The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §§39.402, 39.404, and 39.606; adopts new §39.402; and also adopts the amendments to §§39.106, 39.403, 39.405, 39.409, 39.411, 39.418 - 39.420, 39.501, 39.551, 39.601 - 39.605, 39.651, 39.653, and 39.709.

New §39.402 and the amendments to §§39.405, 39.411, 39.418 - 39.420, 39.603, and 39.605 are adopted *with changes* to the proposed text as published in the January 15, 2010, issue of the *Texas Register* (35 TexReg 306). The amendments to §§39.106, 39.403, 39.409, 39.501, 39.551, 39.601, 39.602, 39.604, 39.651, 39.653, and 39.709 *and* the repeal of §§39.402, 39.404, and 39.606 are adopted *without changes* and will not be republished.

The following new and amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP): §§39.402(a)(1) - (6), (8), and (10) - (12), 39.405(f)(3) and (g), (h)(1)(A) - (4), (6), (8) - (11), (i) and (j), 39.409, 39.411(e)(1) - (4)(A)(i) and (iii), (4)(B), (5)(A) and (B), and (6) - (10), (11)(A)(i) and (iii) and (iv), (11)(B) - (F), (13) and (15), and (f)(1) - (8), (g) and (h), 39.418(a), (b)(2)(A) and (c), 39.419(e), 39.420 (c)(1)(A) - (D)(i)(I) and (II), (D)(ii), (c)(2), (d) - (e), and (h), and 39.601 - 39.605.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

PRIOR SIP SUBMISSIONS

Certain sections and subsections of the rules regarding public participation for air quality permit applications were previously submitted to EPA as revisions to the SIP on October 25, 1999, July 31, 2002, and March 9, 2006. The sections submitted in 1999, as part of the implementation of House Bill (HB) 801 (76th Legislature, 1999) which is discussed more fully later in this preamble, were §39.201;

§39.401; §39.403(a) and (b)(8) - (10); §39.405(f)(1) and (g); §39.409; 39.411(a), (b)(1) - (6) and (8) - (10) and (c)(1) - (6) and (d); §39.413(9), (11), (12), and (14); §39.418(a) and (b)(3) and (4); §39.419(a), (b), (d), and (e); §39.420(a), (b), and (c)(3) and (4); §39.423(a) and (b); §39.601; §39.602; §39.603; §39.604; and §39.605. The sections submitted in 2002 were new §39.404, and amended §§39.411, 39.419, 39.420; 39.603, 39.604, and 39.606. The sections submitted in 2005 were amended §39.403(b)(8) - (10) and new §39.403(f); §39.411(a), (b)(1) - (6), (8) - (10), (c)(1) - (6), and (d); §39.419(a), (b), (d), and (e); and §39.420(a), (b), and (c)(3) and (4). In 2005, the commission also proposed to submit the repeal of §39.404, and the newly adopted §39.404, and to withdraw §§39.411, 39.419, and 39.420 as submitted in 2002.

Subsequently, the commission conducted two rulemakings that concern public participation for air quality permit applications which were not submitted as revisions to the SIP. The first was the implementation of HB 2518 (77th Legislature, 2001), relating to the issuance of certain permits for the emission of air contaminants, by adding new §39.402. The second rulemaking amended alternate language publication requirements in §39.405(h), as well as amendments to §39.604 and §39.605. Therefore, to ensure that current versions of the necessary and appropriate rules are submitted to EPA as revisions the SIP, the commission adopts to withdraw all sections previously submitted as listed earlier and to submit the following sections as revisions to the SIP: §§39.402(a)(1) - (6), (8), and (10) - (12), 39.405(f)(3) and (g), (h)(1)(A) - (4), (6), (8) - (11), (i) and (j), 39.409, 39.411(e)(1) - (4)(A)(i) and (iii), (4)(B), (5)(A) and (B), and (6) - (10), (11)(A)(i) and (iii) and (iv), (13) and (15), and (f)(1) - (8), (g) and (h), 39.418(a), (b)(2)(A) and (c), 39.419(e), 39.420 (c)(1)(A) - (D)(i)(I) - (II) - (e) and (h), 39.601, 39.602, 39.603, 39.604, and 39.605. In addition, §39.407 will be submitted to the EPA as a revision to the SIP. In addition,

§§39.411(a) as adopted in 1999, and amended §39.418(b)(3), submitted in 1999 as §39.418(b)(4), would not be withdrawn as revisions to the SIP, and therefore, remain for EPA review and consideration.

HOUSE BILL 801

In September and October 1999, the commission conducted rulemaking to implement HB 801, adopted by the 76th Legislature to be effective September 1, 1999. HB 801 established new procedures for public participation in multi-media environmental permitting proceedings. It established procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing for certain actions. This legislation allowed the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements, and in 1999, these changes were implemented in various chapters of the commission's rules, including Chapter 39. This effort complimented the commission's ongoing effort to consolidate agency procedural rules and make certain processes consistent among different agency programs and media.

HB 801 revised the commission's procedures for public participation in environmental permitting by adding, among other things, new Texas Water Code (TWC), Chapter 5, Subchapter M; and by revising the Texas Clean Air Act (TCAA), §382.056 in the Texas Health and Safety Code (THSC). The changes in law made by HB 801 apply to certain permit applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999.

Specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit 30 days after declaration of administrative completeness. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county, and, in most cases, to publish newspaper notice of the executive director's preliminary decision of the application. In addition, the bill requires the commission to establish by rule the form and content of the notices and to mail notice to certain persons. It also requires the executive director to hold public meetings regarding applications which are required, if requested by a legislator, or if the executive director determines there is substantial public interest in the proposed activity. The executive director is also required to prepare responses to relevant and material public comments received in response to the notices or at public meetings, and file the responses with the chief clerk. It requires the commission to prescribe alternative cost-effective procedures for newspaper publication for small business stationary sources seeking air quality permits or permit amendments that will not have a significant effect on air quality. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are implemented in 30 TAC Chapters 39, 50, 55, and 80 by consolidating the rules for public participation for various air quality, water quality and waste applications. For air quality applications, the changes were newly added to these chapters rather than amend the existing rules Chapter 116, which contains the rules for the new source review (NSR) permitting program.

EPA REVIEW OF SUBMITTED RULES

On November 26, 2008, the EPA proposed simultaneous limited approval and limited disapproval of revisions to the applicable implementation plan for the State of Texas which relate to public participation for air quality permit applications for new and modified sources (*Federal Register* notice of November 26, 2008, hereinafter referred to as "Public Participation Notice"). With noted exceptions, this proposed limited approval and limited disapproval affects portions of SIP revisions submitted by the commission on December 15, 1995; July 22, 1998; and October 25, 1999 (See 73 *Federal Register* 72001). EPA found that these revisions, as a whole, strengthen the SIP as compared to the provisions in the existing SIP (located in 30 TAC §§116.130 - 116.137). However, EPA also found that these rules do not meet all of the minimum federal requirements that relate to public participation. The TCEQ filed comments in response to this notice. In addition, the executive director's letter to EPA dated October 23, 2009 included a commitment to submitting this rulemaking for proposal by the commission at its December 9, 2009 open meeting. This adoption is intended to address EPA's comments as set forth in the Public Participation Notice, and its comments submitted as part of this rulemaking process, and to submit rule amendments that are approvable as a revision to the Texas SIP. The text of the SECTION BY SECTION DISCUSSION portion of this preamble incorporates EPA's concerns and the commission's responses to those comments.

At the time the rules were adopted in 1999, the commission stated that, generally, the amendments made by HB 801 are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

Based on the Public Participation Notice, the commission has determined that to meet the minimum requirements of federal law for public participation for air quality permit applications, amendments to the established rules implementing the various state legislation described above, are necessary.

DESCRIPTION OF THE PROCESS FOR PUBLIC PARTICIPATION FOR AIR QUALITY PERMIT APPLICATIONS PRIOR TO THE AMENDMENTS IN THIS RULEMAKING

Due to the comprehensive nature of the requirements of HB 801 (76th Legislature, 1999), the commission's permitting process is frequently referred to as the "HB 801" process. The vast majority of air, waste, and water quality permit applications received by the commission are subject to the procedural requirements of HB 801. A brief description of that process for air quality permit applications follows. As there are a number of possible scenarios depending on the type of permit, this discussion focuses on the basic HB 801 process. Additionally, in its Public Participation Notice, EPA states "for a new or modified source subject to PSD, the revised rules do not contain a definition of a final appealable decision for a PSD permit" (see 73 *Federal Register* 72008). EPA goes on to state that it would like "further information about how and when commenters are informed of the agency's final decision, access to the response to comments (RTC) and timing for judicial appeal, in order to provide an opportunity for State court judicial review" (see 73 *Federal Register* 72008). The following discussion also addresses those issues. The SECTION BY SECTION DISCUSSION of the preamble for §55.156, Public Comment Processing, in the concurrent adoption preamble discusses in greater detail EPA's issue regarding access to the RTC.

