Preliminary Decision shall be published as specified in Subchapter K of this chapter (relating to Public Notification of Air Quality Applications) for permits that are not exempt under paragraph (1)(A) - (D) of this subsection or are for the following federal preconstruction approvals:

(A) applications under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review);

(B) applications under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review); and

(C) applications under Chapter 116, Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

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

(a) When required by and subject to §55.156 of this title (relating to Public Comment Processing), after the close of the comment period, the chief clerk shall transmit to the people listed in subsection (b) of this section the following information:

- (1) the executive director's decision;
- (2) the executive director's response to public comments;
- (3) instructions for requesting that the commission reconsider the executive director's decision; and
- (4) instructions for requesting a contested case hearing.

(b) The following persons shall be sent the information listed in subsection (a) of this section:

- (1) the applicant;
- (2) any person who requested to be on the mailing list for the permit action;
- (3) any person who submitted comments during the public comment period;
- (4) any person who timely filed a request for a contested case hearing;
- (5) Office of the Public Interest Counsel; and
- (6) Office of Public Assistance.

(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) applications for initial issuance of permits under Texas Health and Safety Code, §§382.05183, 382.05185(c) and (d), 382.05186 and 382.0519;

(2) applications for initial issuance of electric generating facility permits under Texas Utilities Code, §39.264;

(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) applications for which 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) 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 and the executive director may act on the application under §50.133 of this title (relating to Executive Director Action on Application or WQMP Update).

SUBCHAPTER K: PUBLIC NOTICE OF AIR QUALITY APPLICATIONS

§§39.603, 39.604, 39.606

STATUTORY AUTHORITY

The amendments are adopted under THSC, TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.012, which provides the commission the authority to develop a comprehensive plan for the state's air; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.0518, which authorizes the commission to issue permits for construction of new facilities or modifications of existing facilities; §382.05181, which requires grandfathered facilities to apply for a permit and comply with its conditions by certain dates, and requires certain actions of the commission; §382.05182, which requires notices for the shutdown of certain grandfathered facilities; §382.05183, which requires certain grandfathered facilities to obtain an existing facility permit; §382.05184, which requires certain grandfathered facilities to obtain a small business stationary source permit; §382.05185, which requires certain EGFs to obtain a permit; §382.05186, which requires certain reciprocating internal combustion engines to obtain a permit; §382.05191, which requires applications for certain permits to publish notice consistent with the procedures for federal operating permits; §382.05192, which requires that certain permits to be renewed in accordance with §382.055; §382.055, which authorizes the commission to establish procedures for review or renewal of a permit; §382.056, which authorizes the commission to require public notice of certain permit applications and procedures for requesting hearings and responding to comments; §382.0561, which authorizes hearing procedures for federal operating permits; §382.0562, which requires notices of decision; and TWC, §5.103, which authorizes the commission to adopt rules.

§39.603. Newspaper Notice.

(a) 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) is required to be published no later than 30 days after the executive director declares an application administratively complete. This notice must contain the text as required by §39.411(b)(1) - (6) and (8) - (10) of this title (relating to Text of Public Notice).

(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 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(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) One notice shall be published in the public notice section of the newspaper and shall comply with §39.411 of this title (relating to Text of Notice).

(2) Another notice with a total size of at least 6 column inches, with a vertical dimension of at least 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;

(B) company name;

(C) type of facility;

(D) description of the location of the facility; and

(E) a note that additional information is in the public notice section of the same issue.

(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 enrolled in a program at that school;

(B) students from that school attend a bilingual education program at another location; or

(C) the school that otherwise would be required to provide a bilingual education program waives out of this requirement under 19 TAC §89.1205(g).

(2) Elementary or middle schools that offer English as a second language under 19 TAC §89.1205(e), and are not otherwise affected by 19 TAC §89.1205(a), will not trigger the requirements of this subsection.

(3) The notice shall be published in a newspaper or publication that is published primarily in the alternative languages in which the bilingual education program is or would have been taught, and the notice must be in those languages.

(4) The newspaper or publication must be of general circulation in the municipality or county in which the facility is located or proposed to be located. Notice under this subsection shall only be required to be published within the United States.

