

The Texas Natural Resource Conservation Commission (commission) proposes a new §39.404, Applicability for Certain Initial Applications for Air Quality Permits for Grandfathered Facilities. The commission also proposes 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. The new and amended sections of Chapter 39 are proposed to 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 PROPOSED 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 have not been modified since 1971, they continue 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) permitting 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. Senate Bill 7 required the commission to implement the permitting and allowance requirements of new Texas Utilities Code, §39.264, concerning Emissions Reductions of "Grandfathered Facilities." Senate Bill 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. Senate Bill 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 the 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. House Bill 2912 created four new types of permits for grandfathered facilities: existing facility permits, small business stationary source permits, EGF permits, and pipeline facility permits. House Bill 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 their eligibility for amnesty from enforcement.

To implement these revisions to the TCAA, the commission proposes new and amended rules in Chapter 116, Subchapter A, Definitions; Subchapter H, Voluntary Emission Reduction Permits; and Subchapter I, Electric Generating Facilities, which were published in the January 4, 2002 issue of the *Texas Register*.

Additionally, revisions to Chapter 39, Public Notice, are 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.

Texas Health and Safety Code, 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.

Texas Health and Safety Code, 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 commission must publish 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.

Texas Health and Safety Code, TCAA, §382.0561 also requires that public hearings are not 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.

Texas Health and Safety Code, 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 proposing new procedures for grandfathered facility permits in this chapter.

## SECTION BY SECTION DISCUSSION

### *Subchapter H, Applicability and General Provisions*

The proposed new §39.404 is necessary to implement requirements of HB 2912, §§5.02 - 5.05. The existing §39.403, Applicability, is currently not available to be opened to propose 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 proposes new §39.404 to specify the applicability of Chapter 39 to the new grandfathered facility permits. House Bill 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 proposed 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.

House Bill 2912 also created new THSC, §382.05183 and §382.05186 which established existing facility permits and pipeline facilities permits, respectively, and §382.05181 required that the permit applications for grandfathered facilities permits were subject to notice and hearing requirements as provided by THSC, §382.05191. The proposed 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 proposed amendments to §39.411, Text of Public Notice, are necessary due to the proposed 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 proposed §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 proposed amendments to §39.419, Notice of Application and Preliminary Decision, are necessary due to the proposed 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 proposed §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 proposed 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 proposed §39.419(e)(3) correctly refers to exemptions under §39.419(e)(1)(A) - (D).

The proposed 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 proposed 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 proposed revisions delete the words "voluntary emission reduction" since multiple permit types are referenced in the proposed language.

*Subchapter K, Public Notice of Air Quality Applications*

The proposed amendments to §39.603, Newspaper Notice, are necessary to correct a subsection reference. In §39.603(e)(1), subsection (c)(2) should be referenced instead of subsection (a)(2). 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 proposed §39.603(e)(1) corrects this reference to (c)(2), which specifies the requirements for the publication in the newspaper other than the legal section of the newspaper.

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

The proposed 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.

**FISCAL NOTE: COST TO STATE AND LOCAL GOVERNMENT**

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments are in effect, there will be fiscal implications, which are not anticipated to be significant, for certain units of state and local government including institutions of higher education that operate grandfathered equipment that will be required to obtain permits created by this rulemaking. For those affected units of government that are required to obtain permits, there will be public notice costs to comply with this rulemaking.

The State of Texas began permitting new and modified sources of air pollutants in 1971. Sources built before the permitting rules became effective were not required to obtain permits for air emissions as long as they were not modified. These sources are known as grandfathered sources. The proposed amendments implement certain provisions of HB 2912. Provisions in HB 2912 require grandfathered air emission facilities, that apply for an existing facility permit, existing facility flexible permit, pipeline facilities permit, or EGF permit, to comply with the commission's public notice and hearing rules. This rulemaking is only intended to implement the public notice provisions of HB 2912. The commission has addressed the overall permitting requirements of HB 2912 in a separate rulemaking.