Notice of Receipt of Application and Intent to Obtain Permit (First notice): Permit applications received by the TCEQ undergo an administrative review by staff to determine whether the applicant has submitted all of the initially required parts of the application. Within 30 days after the application is declared

administratively complete, the applicant is required to publish the Notice of Receipt of Application and Intent to Obtain Permit (NORI) in a newspaper of general circulation in the county in which the facility is proposed to be located. The NORI describes the location and nature of the proposed activity, lists agency and applicant contacts for obtaining additional information, and gives the location in the county where a copy of the application can be viewed and copied. In some cases, the applicant may also have to publish the notice in other languages. Applicants must post signs with application and contact information around the property. Mailed notice to persons on the mailing list and others is also provided by the chief clerk. The NORI provides instructions for submitting comments, getting on the mailing list, requesting a public meeting, and requesting a contested case hearing. The instructions explain that in order for an issue to be considered at a contested case hearing, it must first be raised in a comment or in a request for a contested case hearing during the time specified in the published notice.

Notice of Application and Preliminary Decision (Second notice): After the application has been determined to be administratively complete, it undergoes a technical review to determine whether it satisfies state and federal regulatory requirements. For certain types of permits, after technical review is complete, the executive director issues his preliminary decision. The applicant is then required to publish a second notice, called the Notice of Application and Preliminary Decision (NAPD), in the same newspaper as the NORI and the notice is also mailed to persons who timely filed public comment or hearing requests and to persons on the mailing list. The NAPD contains information regarding the review of the application and provides an additional opportunity to submit comments, request a public meeting and/or contested case hearing, or request to be added to the mailing list.

Prior to these amendments, second notice was required for an air quality permit application for a minor source (or a registration for a concrete batch plant standard permit) *only* when a request for a contested case hearing was made during the first notice (NORI) period and was not withdrawn before the preliminary decision was issued. If no contested case hearing has been requested, the comment period ends 30 days after the date of publication of the NORI. For all major sources of air pollution which require a Prevention of Significant Deterioration (PSD) or nonattainment permit, publication of the NAPD is required, regardless of whether or not contested case hearing requests are received for the permit application. This rulemaking expands the requirement to publish the NAPD to all minor source applications. This is more fully discussed later in the SECTION BY SECTION DISCUSSION portion of this preamble.

Response to comments: After the public comment period closes, the executive director is required to review and respond to all timely, relevant and material, or significant filed comments in a formal RTC prior to issuance of the permit. The TCEQ's practice is to respond to all comments. The staff considers all timely filed comments to determine whether any issues raised require changes to the preliminary decision and/or proposed permit. The RTC and the executive director's preliminary decision are mailed to the applicant, and any person who submitted comments during the public comment period, timely filed a contested case hearing request, or requested to be on a mailing list for the permit application.

Mailing list for notice: Interested persons can receive future public notices by requesting to be placed on either the permanent mailing list for a specific applicant name and permit number or the permanent mailing list for a specific county which includes all air, water, and waste permit notices in that county.

Persons who submit a comment, request a public meeting, or request a contested case hearing regarding a specific application, are automatically added to the mailing list for that specific permit application.

Public meeting: Public meetings provide the public with an opportunity to learn about the application, ask questions of the applicant and TCEQ, and offer formal comments. It also allows TCEQ staff to hear firsthand the concerns and objections of the community and gather input for use in the agency's consideration of the application. The TCEQ will hold a public meeting if there is significant interest in an application, if requested by a legislator from the area of the proposed project, or if otherwise required by law. This rulemaking adds the requirement that for some types of permits, including PSD and nonattainment, that a meeting will be held upon request of an interested person. A request for a public meeting must be submitted in writing to the chief clerk during the public comment period.

Request for contested case hearing: If comments were filed during the comment period, there may be an opportunity to request a contested case hearing. For there to be an opportunity for a contested case hearing, a request for a contested case hearing must be received during the NORI comment period for applications for minor sources of air pollution. For major sources of air pollution, the opportunity for a contested case hearing request to be made extends to the end of the comment period, with an additional opportunity to make the request for 30 days after the mailing of the executive director's RTC. A hearing request must be based on issues that were raised during the comment period, in comments that were not withdrawn prior to the filing of the RTC. The person requesting a hearing must demonstrate that they are an "affected person" as defined in state law in order to be granted party status and challenge the executive director's preliminary decision on an application. Requests for contested case hearings must include, among other pertinent information, a detailed explanation of how the requester would be adversely

affected by the proposed facility or activity in a manner not common to the general public. If the request is made on behalf of a group or an association, the request must identify one or more members who are affected persons, and state how the interest that the group or association seeks to protect is relevant to the group's purpose. The request for hearing must be received no later than 30 days after the date of the letter transmitting the executive director's preliminary decision and RTC, which is mailed out by the chief clerk. The TCEQ considers all contested case hearing requests received during the public comment period as well as those timely received after the RTC is filed and mailed.

Commission consideration of requests for reconsideration and contested case hearing: After the executive director's preliminary decision and RTC have been mailed, any person has the option of filing a request for reconsideration, which asks the commissioners to reconsider the executive director's decision. The request for reconsideration must be received no later than 30 days after the date of the decision letter. All timely filed requests for reconsideration and contested case hearing are considered at the commissioner's agenda meetings, except when the application is directly referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. At these meetings, the commissioners consider contested case hearing requests, response and reply briefs, the executive director's RTC, and applicable statutes and rules and decide whether they will grant or deny the contested case hearing requests and requests for reconsideration. If the commission decides to grant a request for a contested case hearing, the case is referred to SOAH with a list of issues to be the subject of the hearing and an expected duration for the hearing.

Contested case hearing: A contested case hearing is a legal proceeding similar to a non-jury civil trial in state district court. Hearings are conducted by SOAH, an independent agency that conducts hearings for

state agencies. Contested case hearings can take place either when referred to SOAH by the commission, or when an application is directly referred to SOAH, usually by the applicant. When a contested case is referred to SOAH, an administrative law judge will preside over the hearing and will consider evidence in the form of sworn witness testimony and documents presented as exhibits. At the conclusion of the SOAH hearing, the judge issues a proposal for decision with proposed findings of fact and conclusions of law, which is submitted to the TCEQ for formal consideration by the commission. The commission then approves, denies, or modifies the proposal for decision.

For minor sources of air pollution, if there are comments but no contested case hearing requests in response to the first notice (NORI), the executive director will respond to comments, but there is no longer an opportunity to request a contested case hearing. Persons wishing to protest the granting of the permit must file a motion to overturn.

Motion to overturn: If no request for contested case hearing or reconsideration is received and the executive director issues the uncontested permit, any person may file a *motion to overturn* requesting that the commission overturn the executive director's action. The motion must be filed no later than 23 days after the date the agency mails notice of the signed permit, and must explain why the commission should review the executive director's action. If a motion to overturn has not been acted on by the commissioners within 45 days after the date the agency mails notice of the signed permit, the motion is overruled by operation of law, unless an extension of time is specifically granted. In the case of an uncontested permit application that is issued by the executive director, agency rules require the chief clerk to send the executive director's RTC along with notice that the permit has been signed to appropriate persons including all who timely filed public comments. That letter also explains that a motion to overturn can be

filed for the commission's consideration, and that an appeal may be filed in state district court in Travis County, Texas.

Protesting a commission approved permit: For a contested permit, i.e., one for which a contested case hearing was requested and the permit was subsequently issued by the commission either after denial of all hearing requests or after a contested case hearing, the rules also require the chief clerk to send the order and notice of the action to a list of persons including those who timely filed public comment. If the commission adopts a change to the executive director's original RTC, the rules require the chief clerk to include this final RTC with the notice of the commission's action. In matters where the commission makes no changes to the executive director's RTC, in accordance with the rules, the chief clerk would have previously transmitted the executive director's RTC to appropriate persons including commenters who subsequently receive the order and notice of action. The letter transmitting the order and notice of commission action explains that a motion for rehearing of the commission's action can be filed. A motion for rehearing is a prerequisite to appeal.

Judicial review: Access to judicial review for air quality permits is governed by THSC, §382.032. Generally, a person must comply with the requirement to exhaust the available administrative remedies prior to filing suit in district court. In addition, EPA has approved the Texas Title V Operating Permit Program, which required the submission of a Texas Attorney General opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution. The Attorney General Opinion specifically states that "{a}ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution." The state statutory authority cited in support of the Texas Title V Operating

Program includes THSC, §382.032, which is the underlying authority for the appeal of Texas' air quality permit actions, including PSD permitting program. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with Article III of the United States Constitution is also applicable for every action of the commission subject to the TCAA, including PSD permit decisions.