(5) The requirements of this subsection are waived for each language in which no publication exists, or if the publishers of all alternative language publications refuse to publish the

notice. If the alternative language publication is published less frequently than once a month, this notice requirement may be waived by the executive director on a case-by-case basis.

(6) Each alternative language publication shall follow the requirements of this chapter that are consistent with this section.

(7) If a waiver is received under this section, the applicant shall complete a verification and submit it as required under §39.605(3) of this title (relating to Notice to Affected Agencies).

(e) Alternative publication procedures for small businesses.

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

(A) the applicant and source meets the definition of a small business stationary source in §382.0365 of the Texas Health and Safety Code including, but not limited to, those which:

(i) are not a major stationary source for federal air quality permitting;

(ii) do not emit 50 tons or more per year of any regulated air pollutant;

(iii) emit less than 75 tons per year of all regulated air pollutants combined; and

(iv) are owned or operated by a person that employs 100 or fewer individuals; and

(B) if the applicant's site meets the emission limits in §106.4(a) of this title (relating to Requirements for Exemption from Permitting) it will be considered to not have a significant effect on air quality.

(2) The executive director may post information regarding pending air permit applications on its website, such as the permit number, company name, project type, facility type, nearest city, county, date public notice authorized, information on comment periods, and information on how to contact the agency for further information.

(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 (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.

§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) Signs shall consist of dark lettering on a white background and shall be no smaller than 18 inches by 28 inches and all lettering shall be no less than one and one-half inches in size and block printed capital lettering;

(2) Signs shall be headed by 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) Signs shall include the words "APPLICATION NO." and the number of the permit application. More than one application number may be included on the signs if the respective public comment periods coincide;

(4) Signs shall include the words "for further information contact";

(5) Signs shall include the words "Texas Natural Resource Conservation Commission," and the address of the appropriate commission regional office;

(6) Signs shall include the telephone number of the appropriate commission office;

(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. The applicant must provide a verification that the sign posting was conducted according to this section.

(c) Each sign placed at the site must be located within ten feet of every property line paralleling a public highway, street, or road. Signs must be visible from the street and spaced at not more than 1,500-foot intervals. A minimum of one sign, but no more than three signs shall be required along any property line paralleling a public highway, street, or road. The executive director may approve variations from these requirements if it is determined that alternative sign posting plans proposed by the applicant are more effective in providing notice to the public. This section's sign requirements do not apply to properties under the same ownership which are noncontiguous or separated by intervening public highway, street, or road, unless directly involved by the permit application.

(d) The executive director may approve variations from the requirements of this subsection if the applicant has demonstrated that it is not practical to comply with the specific requirements of this

subsection and alternative sign posting plans proposed by the applicant are at least as effective in providing notice to the public. The approval from the executive director under this subsection must be received before posting signs for purposes of satisfying the requirements of this section.

(e) Alternative language sign posting is required whenever alternative language newspaper notice would be required under §39.603 of this title (relating to Newspaper Notice). The applicant shall post additional signs in each alternative language in which the bilingual education program is taught. The alternative language signs shall be posted adjacent to each English language sign required in this section. The alternative language sign posting requirements of this subsection shall be satisfied without regard to whether alternative language newspaper notice is waived under §39.703(d)(5) of this title (relating to Newspaper Notice). The alternative language signs shall meet all other requirements of this section.

§39.606. Alternative Means of Notice for Permits for Grandfathered Facilities.

(a) An applicant for a permit, under Texas Health and Safety Code, §§382.05183, 382.05185(c) and (d), 382.05186, or 382.0519, for a facility that constitutes or is part of a small business stationary source, as defined in Texas Health and Safety Code, §382.0365(g)(2), may request that the executive director approve an alternative means from the notice methods required under this subchapter.

(b) The executive director may approve the request upon a determination that the alternative means will result in equal or better communication with the public, considering the following factors:

- (1) the effectiveness of the method of notice in reaching potentially affected persons;
- (2) the cost of the method of notice; and
- (3) whether the method is consistent with federal requirements.

(c) The applicant may not use the alternative means of notice until the executive director gives written approval.

(d) Notice of hearing. The applicant shall publish notice of the hearing 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. The notice must be published not less than 30 days before the hearing.