The proposed amendments will update existing commission rules to reflect that applications for existing facility permits, existing facility flexible permits, pipeline facilities permits, and EGF permits, created by HB 2912 will be subject to the commission's public hearing and notice requirements. Applicants for any of these permits will have to provide sufficient public notice via notices in newspapers and public hearings, if required, to comply with the proposed amendments.

Examples of grandfathered facilities affected by this rulemaking include oil/coal/wood/gas-fired boilers; process heaters; kilns; gas turbines; duct burners; flares; storage tanks; connections and valves used in piping located at oil and gas production, processing, and transmission; chemical processing; electricity generation; metal manufacturing; general manufacturing; and oil refining operations. Additionally, grandfathered reciprocating internal combustion engines used in pipeline operations would be affected by the proposed amendments.

The public notice requirements of this rulemaking will affect permit applicants depending on when they are required to submit permit applications. Compliance deadlines depend on whether the facility is located in East or West Texas. The East Texas region includes all counties traversed by or east of Interstate Highway 35 north of San Antonio or traversed by or east of Interstate Highway 37 south of San Antonio, and also including Bexar, Bosque, Coryell, Hood, Parker, Somervell, and Wise Counties. All other counties in Texas are considered to be in the West Texas region. Affected facilities in East Texas must submit an application before September 1, 2003 and any controls required by the permit must be in operation by March 1, 2007. Affected facilities in West Texas must submit an application

before September 1, 2004 and any control required by the permit must be in operation by March 1, 2008.

Based on analysis of the 1997 emissions inventory, there are a total of approximately 800 grandfathered facilities in Texas. Since 1997, it is estimated that 300 of these sites have been authorized to continue operations under a permit, permit-by-rule, or currently have a pending permit application. The commission has identified three grandfathered natural gas-fired boilers operated by Texas A&M University, and two grandfathered natural gas-fired boilers operated by the University of Texas at Austin that would be affected by the proposed amendments. The commission anticipates there will be additional state and local government sites, including an unknown number of facilities owned and operated by river authorities, that would be affected by the proposed amendments.

The costs to affected units of state and local government to comply with this rulemaking will be limited to public notice costs. The costs for public notice vary significantly depending on the location of the facility and its proximity to large metropolitan areas. Small town/city newspapers generally charge much less for publication of a public notice. The commission estimates a large city newspaper would charge approximately \$3,000 for the display notice and approximately \$450 for the legal notice. A smaller city newspaper would charge approximately \$210 for the display notice and \$20 for the legal notice. The cost for alternative language publication, if needed, is estimated to be \$150. The cost for signs at affected facilities would cost approximately \$300. The total costs for public notice associated with permitting a grandfathered facility would range from \$680 to \$3,900, assuming alternative language notice is also required. If a request for notice and comment hearing is received on an

application, the applicant would also be required to publish a legal notice for the hearing, which would cost an additional \$450 for publication in a large city newspaper, and \$20 in a smaller city newspaper.

#### PUBLIC BENEFIT AND COSTS

Mr. Davis has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be public awareness concerning the status of grandfathered permit application proceedings.

The State of Texas began permitting new and modified sources of air pollutants in 1971. Sources built before the permitting rules became effective were not required to obtain permits for air emissions as long as they were not modified. These sources are known as grandfathered sources. The proposed amendments implement certain provisions of HB 2912. Provisions in HB 2912 require grandfathered air emission facilities, that apply for existing facility permits, existing facility flexible permits, pipeline facilities permits, and EGF permits to comply with the commission's public notice and hearing rules. This rulemaking is only intended to implement the public notice provisions of HB 2912.

The proposed amendments will update existing commission rules to reflect that applications for existing facility permits, existing facility flexible permits, pipeline facilities permits, and EGF permits, created by HB 2912 will be subject to the commission's public hearing and notice requirements. Applicants for any of these permits will have to provide sufficient public notice via notices in newspapers and public hearings, if required, to comply with the proposed amendments.