OVERVIEW OF THE AMENDMENTS AND RELATED RULEMAKING

This rulemaking, in Chapters 39, 55, and 116 includes significant changes to the existing public participation process for air quality permit applications. The first is the expansion of the scope of applications that are subject to NAPD to all air quality permit applications, except certain permit renewal applications; the commission is no longer excluding minor NSR applications from this notice requirement when no request for a contested case hearing is received by the commission, or such request is withdrawn. This addresses EPA's comments regarding opportunity for the public to comment on the executive director's draft permit and air quality analysis for new or modified minor NSR sources or minor modifications at major sources. There is no change in the commission's procedure for requesting a contested case hearing for any air quality applications that are subject to a request for contested case hearing. For air quality minor NSR permit applications, the opportunity to request a contested case hearing continues to be contingent upon a request for such a hearing being received during the comment period for the NORI. If a request for a contested case hearing is received during the NORI comment period for these applications, then the opportunity to request a contested case hearing through the NAPD comment period and for 30 days after the executive director's RTC is mailed continues to apply. If, however, no requests for a contested case hearing are received during the comment period for NORI, then there is no further opportunity to request a contested case hearing for an air quality permit for a minor

source. Importantly, however, the NAPD for minor NSR applications is required, giving the public an opportunity for public comment as well as an opportunity to request a public hearing. For major sources, the opportunity to request a contested case hearing is open until the end of the NAPD comment period, or, if timely comments are filed, for 30 days after the executive director's RTC is mailed. Second, the commission is ensuring that all persons to whom notice must be given, and specific notice content, are specifically set forth in the rules. In addition, because EPA expressed concern in the Public Participation Notice about portions of previously submitted rules applying to media other than air, or including rules that cite cross-references that are not submitted as SIP revisions, the rules are revised to segregate certain requirements for air quality permits where necessary for SIP approval. It should be noted that not all of the rules that apply to air quality permitting are adopted to be submitted as a SIP revision. Rather, the commission adopts those sections, or portions of sections that meet minimum federal requirements or meet the requirements of the existing Texas SIP, as revisions to the SIP.

Concurrently with this adoption, and published in this issue of the *Texas Register*, the commission is adopting amendments to 30 TAC Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 60, Compliance History; and Chapter 116, Control of Air Pollution by Permits for New Construction or Modification. The adopted amendments to Chapter 55 require the executive director to hold a public meeting when requested by any interested person for applications for PSD or nonattainment permits, and update the type of application available for concrete batch plants that are subject to the public participation requirements in Chapter 55. Finally, the rules specify that before any air quality permit application for a PSD and nonattainment permit is approved, the executive director shall prepare a response to all comments received and shall post the finished RTC on the commission's Web site. The commission is also adopting to withdraw certain sections and resubmit certain sections in

Chapter 55 as revisions to the SIP. The primary objective of this rulemaking is to obtain SIP approval for the public participation requirements and process for the commission's NSR air quality permitting program.

The commission is adopting amendments to Chapter 60 to update a cross-reference that changed as part of this rulemaking.

The commission is also concurrently adopting amendments to certain sections in Chapter 116 to ensure that the public participation requirements for Plant-wide Applicability Limit (PAL) permits meet state and federal public participation requirements. In addition, the amendments update cross-references.

The new and amended rules in these four chapters should be considered together, since all changes in Chapters 39, 55, and 116 are necessary to achieve the goal of SIP approval and the increased public participation opportunities.

SECTION BY SECTION DISCUSSION

Section 39.106, Application for Modification of a Municipal Solid Waste Permit or Registration

The commission adopts the amendment to §39.106(a) to update the cross-reference to §39.411(b)(1) - (3), (6), (7), (9), and (12) re-designated as §39.411(b)(1) - (3), (6), (7), (9), and (11).

Section 39.402, Applicability to Air Quality Permits and Permit Amendments

The commission adopts the repeal of existing §39.402 and simultaneously adopts new §39.402. The adopted new section consolidates the rules for the types of applications subject to notice requirements in

Chapter 39, Subchapters H and K previously listed in §39.402 and §39.403(b)(8) - (10) and (13). In the consolidation, the commission is not carrying forward the references to certain types of permit applications for which the deadline to submit those applications has passed. Specifically, those references are in existing §39.404(a), which is repealed as part of this rulemaking, and include grandfathered facilities, electric generating facilities, and existing facilities permits. No applications for these types of permits remain pending.

The commission adopts new §39.402(a), which requires applications for new air quality permits be subject to Chapter 39, Subchapters H and K. Section 39.402(a)(1) was revised from adoption to clearly separate new permit applications from permit amendment applications, now in subsection (a)(3) for permit amendment applications under Chapter 116, Subchapter B. New subsection (a)(1) applies to applications for new permits under Chapter 116, Subchapter B, and new subsection (a)(4) applies to applications for new flexible permits under Chapter 116, Subchapter G. Federal permit applications are segregated as new subsection (a)(2).

The commission also adopts new §39.402(a)(3) and (5) which implement HB 2518, as discussed in further detail elsewhere in this preamble. These are moved from repealed §39.402(a). Because the commission's flexible permit program is not yet approved by EPA as a minor NSR authorization, the notice requirements for new permit applications and permit amendment applications are in new subsection (a)(4) and (5); these two subsections track (a)(1) and (3), respectively.

In the Public Participation Notice, EPA commented that, under §39.403(b)(8), for a minor NSR permit amendment or minor modification under §116.116(b), (where there is a change in the method of control

of emissions; a change in the character of the emissions; or an increase in the emission rate of any air contaminant) the existing SIP requires the permit holder to apply for and receive approval of a permit amendment. EPA is correct that this requirement must be met. The approved SIP provides that the executive director determines which amendment applications go to notice, and in the Public Participation Notice, EPA acknowledged that adding criteria for when amendment applications are subject to notice would strengthen the SIP. Thus rulemaking adds the specific criteria for that determination in §39.402(a)(3) and (a)(5). This is more fully discussed in the RESPONSE TO COMMENTS SECTION.

Adopted new §39.402(a)(3)(A) and (a)(5)(A) provides that applications for permit amendments are subject to the notice requirements in Subchapters H and K when the amendment involves a change in character of emissions or release of an air contaminant not previously authorized under the permit. This is moved from existing §39.402(a)(1).

In adopted new §39.402(a)(3)(B) and (5)(B), the commission relocates existing text in §39.402(a)(3). This implements HB 2518 (77th Legislature, 2001), which added THSC, §382.0518(h), which provides that for certain permit amendments, the public participation requirements of THSC, §382.056 do not apply if the total increase for all facilities authorized under the amended permit will meet the commission's *de minimis* criteria. The criteria were established in 2001 in then new §39.402, and the criteria in new clauses (i) - (iv) in each subsection remain the same in adopted new subsection (a)(3)(B) and (5)(B). No comments were received in this rulemaking regarding the specific criteria. This is more fully discussed in the RESPONSE TO COMMENTS SECTION.

In adopted new §39.402(a)(3)(C) and (a)(5)(C), the commission relocates existing text in §39.402(a)(2) and §39.403(b)(8)(B). This implements HB 2518 (77th Legislature, 2001), which added new THSC, §382.0518(h), which provides that for permit amendments the public participation requirements of THSC, §382.056 do not apply if the total increase for all facilities that are affected by THSC, §382.020 (relating to control of emissions from facilities that handle certain agricultural products) authorized under the amended permit will not be significant. In the existing rule, the commission established the significance levels, which are the same as in SIP-approved §106.4(a); these remain the same in the adopted rule.

In adopted new §39.402(a)(3)(D) and (a)(5)(D), the commission relocates existing text in §39.402(a)(4) and §39.403(b)(8)(C). This provides for amendment applications to be subject to the notice requirements of Chapter 39, Subchapters H and K when the executive director determines that there is a reasonable likelihood for emissions to impact a nearby sensitive receptor or there is a reasonable likelihood of high nuisance potential from the operation of the facilities. It also applies when an application involves a facility with a poor compliance history rating, or when there is a reasonable likelihood of significant public interest in a proposed activity.

Adopted new §39.402(a)(4) specifies that applications for new flexible permits are subject to the public participation requirements of Chapter 39, and new §39.402(a)(5) specifies that applications for amendment to flexible permits are also subject to the public participation requirements of Chapter 39. In two notices published on September 23, 2009, in the *Federal Register* (74 FR 48467, regarding New Source Review, and 74 FR 48480, regarding Flexible Permits), EPA stated concerns about notice requirements for flexible permits. EPA specifically stated that, for initial issuance of a flexible permit to establish a minor NSR applicability cap or an increase in a flexible permit cap, the rules do not require

30-day notice and comment on information submitted by the owner or operator and the agency's analysis of the effect of the permit on ambient air quality, including the agency's proposed approval or disapproval as required by 40 CFR §51.161. Flexible permits applications, like other minor NSR applications, are subject to publication of NAPD with the adoption of the amendments to the rules in Chapter 39. EPA also commented that where PSD and nonattainment permit terms and conditions are modified or eliminated when the permit is incorporated into a flexible permit, the rules do not require public participation consistent with 40 CFR §51.161 and §51.166(q). The adopted changes in this rulemaking clarify the applicable notice requirements for applications for both new permits and amendments of flexible permits.

In adopted new §39.402(a)(6), proposed as §39.402(a)(3), the commission relocates text regarding renewal applications from §39.403(b).

In adopted new §39.402(a)(7), proposed as §39.402(a)(4), the commission relocates text and corrects the reference to Subchapter C to the correct Subchapter E for hazardous air pollutants (HAPs) from §39.403(b)(9), which states that applications for hazardous air pollutant permits are subject to the notice requirements of Chapter 39, Subchapters H and K.

In adopted new §39.402(a)(8), proposed as §39.402(a)(5), applications for the establishment or renewal of, or an increase in, a PAL permit under Chapter 116 are subject to the requirements of Chapter 39, Subchapters H and K. In the Public Participation Notice (73 *Federal Register* at 72012), EPA commented that for PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 CFR §51.160 and §51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a

PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR §51.165(f)(5) and (11) and §51.166(w)(5) and (11).

In addition, in two notices published on September 23, 2009, in the *Federal Register* (74 FR 48467, regarding NSR, and 74 FR 48420, regarding Flexible Permits), EPA stated that the commission's rules for PAL permit applications were deficient, specifically because the rules do not include a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR §51.165(f)(5) and (11) and §51.166(w)(5) and (11). EPA also commented that the rule applicability section in §39.403 does not include PALs, despite the cross-reference to Chapter 39 in §116.194. In response, the commission adopts new subsection (a)(8), which adds PAL applications to the list of types of applications subject to notice and clarified the public participation requirements for these permits. Specifically, applications for establishment or renewal of, or an increase in, a PAL permit is required to comply with the requirements in Chapter 39. The rule amendments address these comments by EPA.

In adopted new §39.402(a)(9), proposed as §39.402(a)(6), the commission relocates text regarding multiple plant permit (MPP) applications from §39.403(b)(13).

In adopted new §39.402(a)(10), proposed as §39.402(a)(7), the commission relocates applicability for Future Gen permit applications from existing §39.404(b)(2). That section is adopted for repeal.

In adopted new §39.402(a)(11), proposed as §39.402(a)(8), the commission has relocated and updated the text of §39.403(b)(10) and updated the citation to the current type of authorization that is available for concrete batch plants that are subject to the public participation requirements in THSC, §382.056.

In adopted new §39.402(a)(12), proposed as §39.402(a)(9), applications for change of location and relocation of portable facilities are subject to certain notice requirements of Subchapters H and K. Proposed new §39.402(a)(9) codified existing commission guidance and practice on notice requirements for the change of location of portable facilities pursuant to THSC, §382.056(r) (*See* "Guidance Memo for the Relocations and Change of Locations of Portable Facilities," September 10, 2008, from Richard Hyde, P.E., Director, TCEQ Air Permits Division to Air Permits Staff, Field Operations Staff, and Interested Applicants, which can be found at *http://www.tceq.state.tx.us/assets/public/permitting/air/memos/portable_memo_9_10_08.pdf*). Since proposal of this section, the commission adopted §116.20 and §116.178 regarding changes of location of portable facilities (February 26, 2010, issue of the *Texas Register* (35 *TexReg* 1749)), and the rule text is revised to conform to the text of those new rules. In that rulemaking, the commission adopted new §116.20, Portable Facilities Definitions. It defines "change of location" as "{t}he process of gaining approval and moving a permitted facility and associated sources to a new location in which public notice is required, in accordance with the requirements of Chapter 39 of this title (relating to Public Notice)." In new §116.178, the appropriate regional office may approve the relocation of a portable facility if the applicant's permit contains current special conditions defining the approval process to move. Approval for relocation is based on one of the following conditions: (1) a permitted portable facility and associated equipment are moving to a site for support of a public works project in which the proposed site is located in or contiguous to the right-of-way of the public works project; or (2) a portable facility is moving to a site in which a portable facility has been located at the site at any time during the previous two years and the site was subject to public notice as required under Chapter 39 of this title (relating to Public Notice), the Air Quality Standard Permit for Concrete Batch Plants, or the concrete batch plant permits by rule.

Therefore, for approval of change of location of a portable facility, the applicant is subject to public notice requirements. In addition, to obtain approval of a relocation of a portable facility, the applicant may also be subject to public notice requirements if the new site was not subject to public notice in the previous two years; in that circumstance, the applicant is subject to the requirements in Chapter 39, Subchapters H and K.

In the Public Participation Notice, EPA objected to the inclusion of statutory references in the rules. Although EPA has approved other states' rules that include statutory text, the commission agreed that the references are generally not necessary here and as such has included them only where absolutely necessary. This is also consistent with the rules that EPA has already approved as part of the Texas SIP, namely §§116.130 - 116.137.

The commission adopts new §39.402(b), that provides that unless otherwise stated in this chapter, applications for air quality permits and permit amendments declared administratively complete on or after September 1, 1999 and before the effective date of this section, are governed by the rules in Chapter 39, Subchapters H and K as they existed immediately before the effective date of this section, and that those rules are continued in effect for that purpose. Prior to this rulemaking, the applicability text, adopted in 1999, was found in §39.402 and §39.403(a) and (b), which are revised to exclude air quality applications due to the repeal of existing §39.402 and the adoption of new §39.402 in this rulemaking.

The commission adopts new §39.402(c), which relocates text from existing §39.403(c)(4) - (6). This section states that applications for federal operating permits and standard permits (other than those

specified in new §39.402(a)(11)), and registrations for permits by rule are not subject to the requirements of Chapter 39, Subchapters H and K.

Section 39.403, Applicability

The commission adopts (a), (a)(1), and (b) to segregate references to Subchapter K.

In subsection (b), the commission adopts the deletion of the types of applications subject to notice requirements in Chapter 39, Subchapters H and K previously listed in §39.403(b)(8) - (13). Except for Voluntary Emission Reduction Permits (VERPs) and Electric Generating Units (EGUs), the commission is relocating these to adopted new §39.402. VERPS and EGUs have been deleted from the rule because no pending applications remain. The restructuring results in relettering remaining subsection (b)(14) as subsection (b)(8). Existing §39.403(c)(4) - (6) is adopted to be relocated to adopted new §39.402(c)(1) - (3), and the subsequent paragraphs are adopted as subsection (c)(4) - (12).

Existing §39.403(d), which is adopted for repeal, refers to types of permits no longer issued by the commission, including VERPs, EGUs, and MPPs for which applications were filed before September 1, 2001. Therefore, it is appropriate for the commission to omit this outdated language from the rule. Existing subsection (e) is adopted to be relettered as subsection (d). Existing subsection (f) is adopted to be relocated to adopted new §39.402(a)(10).

Section 39.405, General Notice Provisions

The commission adopts several amendments to §39.405 for the purpose of segregating requirements for air quality permit applications from the other types of applications that are subject to this section. As

discussed earlier, the commission is eliminating references to other programs that are not subject to the requirements of the FCAA, and therefore, cannot be approved as a revision to the SIP. The first adopted change is to segregate out references to Subchapter K in subsections (a) and (e). The commission adopts to relocate the existing requirements regarding failure to publish notice in subsection (a) and the notice and affidavit requirements of subsection (e) to adopted subsections (i) and (j). As part of this restructuring, the commission adopts to relocate the last sentence of subsection (f)(1) to adopted subsection (f)(3).

In addition, in §39.405(g)(3), the commission adds text that provides that for certain air quality permit applications that the applicant shall make available the executive director's draft permit, preliminary determination summary, and to the air quality analysis, beginning on the first day of newspaper notice required by in §39.419 of this title. The reference to in §39.419 is added in response to comment to ensure clarity as to applicable time period. Finally, the commission adopts rule text that was revised from proposal to provide that the rule changes are applicable to applications filed on or after the effective date of the rule amendments, rather than as of July 1, 2010.

The commission adopts amendments to subsection (h)(1) by segregating air quality applications from other applications by splitting paragraph (1) into adopted subparagraphs (A) and (B).

The commission also adopts to update the cross-reference in §39.405(h)(2)(C). Effective September 17, 2007, the Texas Education Agency amended 19 TAC §89.1205 by deleting subsection (g) regarding bilingual education program exceptions. The cross-reference updates the new location for this information, which was moved to new 19 TAC §89.1207.

In §39.405(i), the commission updates from proposal the cross-reference to subsection (j) from proposed subsection (e).

Section 39.409, Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing or Notice and Comment Hearing

The commission adopts the amendment to §39.409 to update the title of the reference to §55.152.

Section 39.411, Text of Public Notice

The commission adopts the amendment that moves the air requirements located in existing subsections (a) - (d) to adopted subsections (e) - (h). The commission adopts to add a statement in subsection (b) to indicate that the requirements of that section for air quality permits are in subsections (e) - (h). In subsection (b), paragraph (10) is deleted, and the remaining paragraphs are renumbered as paragraphs (10) - (13), and the cross-reference to existing subsection (b)(12) in subsection (c)(1) is updated.