The public notice requirements of this rulemaking will affect permit applicants depending on when they are required to submit permit applications. Compliance deadlines depend on whether the facility is located in East or West Texas. Affected facilities in East Texas must submit an application before September 1, 2003 and any controls required by the permit must be in operation by March 1, 2007. Affected facilities in West Texas must submit an application before September 1, 2004 and any control required by the permit must be in operation by March 1, 2008.

Based on analysis of the 1997 emissions inventory, there are a total of approximately 800 grandfathered facilities in Texas. Since 1997, it is estimated that 300 of these sites have been authorized to continue operations under a permit, permit-by-rule, or currently have a pending permit application. The remaining 500 facilities, the vast majority of which are owned and operated by large businesses, are oil/coal/wood/gas-fired boilers; process heaters; kilns; gas turbines; duct burners; and flares used in oil and gas production, processing, and transmission; chemical processing; electricity generation; metal manufacturing; general manufacturing; and oil refining operations. The commission estimates the actual number of affected large businesses will be higher since there are probably additional operational grandfathered facilities that were not included in the 1997 emissions inventory.

The costs to affected businesses and individuals to comply with this rulemaking will be limited to public notice costs. The costs for public notice vary significantly depending on the location of the facility and its proximity to large metropolitan areas. Small town/city newspapers generally charge much less for publication of a public notice. The commission estimates a large city newspaper would charge approximately \$3,000 for the display notice and approximately \$450 for the legal notice. A smaller city

newspaper would charge approximately \$210 for the display notice and \$20 for the legal notice. The cost for alternative language publication, if needed, is estimated to be \$150. The cost for signs at affected facilities would cost approximately \$300. The total costs for public notice associated with permitting a grandfathered facility would range from \$680 to \$3,900, assuming alternative language notice is also required. If a request for notice and comment hearing is received on an application, the applicant would also be required to publish a legal notice for the hearing, which would cost an additional \$450 for publication in a large city newspaper, and \$20 in a smaller city newspaper.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There may be adverse fiscal implications, which are not anticipated to be significant, for small and micro-businesses that have to obtain a permit as a result of implementation and enforcement of the proposed amendments, which are intended to implement the grandfather permitting public notice requirements of HB 2912 by updating commission rules to reflect that applicants seeking existing facility permits, existing facility flexible permits, pipeline facilities permits, or EGF permits would be subject to existing commission public notice and hearing rules.

The commission anticipates that grandfathered facilities owned and operated by small and micro-businesses will likely apply for either existing facility or small business stationary source permits. There are no known small or micro-businesses that would be eligible for the EGF permit and the commission anticipates there are very few small or micro-businesses with equipment that would qualify for the pipeline facility permit. The commission anticipates that the owners or operators of these facilities will obtain a small business stationary source permit rather than a pipeline facility permit. In order to

qualify for the small businesses stationary source permit, the site must emit less than 50 tons per year (tpy) of any regulated air pollutant and cannot emit more than 75 tpy of all regulated air pollutants. Small or micro-businesses with emission outputs above these thresholds would have to obtain an existing source permit.

The public notice requirements of this rulemaking will affect permit applicants depending on when they are required to submit permit applications. Grandfathered facilities owned and operated by small or micro-business that intend to obtain a small business stationary source permit must submit an application before September 1, 2004 and any controls required by the permit must be in operation by March 1, 2008. Small and micro-businesses that do not qualify for, or choose not to obtain a small business stationary source permit, must submit a permit application by March 1, 2008 or shut down.

Based on analysis of the 1997 emissions inventory, there are a total of approximately 800 grandfathered facilities in Texas. Since 1997, it is estimated that 300 of these sites have been authorized to continue operations under a permit, permit-by-rule, or currently have a pending permit application. Of the remaining 500 facilities identified on the emissions inventory, the commission estimates that fewer than ten are small or micro-businesses. The commission estimates there may be other grandfathered facilities owned and operated at small and micro-businesses that qualify for the small business stationary source permit, and therefore would not have shown up on the emissions inventory. Examples of grandfathered equipment owned and operated by small and micro-businesses include small industrial, institutional, and commercial boilers, process heaters, and internal combustion engines.