The commission adopts to move the requirements for text of public notice listed in existing subsection (b)(1) - (10) to adopted subsection (e)(1) - (11) and (13) - (14), with additional adopted text. Specifically, the commission adopts to specify in subsection (e)(4)(A)(i) that the executive director will respond to all comments submitted regarding PSD, nonattainment, and PAL permit applications when those applications are filed on or after the effective date of this section. In addition, the commission adopts to specify in subsection (e)(4)(A)(ii) that the executive director will respond to all comments submitted regarding HAPs permit applications when those applications are filed on or after the effective date of this section. In adopted subsection (e)(5), the commission adds that, where applicable, the notice should include a statement that a public meeting will be held by the executive director if requested by an

interested person for an application filed on or after the effective date of this section for a PSD, nonattainment, PAL, or hazardous air pollutant permit.

In addition, the commission adopts rule text in §39.411(e)(4)(A)(i) and (ii) and (e)(5) that was revised from proposal to provide that the rule changes are applicable to applications filed on or after the effective date of the rule amendments, rather than as of July 1, 2010.

In adopted subsection (e)(11)(A), the commission prescribes notice text regarding the period for which a contested case hearing can be requested for applications for PSD and nonattainment permits, hazardous air pollutant permits, permit renewals, as well as all other applications which are subject to a contested case hearing. In subsection (e)(11)(A)(i), (ii), and (iv) and (E) and (F) text was added to clarify these subparagraphs, and in (iii), the text was corrected from proposal to add the words "Receipt of" to ensure the correct notice reference is included.

In adopted subsection (e)(11), subparagraph (F) is added to include the requirement to include in text of the NORI (first notice), that for minor NSR applications for which no hearing requests are received, or are received and withdrawn, then the applicant will publish the NAPD (second notice) that provides an opportunity to submit public comment and request a public meeting. Adopted subsection (e)(12) requires text regarding requesting a public meeting or notice and comment hearing, as applicable, for certain applications.

The commission adopts subsection (f), which provides that the chief clerk shall mail notice to the persons listed in §39.602, and that text of notice must include the information listed in paragraphs (1) - (7). This

includes a summary and public location of the executive director's preliminary decision, preliminary determination summary, and air quality analysis, as well as the location of the application. The commission also adopts requirements for text regarding public comment procedures, the deadline for filing comments, or requesting a public meeting. It also states that for PSD applications, the text must include the degree of increment consumption that is expected from the source or modification. This addresses EPA's comment in the Public Participation Notice that for a new or modified source subject to PSD, the revised rules do not require that the public notice of a PSD permit contain the degree of increment consumption that is expected from the source or modification as required by 40 CFR §51.166(q)(2)(iii) and Clean Air Act, §165(a)(2).

At adoption, the commission adds the requirements in §39.411(f)(3) that the public location for placement of the permit application, and the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis must have internet access.

In the Public Participation Notice, and in comments submitted as part of this rulemaking, EPA expressed concern about the ability to timely determine the beginning and ending dates of the comment period. Existing text, which the commission now adopts to locate in §39.411(f)(5), requires that the text of the notice state the deadline to file comments. Comments are timely if received at any time after the application is filed with the TCEQ until the close of the comment period, which is never less than 30 days from date of initial publication. The TCEQ includes text of notice on its Web site from the time it is provided to applicants for publication, and makes every effort to include the actual date of the end of the comment period in its Web database for contested items. Additionally, both EPA and the general public can call the TCEQ with questions about the close of the comment period. The commission's current and

adopted rules meet existing federal requirements, and any infrequent or non-existing delays due to mailing are not a reasonable or supportable basis for disapproval of TCEQ's rules. At adoption, the commission adds the last sentence to §39.411(f)(5) which provides that the notice should include a statement that the comment period will be for at least 30 days following publication of the NAPD.

New §39.411(f)(7) is added which requires the text of the notice to state that if the executive director prepares an RTC, the chief clerk will make it available on the commission's Web site.

Adopted §39.411(f)(8)(D), proposed as (f)(7)(D), also specifies that the notice text should include a statement that the executive director will hold a public meeting at the request of any interested person for PSD and Nonattainment permit applications. This, together with the concurrently adopted amendment to §55.154 is in response to EPA's comment in the Public Participation Notice comment that, for a new or modified source subject to PSD, the revised rules do not require the commission to provide an opportunity for a public hearing for interested persons to appear and submit written or oral comment on the air quality impact of the source, alternatives to it, the control technology required, and appropriate considerations and to provide notice of the opportunity for a public hearing, as required by 40 CFR §51.166(q)(2)(v) and Clean Air Act, §165(a)(2). In addition, the commission adopts rule text in §39.411(f)(8), which has been revised from proposal to provide that the rule changes are applicable on the effective date of the rule amendments, rather than as of July 1, 2010.

New §39.411(f)(8)(E) is added at adoption to ensure that for PSD and nonattainment permit applications, the text of the notice will include a statement that the executive director's draft permit and preliminary

decision, preliminary determination summary, and air quality analysis are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision; New §39.411(f)(9) is similar to (f)(8), and is adopted to segregate the requirements for hazardous air pollutant permit applications.

Adopted subsection (g) specifies text for a notice of public meeting, and includes a brief description of the public comment procedures. At adoption, the commission adopts rule text in subsection (g) that was revised from proposal to provide that the rule changes are applicable to applications filed on or after the effective date of the rule amendments, rather than as of July 1, 2010. Further, the commission revised subsection (g)(1) from proposal to include a reference to §39.411(e)(15), which provides that notice of a public meeting may include any additional information required by the executive director or needed to satisfy federal public notice requirements. Finally, text is added to (g)(3) to ensure that the all applicable documents are listed for which comment can be made.

Adopted subsection (h) specifies text of a notice for a contested case hearing.

Section 39.418, Notice of Receipt of Application and Intent to Obtain Permit

The commission adopts the amendment to §39.418(b)(3), which relocates the text from §39.418(b)(4) and states that the notice must include the applicable information required by §39.411(b). New §39.418(c), relocates text from §39.418(b)(3), by segregating the requirements for air permits that are subject to the requirement to publish the NORI. The change allows the commission to submit adopted subsections (a), (b)(2)(A), and (c) as revisions to the SIP. In addition, at adoption the commission clarified that this section does not apply to applications for plant-wide applicability permits.

Section 39.419, Notice of Application and Preliminary Decision

The commission adopts the amendment to §39.419 by restructuring subsection (e) to require publication of the NAPD for all air quality permit applications, except for applications for renewals of air quality permits for which there is no increase in emissions or change in character of emissions, and for which the applicant's compliance history is not rated "poor" under the commission's compliance history rules. Prior to this amendment, the rule listed which applications are not required to publish this notice. The commission makes this change to add this requirement for certain applicants who currently are not subject to this requirement, and to improve readability and understanding of the rule. In addition, the text has been revised from proposal to provide that the rule changes are applicable to applications filed on or after the effective date of the rule amendments, rather than as of July 1, 2010.

The expansion of the scope of which applications are subject to this requirement is based on comment from EPA. In its Public Participation Notice, EPA commented that under §39.419(e), for new or modified minor NSR sources or minor modifications at major sources, the rules do not require public notice and the opportunity for comment on the state's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval, as required by 40 CFR §51.161(a) and (b), unless a contested case hearing is requested and not withdrawn after notice of application and intent to obtain a permit is published. The adopted change to the rule no longer excludes applicants whose applications for new or modified minor NSR sources which are not subject to a request for a contested case hearing during the NORI comment period.

In the Public Participation Notice, EPA commented that under §39.419(e)(1)(C), for any amendment, modification, or renewal of a major or minor source which require a permit application, the rules do not require public notice and the opportunity for comment on the state's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval, as required by 40 CFR §51.161(a) and (b), if the amendment, modification, or renewal 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 that are unresolved and that 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. At adoption, §39.419(e) is amended to add text that requires that after technical review is complete, the executive director shall file the executive director's draft permit and preliminary decision, and, where applicable the preliminary determination summary and air quality analysis, with the chief clerk and the chief clerk shall post these on the commission's Web site.

The commission is not adopting any changes to the rules in response to this comment with regard to renewal applications for which there is no increase in allowable emissions. The executive director may, however, require such applications to publish NAPD if the application involves a facility for which the applicant has a poor compliance history. There are no requirements for renewal of permit under the EPA's general permit rules, and therefore, there are no accompanying notice requirements. Further, the commission is prohibited by THSC, §382.056(g) from seeking comment for renewal applications for which there is no increase in allowable emissions beyond the comment period for NORI as required by §39.418. Further, the commissions's existing rules do not require publication of NAPD for any

amendment or modification application for which there is no increase in allowable emissions and no new air contaminants not previously emitted.

Section 39.420, Transmittal of the Executive Director's Response to Comments and Decision

Adopted §39.420 segregates certain requirements for air quality permit applications by amending subsection (a) to exclude those applications from the requirements of that subsection, which concerns the transmittal of the executive director's response to comments. Similar requirements for air quality applications are in adopted subsections (c) and (d). Existing subsection (c) is adopted to be relettered as subsection (e), and the commission adopts to delete references to permit applications for which the commission no longer issues permits, specifically VERPs, EGUs, and existing facility permits.

The commission adopts subsection (c)(1)(D) to add text, which currently exists in §55.156(d), that must be included regarding instructions for requesting a contested case hearing for certain types of permit applications. The text of §39.420(c)(1)(D) is revised since proposal. Proposed §39.420(c)(1)(D) is restructured to ensure that the reference to hazardous air permit applications is segregated because it is not submitted as part of the SIP revision. In addition, subclauses (I) and (II) separate the references to rules regarding permit applications filed under Chapter 116, Subchapter B and those which are subject to Chapter 116, Subchapter G. As discussed elsewhere, this is because EPA is specifically reviewing the rules regarding the commission's flexible permit program, and because the commission is adopting rules changing the requirement to publish NAPD for minor sources, but not changing the process for requesting a contested case hearing for minor sources.

The commission adopts the amendment to §39.420(c) by adding paragraph (2) to address EPA's rule in 40 CFR §51.166(q)(2)(vi) and (viii), which requires the commission to make available comments and the final determination on the application for public inspection in the same locations where the reviewing preconstruction information was made available. The commission interprets this as a requirement that the RTC, which is a summary of the comments submitted on an application and the agency's response to those comments, and the issued permit, be made available in the local area. The commission adopts, in §39.420(c)(2) requirements to make available all RTCs on its Web site, and also requires the draft permit PDS, and air quality analysis be electronically available for PSD and Nonattainment permits. The posting of RTCs was established by the commission in January 2010. This rule change is in addition to its long-standing practices of maintaining a copy of the final permit at the commission's headquarters in Austin and at the appropriate regional offices, and, as required by rule, by mailing a copy of the RTC to all commenters, as well as any other interested persons who have asked to be included on a mailing list for a particular application. This rule change not only satisfies but exceeds the federal rule, and thus is at least as stringent. Concurrently, the commission is adopting similar rule amendments regarding RTCs in §55.156(g).

The commission adopts the re-lettering of existing subsection (c)(3) - (5) as subsection (e)(1) - (3). The commission had proposed repealing existing subsection (c)(3), but it is retained in this adoption as (e)(1); this is because the commission is retaining the existing scheme for which minor NSR applications are subject to contested case hearing. Adopted (e)(2) is amended at adoption to add clarifying language. Adopted subsection (e)(3) includes the statutory text regarding the authorization for the commission's compliance history requirements. Existing subsections (d) - (f) are re-lettered as subsections (f) - (h).

Section 39.501, Application for Municipal Solid Waste Permit

The commission adopts the amendment to §39.501(c)(2)(A) to update the cross-reference to §39.411(b)(1) - (9), (11), and (12) as §39.411(b)(1) - (11).

Section 39.551, Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge

The commission adopts the amendment to §39.551 to update the cross-reference to §39.411(b)(12) throughout this section as §39.411(b)(11).

Subchapter K, Public Notice of Air Quality Applications

The commission adopts the amendment to the title of Subchapter K to add the word "Permit," such that the new title will be Public Notice of Air Quality Permit Applications. This change is to ensure consistency with rule text regarding air quality permit applications in Chapter 39, Subchapters H and K.

Section 39.601, Applicability

The commission adopts to add text for consistency with other amendments in this rulemaking. Specifically, the commission is revising the references of "air applications" to "air quality permit applications."

Section 39.602, Mailed Notice

The commission adopts subsection (a)(1) - (4) that lists the persons to whom mailed notice must be provided that were previously included only by cross-reference to §39.413.

Section 39.603, Newspaper Notice

The commission adopts to add language to subsection (a) to clarify that the NORI under §39.418 is not required for PAL permit applications. The commission also adopts to update cross-references in subsections (a), (c)(1), and (e) that is based on this rulemaking.

In the Public Participation Notice, EPA commented that the existing SIP has no provision for alternative public notice for small businesses, and that the provision in §39.603(e)(1)(A), now located in §39.603(d), is a relaxation of the SIP. Specifically, the rule reviewed by EPA referred to a definition of "small business stationary source" in THSC, §382.0365. Since that rule was submitted to EPA, the TCAA has been revised. THSC, §382.056(a) now requires that the commission, by rule, shall prescribe alternative procedures for publication of newspaper notice if the applicant is both a small business stationary source as defined in TWC, §5.135 and will not have a significant effect on air quality. TWC, §5.135 establishes the commission's small business compliance assistance program as required by the FCAA, and it incorporates the definition of "small business stationary source" in FCAA, §507(c). The statute also requires that the alternative procedures must be cost-effective while ensuring adequate notice.

To implement this, the commission has adopted §39.602(d). It defines applicable small businesses as those meeting the definition in TWC, §5.135, and adds that the determination of whether the applicant's site is significant is based on the emission limits in §106.4(a), which is part of the Texas SIP. This subsection waives only one notice requirement, which is the newspaper display notice required by §39.603(c)(2). The primary purpose of this notice is to direct newspaper readers to the full notice in the public notice section of the newspaper. Therefore, waiver of this requirement does not diminish notice of detailed information regarding the application and the public participation procedures, while achieving

the statutory requirement to adopt a cost-effective procedure. The display notice requirement is a procedural rule that has no counterpart in federal rules. The commission's adoption of this additional procedural requirement as revised will not interfere with the requirement for the commission to attain and maintain the national ambient air quality standards. Therefore, the commission respectfully disagrees that this alternative procedure constitutes a relaxation of the SIP. EPA did not submit a comment regarding the proposed change which is adopted by the commission.

Section 39.604, Sign-Posting

The commission adopts to update a cross-reference in subsection (e) that is based on this rulemaking. The commission adopts to amend §39.604 to update the cross-reference to §39.405(h)(7) in subsection (e) to §39.405(h)(8).

In the Public Participation Notice, EPA commented that it identified two provisions which relax the sign posting requirements in §39.604(c), and asked the commission to demonstrate how this rule is consistent with FCAA, §110(l). EPA has acknowledged that the sign posting requirements, in state rule since 1985, have no federal counterpart and exceed federal requirements. Further, both of the issues raised by EPA relate to text that is already part of a SIP-approved rule (see TCEQ's submission to EPA on August 31, 1993, and July 22, 1998). The text of these two issues is in §116.133, as approved by EPA into the SIP (see 71 *Federal Register* 12285 (March 10, 2006)). However, further discussion may be helpful due to reorganization of the text when it was adopted as new §39.604 in 1999. First, in 1999, the term "thoroughfare" was replaced with "public highway, street or road" in subsection (c) when §39.604 was adopted. As explained in the TCEQ's proposal for this rule change (July 16, 1999 issue of the *Texas Register* (24 *TexReg* 5303, 5309)) and the adoption preamble (September 24, 1999, issue of the *Texas*

Register (24 *TexReg* 8190, 8218)), these changes were made to clarify that a sign is not required to be posted on a waterway based on TCEQ Air Rule Interpretation Memo R6-133.001. The memo addresses the issue of what is meant by the undefined term "thoroughfare." It analyzed Texas law and determined that the term "thoroughfare" means a street or passage through which one can travel, or a street or highway affording an unobstructed exit at each end into another street or passage. Given this interpretation, and the fact that agency staff historically had not considered rivers or any water body a public thoroughfare and therefore no applicant had been required to post a sign on the shore of a river or water body, the new rule included this amended text.

Second, the rulemaking added the last sentence to subsection (c) in new §39.604 which states, "{t}his 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." The sentence that was and is located in subsection (e) of §116.133 was revised to replace the word "thoroughfare" when it was relocated into the §39.604 that was adopted. Section 116.133 is SIP-approved; see 67 *Federal Register* 58709, (September 18, 2002) and 60 *Federal Register* 49781 (September 27, 1995). The relocated sentence incorporates and compliments this clarification and ensures that the property that is the subject of the application has proper signage.

In addition, TCEQ respectfully disagrees that the sign posting rule was further relaxed by the omission of the SIP-approved §116.133(f)(1). The requirement to post signs in an alternate language, even if alternate language newspaper notice publication is waived, remains in the rule at §39.604(e). However, it appears that the version of the rule submitted to EPA in 1999 contained an incorrect cross-reference

(§39.703(d)(5)); this was corrected in a subsequent rulemaking that was not concurrently submitted as a revision to the SIP.