The costs to affected small and micro-businesses to comply with this rulemaking will be limited to public notice costs for those facilities that do not qualify for a small business stationary source permit. The costs for public notice will be decreased for small and micro-businesses compared to larger businesses, because they would not be required to publish a display notice. The public notice costs will vary depending on the location of the facility and its proximity to large metropolitan areas. Small town/city newspapers generally charge much less for publication of a public notice. The commission estimates a large city newspaper would charge approximately \$450 for the legal notice. A smaller city newspaper would charge approximately \$20 for the legal notice. The cost for alternative language publication, if needed, is estimated to be \$150. The cost for signs at affected facilities would cost approximately \$300. The total costs for public notice associated with permitting a grandfathered facility owned and operated by a small or micro-business would range from \$470 to \$900, assuming alternative language notice is also required. If a request for notice and comment hearing is received on an application, the applicant would also be required to publish a legal notice for the hearing, which would cost an additional \$450 for publication in a large city newspaper, and \$20 in a smaller city newspaper.

The following is an analysis of the cost per employee for small or micro-businesses affected by the proposed amendments. Small and micro-business are defined as having fewer than 100 or 20 employees respectively. A small business that applies for an existing facility permit for one natural gas-fired boiler would incur additional costs of approximately \$13.50 per employee, assuming alternative language notice and a comment is required. A micro-business that applies for an existing facility permit for one natural gas-fired boiler would incur additional costs of approximately \$67.50 per employee,

assuming alternative language notice and a comment is required. The cost to comply with the public notice requirements of this rulemaking is anticipated to be less for small and micro-businesses, compared to larger businesses, because a small business would not have to pay for a display notice in a newspaper.

#### LOCAL EMPLOYMENT IMPACT

The commission has 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 affect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking implementing HB 2912, §§5.02 - 5.04 does not meet the definition of a “major environmental rule” as defined in that statute. The 77th Legislature, 2001 amended the THSC to require that all grandfathered facilities obtain permits. These 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 emission reductions of nitrogen oxides (NO<sub>x</sub>) and volatile organic compound (VOC). The substantive requirements of the permitting system created by HB 2912 are contained in a different proposed action by the commission, published in an earlier edition 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. While the proposed rules 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, jobs, the environment, or the public health and safety of the state or a sector of the state, the proposed new sections of Chapter 39 are merely procedural. Furthermore, the analysis required by Texas Government Code, §2001.0225(c) does not apply because the proposed rules do not meet any of the four applicability requirements of a major environmental rule. The proposed 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 proposed specifically to comply with HB 2912, and do not exceed the requirements of that bill.

#### TAKINGS IMPACT ASSESSMENT

The commission has completed a takings impact assessment for the proposed rules. The following is a summary of that assessment. The purpose of the proposed rules is to create the procedural provisions necessary for the implementation of the substantive permitting requirements of HB 2912, and will advance this purpose by supporting the permitting system created by HB 2912. This system includes four different types of permits which will cover all grandfathered facilities, and provide for emission reductions of NO<sub>x</sub> and VOC.

The commission evaluated these proposed rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed 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 the EPA approval as part of the SIP, which is mandated by 42 USC, §7410. Also, the proposed rules are a necessary component of the permitting program created by HB 2912 and proposed to be implemented by changes to 30 TAC Chapter 116 in an action proposed in an earlier *Texas Register*, and will 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 NO<sub>x</sub> and VOC 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 the reductions required by these rules will be 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, promulgation and enforcement of these rules will not burden private real property. The proposed 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 proposed 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 proposed 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 Coastal Management Program (CMP), the proposed 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 proposed rulemaking is not subject to the CMP.

#### ANNOUNCEMENT OF HEARING

Public hearings on the proposal will be 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 hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings, and answer questions before and after the hearings.