The sign posting rule is a procedural rule that has no counterpart in federal rules. The commission's adoption of this additional procedural requirement as revised will not interfere with the requirement for the commission to attain and maintain the national ambient air quality standards. Therefore, the commission respectfully disagrees that these changes constitute a relaxation of the SIP. EPA did not submit a comment regarding the proposed change which is adopted by the commission.

Section 39.605, Notice to Affected Agencies

The commission adopts the addition of paragraph (1)(D) that requires applicants for a PSD or nonattainment permit under Chapter 116, Subchapter B, filed on or after the effective date of this section, to notify the chief executives of the city and county where the source would be located, and any State or Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the source or modification. This is in response to EPA comment in the Public Participation Notice and comments filed in response to this rulemaking that for a new or modified source subject to PSD, the rules do not require a copy of the public notice of a PSD or nonattainment permit to be sent to state and local air pollution control agencies, the chief executives of the city and county where the source would be located, and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification, as required by 40 CFR §51.166(q)(2)(iv). The commission is addressing this comment by adopting §39.605(1)(D). Because nearby state and local pollution control agencies are already included in rule in subparagraphs (B) and (C), they were not added as part of this rulemaking. In addition, the paragraph is revised from proposal to provide that the rule changes are

applicable to applications filed on or after the effective date of the rule amendments, rather than as of July 1, 2010.

Section 39.606, Alternative Means of Notice for Permits for Grandfathered Facilities

The commission adopts the repeal of this section as it is obsolete.

Section 39.651, Application for Injection Well Permit

The commission adopts the amendment to§39.651(c)(2) to update the cross-reference to §39.411(b)(1) - (9) and (12) as §39.411(b)(1) - (9) and (11).

Section 39.653, Application for Production Area Authorization

The commission adopts the amendment to §39.653(b) to update the cross-reference to §39.411(b)(1) - (9) and (12) as §39.411(b)(1) - (9) and (11).

Section 39.709, Notice of Contested Case Hearing on Application

The commission adopts the amendment to §39.709(c) to update the cross-reference to §39.411(b)(13) and (d) as §39.411(b)(12) and (d).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to

human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted revisions to Chapter 39 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants; instead they amend the notice requirements for applications for air quality permits, which are procedural in nature. The primary purpose of the adopted rulemaking is to correct deficiencies in the public notice requirements of the rules as identified by the EPA in the Public Participation Notice. Correction of these deficiencies is necessary to ensure that the rules can be a federally approved part of the Texas SIP.

The first adopted change is the expansion of the scope of applications that are subject to Notice of Preliminary Decision to all applications for minor NSR applications, except for renewals of air quality permits that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. This includes applications for PALs and flexible permits. In addition, the commission is ensuring that all persons to whom notice must be given, and specific notice content, are specifically set forth in the rules, and the list has been expanded to include the chief executives of the city and county where the source would be located, and any State or Federal Land Manager or Indian Governing Body whose lands may be affected by emissions from the source or modification. Because EPA expressed concern about portions of previously submitted rules applying to media other than air, or including rules that cite cross-references that are not submitted as SIP revisions, the rules are revised to segregate certain requirements for air quality permits where necessary for SIP approval. The adopted rulemaking also requires applicants for PSD and nonattainment air quality permits to make available for public comment the executive director's air quality analysis of the permit. Finally,

the adopted rulemaking removes obsolete references from the rules for VERPs, FGUs, and MPPs for which applications were filed before September 1, 2001. Although the expansion of publication requirements may place additional financial requirements on the regulated community, the rulemaking action does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the adopted revisions to Chapter 39 were developed to correct deficiencies in the public notice requirements for air quality permit applications identified by EPA in the Public Participation Notice. This adopted rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the FCAA, and authorized under THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.0291, 382.040, 382.051, 382.05101, 382.0512, 382.0515, 382.0516, 382.0518, 382.05186, 382.05192, 382.05194, 382.05195, 382.05197, 382.05199, 382.055, 382.056, 382.057 and 382.058; TWC Chapter 5, Subchapter M; Texas Government Code §§2001.004, 2001.006, and 2001.142; and FCAA, 42 USC, §§7401 *et seq*., as well as TWC, §§5.102, 5.103 and 5.105; TWC,

§5.1733, Chapter 5, Subchapter M; TWC, Chapter 26; the Injection Well Act, TWC, Chapter 27; the Solid Waste Disposal Act, THSC, Chapter 361 and the Texas Radiation Control Act, THSC, Chapter 401.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted revisions to Chapter 39 amend the procedural requirements for applications for air quality permits. The primary purpose of the adopted rulemaking is to correct deficiencies in the public notice requirements of the rules as identified by the EPA in the Public Participation Notice. Correction of these deficiencies is necessary to ensure that the rules can be a federally approved part of the Texas SIP. Promulgation and enforcement of the adopted rulemaking will not burden private real property. The adopted rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Although the adopted rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do partially fulfill a federal mandate under 42 USC, §7410. Consequently, the exemption that applies to these adopted rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The adopted rules update procedural rules that govern the submittal of air quality permit applications. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The adopted rules will not require any changes to outstanding federal operating permits.

PUBLIC COMMENT

The commission held a public hearing on January 25, 2010. The hearing was for concurrent rulemakings regarding Chapters 39, 55, 116 and 60, as discussed earlier. Comments made at the hearing as well as the written comments made during the comment period were regarding proposed rules in one or more of the four chapters. At the hearing the commission received oral comments from Kelly Haragan on behalf of Citizens for Environmental Justice. The comment period closed on February 16, 2010.

Written comments were received from the Association of Electric Companies of Texas, Inc., (AECT); United States Environmental Protection Agency – Region 6 (EPA); Harris County Public Health & Environmental Services, Environmental Public Health Division (HCPHES); Office of Public Interest Counsel of the TCEQ (OPIC); RPS; Texas Aggregates & Concrete Association (TACA); Texas Chemical Council (TCC); Texas Cotton Ginners' Association (TCGA); Texas Industry Project (TIP); Texas Oil and Gas Accountability Project (TOGAP); and Zephyr Environmental Corporation (Zephyr). Comments were also received from the University of Texas School of Law Environmental Clinic on behalf of the following environmental groups (Environmental Groups I): Citizens for Environmental Justice, Texas Environmental Justice Advocacy Services, Galveston Houston Association for Smog Prevention, Environmental Defense Fund, Public Citizen's Texas Office, Sustainable Energy and Economic Development Coalition, Lone Star Chapter Sierra Club, Environmental Integrity Project, KIDS for Clean Air, Citizens Opposed to Power Plants (COPPS) for Clean Air, Multi-County Coalition, Robertson County: Our Land, Our Lives, Texas Protecting Our Water, Environment and Resources (TPOWER). Written comments were also submitted on behalf of the following environmental groups (Environmental

Groups II) to supplement the comments submitted by Environmental Groups I: KIDS for Clean Air; Sustainable Energy and Economic Development (SEED) Coalition; Robertson County: Our Land, Our Lives; COPPs for Clean Air; Multi-County Coalition; TPOWER. Comments were also received from over 1,000 individuals who submitted a form letter; more than 70 of whom provided additional comments.

RESPONSE TO COMMENTS

General support

CEJ, Environmental Groups I, and Environmental Groups II supported efforts to improve transparency and public access to permitting process. HCPHES supported the process to address public comment and participation, and supported strengthening it to allow Texas citizens to meaningfully participate in the process. TCC supported the proposed revisions to the public participation rules. An individual thanked the commission for protecting and ensuring that our great state will be enjoyed by generations to come; and that we can set an example for the rest of the nation and Washington. OPIC commented that it supported change which will allow the public to conduct a more informed review of the commission's analysis of the application and to provide more constructive comments, and that it agreed with the concept of allowing the public to comment following the technical review of all NSR applications, regardless of whether someone filed a contested case hearing request soon after the application was filed.

The commission appreciates the support.

AECT stated that it is critical that the commission obtain SIP approval for the public participation rules, noting that while the existing rules are, overall, more stringent than EPA's rules, EPA's concerns must be

addressed. TACA and TCC stated that the existing rules meet or exceed federal public participations requirements, and that the commission's public participation program, which includes the very stringent contested case hearing process, is one of the most robust in the nation. AECT and TCC stated that the proposed rules adequately address EPA's concerns and are approvable by EPA. One individual commented in support of the rule stating that it will bring the agency into compliance with EPA guidelines and protect Texas citizens from unwanted additional intrusion into state regulations.

Based on the Public Participation Notice, the commission has determined that to meet the minimum requirements of federal law for public participation for air quality permit applications, amendments to the established rules implementing the various state legislation as described, are necessary.

Public Participation Process

AECT opposed any revisions beyond what was proposed because it would inhibit if not effectively prohibit, timely permitting of new and modified facilities which would make it more difficult for the regulated community to compete in the national and international markets and negatively impact the Texas economy. CEJ and Environmental Groups I commented that the proposed rule changes did not go far enough, and that more comprehensive changes to the rules should be made. The Environmental Groups I further commented that the proposed rules fail to meet federal minimum public participation requirements, and stated that the proposed rules fail to create a process that encourages meaningful public participation.