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

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087; or by fax at (512) 239-4808. All comments must be received by 5:00 p.m. on January 29, 2002. All comments should reference Rule Log No. 2001-076-116-AI. For further information, please contact Steve Hagle, Air Permits Division, at (512) 239-1295; or Jill Burditt, Policy and Regulations Division, at (512) 239-0560.

#### STATUTORY AUTHORITY

The amendments and new section are proposed 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.

The proposed amendments and new section implement THSC, TCAA, §382.002, concerning Policy and Purpose; §382.011, concerning General Powers and Duties; §382.012, concerning State Air Control Plan; §382.017, concerning Rules; §382.051, concerning Permitting Authority of Board; Rules; §382.0518, concerning Preconstruction Permit; §382.05181, concerning Permit Required; §382.05182, concerning Notice of Shutdown; §382.05183, concerning Existing Facility Permit; §382.05184, concerning Small Business Stationary Source Permit; §382.05185, concerning Electric Generating Facility Permit; §382.05186, Pipeline Facilities Permits; §382.05191, concerning Emissions Reduction Permits: Notice and Hearing; §382.05192, concerning Review and Renewal of Emissions Reduction and Multiple Plant Permits; §382.055, concerning Review or Renewal of a Permit; §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing; §382.0561, concerning Federal Operating Permit: Hearing; §382.0562, concerning Notice of Decision; and TWC, §5.103, concerning Rules.

**SUBCHAPTER H : APPLICABILITY AND GENERAL PROVISIONS**

**§§39.404, 39.411, 39.419, 39.420**

**§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) (No change.)

(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) - (9) (No change.)

(10) for notices of air applications:

(A) (No change.)

(B) if notice is for applications described in §39.403(b)(11) or (12) of this title (relating to Applicability), 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) - (iv) (No change.)

(C) - (D) (No change.)

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

(c) - (d) (No change.)

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

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

(e) For air applications:

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

(A) - (C) (No change.)

(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) (No change.)

(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) [(C)] of this subsection or are for the following federal preconstruction approvals:

(A) - (C) (No change.)

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

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

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

(1) applications for initial issuance of [voluntary emission reduction] permits under Texas Health and Safety Code, §§382.05183, 382.05185(c) and (d), 382.05186 and 382.0519;

(2) - (5) (No change.)

(d) (No change.)

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

**§§39.603, 39.604, 39.606**

**STATUTORY AUTHORITY**

The amendments are proposed 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.

The proposed amendments implement THSC, TCAA, §382.002, concerning Policy and Purpose; §382.011, concerning General Powers and Duties; §382.012, concerning State Air Control Plan; §382.017, concerning Rules; §382.0518, concerning Preconstruction Permit; §382.05181, concerning Permit Required; §382.05182, concerning Notice of Shutdown; §382.05183, concerning Existing Facility Permit; §382.05184, concerning Small Business Stationary Source Permit; §382.05185, concerning Electric Generating Facility Permit; §382.05186, Pipeline Facilities Permits; §382.05191, concerning Emissions Reduction Permits: Notice and Hearing; §382.05192, concerning Review and Renewal of Emissions Reduction and Multiple Plant Permits; §382.055, concerning Review or Renewal of a Permit; §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing; §382.0561, concerning Federal Operating Permit: Hearing; §382.0562, concerning Notice of Decision; and TWC, §5.103, concerning Rules.

**§39.603. Newspaper Notice**

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

(e) Alternative publication procedures for small businesses.

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

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

(2) (No change.)

(f) (No change.)

**§39.604. Sign-Posting.**

(a) (No change.)

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

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

**§39.606. Alternative Means of Notice for Permits for Grandfathered Facilities [Voluntary Emission Reduction Permits].**

(a) An applicant for a [voluntary emission reduction] permit, under Texas Health and Safety Code, §§382.05183, 382.05185(c) and (d), 382.05186, or 382.0519, [382.05191,] 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) - (d) (No change).