As discussed elsewhere, changes have been made to the rules to address issues that relate to EPA approvability and to meet federal public participation requirements and the requirements of the existing Texas SIP and Texas law. With these changes, public notice and opportunity for participation regarding NSR permit applications not only meets Texas statutory requirements, but also meets or exceeds the minimum federal requirements.

Zephyr recommended that the commission be very judicious and submit to EPA as revisions to the SIP only those rules that are absolutely necessary to satisfy federal requirements. Specifically, Zephyr stated that the requirement for the NORI appears to be a state-only requirement that should be maintained only under the authority of the Texas legislature. At a minimum, the commission should not submit the NORI requirements as part of the SIP.

No changes were made in response to this comment. The opportunity for a contested case hearing for minor NSR is already in the Texas SIP. These rules do not change the relationship between publication of the NORI and the opportunity to request a contested case hearing for minor NSR permit applications. The commission recognizes that federal rules do not require contested case hearings, but because it is part of the SIP, it is a federal requirement. As discussed in the commission's responses to this rulemaking project, the commission is expanding public notice only to the extent absolutely necessary to meet minimum federal requirements for SIP approval.

One individual commented by urging the commission to put the public back into public policy making. One individual urged the commission to just say "yes" to open government. Another commenter said that the public wants the TCEQ to protect its rights to clean air and water and that it does not want to be left

out of the process. One individual commented that it is time that the people who live in Texas have a voice in protecting their families. One individual commented that the commission must take appropriate responsibility for ensuring the individual's ability to participate in the commission's decision making process. One individual commented that because Texas has the dirtiest air in the country, actions taken by the TCEQ have real and direct consequences for the health and welfare of their family and community. This individual went on to say that it is their belief that if there was more public participation, businesses in Texas would not be allowed to pollute as they have been in the past and that every day they see air quality deteriorate and nothing is being done about it and even worse, polluting permits continue to be granted. Another individual commented that as a degreed biologist, he is appalled at the laxity with which decisions by the commission are made regarding one of the most important issues facing our state.

The commission made no changes in response to these comments. The public is involved in policy making through the rulemaking process and at various stakeholder meetings where public comment is taken. The commission also responds that its process is open and transparent. Its decisions are based upon public comment, testimony from experts and the public, and application of applicable agency rules. Those rules are adopted pursuant to the rulemaking process which involves the taking of public comment and typically includes a public hearing for the public to submit oral or written comments.

TOGAP and an individual supported the rule changes that provide for additional notice, and encouraged the commission and EPA to increase enforcement of both existing and amended rules because the lack of adequate enforcement has detrimental impacts on the quality of the life and health of the public.

The commission appreciates the support. The commission has not experienced applicants failing to comply with notice requirements such that enforcement action is necessary. In addition, although the commission has the authority to publish notice if an applicant fails to do so, the commission has not invoked this authority for any air quality permit applications. This is because compliance with the public participation rules is a pre-requisite to permit issuance.

One commenter stated that it is easy to let polluting industries and car manufacturers off the hook for meeting their responsibilities to invest in clean emissions because the impacts of pollution are not evident right away. Another commenter questioned where is the strengthening of monitoring, enforcement and penalties and further stated that permits mean nothing if there is no means to ensure compliance.

The commission has made no changes in response to these comments. The commission respectfully disagrees with the commenter that it lets polluting industries "off the hook" for any reason. To the contrary, the commission's enforcement program is very vigorous. The enforcement staff is actively engaged in conducting site investigations and following up on complaints. The commission regularly issues orders requiring technical improvements and assessing penalties for violations of its rules. As discussed elsewhere in this preamble, these rule changes relate to public participation for the air permitting program; therefore the specific issues raised in these comments are outside the scope of this rulemaking.

One individual commented that the commission should allow everyone who lives and breathes the right to participate in air permitting. One commenter stated that because the public breathes the air, the public should have some say in how air permits are granted. One individual commented that they will be writing

the EPA. One person commented that they demand greater say in how permits that affect their health are disbursed. One commenter stated that public participation for air quality permit applications for new and modified sources is necessary to protect their family's health, comfort, and wealth of the town from the greed and personal interest of some officials. This same commenter stated that public participation should not be simply ignored as it was during a particular council meeting; the commenter stated that a certain project was unhealthy and immoral for the Town of Flower Mound and Denton County and that future water supply is a great concern**.** One individual commented that real, accessible public participation is a vital element in working to protect and improve our air quality. Another individual commented that the commission should allow the citizens to know what is going on in their backyard and to comment. One commenter stated that comments should be allowed from anyone that is likely affected. One commenter stated that it does not make sense that only local communities' comments carry weight when commenting on proposed coal plants. One person commented that they also require a transparent process that includes accessible channels for input by ordinary citizens, not just lobbyists and industry. Another commenter stated that public participation could help our state in many ways through decision making and also through public confidence in decisions made regarding the environment and that citizen participation is one part to the solution, that the commission must be ready to listen to citizens and not twist facts and rulings to favor industry at the expense of the public. One person commented that as Executive Director of Environmental Stewardship, an environmental advocacy organization in Texas, they want to add their appeal to that of the Lone Star Chapter of the Sierra Club that the air permitting system in Texas be made more transparent and available to public participation. This commenter stated that often the public is only given lip-service as it attempts to be a constructive part of the process. This commenter further stated that it is important that the public's interest be fairly represented in these proceedings.

The commission has made no changes in response to these comments. While the commenter's remarks regarding a water supply matter at a council meeting are beyond the scope of this rulemaking, the commission agrees that public participation is an important part of the decision making process and should not be ignored. The commission agrees that everyone who lives and breathes has the right to make comments to EPA and the commission regarding air quality permit applications and attend any public meetings. The commission's public participation process provides many opportunities for input by the public, including written public comment, oral comments at public meetings and, in certain cases, participation in contested case hearings. The standards for being able to participate in contested case hearings are established by the legislature and are set forth in TWC, §5.115, and further described in commission rules. The commission respectfully disagrees with the commenter that its rulings twist facts and favor industry over the public. The commission bases its decisions on the facts of each particular case and the technical and legal requirements applicable to that application. The technical requirements are adopted as rules in an established process that includes the opportunity for public comment. In addition to multiple opportunities for individual citizens to participate, citizens can contact the Office of Public Assistance (OPA) which answers questions about pending TCEQ permits. OPA explains the permitting process and opportunities for public participation, and conducts public meetings around the state on permit applications. The office includes an environmental equity program that helps minority and low-income communities work toward solutions to problems with industries and facilities near their homes. Additionally, the public can contact the Office of Public Interest Counsel which was created by the legislature to ensure that the public's interest is represented in issues considered by the commission. The office does not formally represent individuals at commission proceedings. However, citizens who have questions about the legal aspects of dealing with the

TCEQ, its hearing process, and its rules can obtain help from this office. Assistance is available to anyone who is affected by a particular permit application or other agency authorization. The staff of the Public Interest Counsel also assists people with questions about enforcement proceedings.

Individuals commented that as the state with the largest number of large industrial air pollutions sources, it is particularly important that Texas have a strong public participation program. One commented that currently, Texas' program is broken, making it very difficult for average people to participate in the process. One commenter stated that the commission should take this opportunity to ensure Texas' air permitting public participation program actually works to encourage public participation. Another commenter stated that they are going to participate whether allowed or not and that public participation might be a town hall meeting, comments to newspapers, postings to internet, voting, donations, demonstrations, or meetings with business. This commenter encouraged the commission to give Texans the respect they deserve and allow them to voice their opinions regarding events which affect themselves and their families**.** One commenter encouraged the commission to ignore comments from outside sources that only serve to bring havoc to the Texas economy. One individual commented that the commission should allow the public to participate, use the press to notify, and plan hearings on days the public can attend.

The commission has made no changes in response to these comments. **For air permitting matters, the commission receives numerous public comments and hearing requests and significant numbers of persons attend public meetings. In its many years of experience with the process, the commission's position is that the air quality permitting public participation program does encourage public participation. The commission supports the right of the public to voice its opinion**

and the air quality permitting process provides ample opportunity for citizens to participate in matters affecting them and their families. The commission is required by law to consider all relevant comments and respond to all timely comments received in response to a proposed rulemaking. Regarding the suggestion to use the press to notify, the first notice for air applications subject to this rulemaking is required to be published in the newspaper. Additionally, for most of the applications subject to this rulemaking, a second newspaper notice is required. The commission further responds that any member of the public can submit written comments on an application and can provide oral or written comments at public meetings. Public meetings are usually scheduled after normal business hours, specifically to accommodate the public. Finally, the adopted amendments strengthen the air quality permitting public participation process, as discussed in the *OVERVIEW OF THE AMENDMENTS AND RELATED RULEMAKING* section of this preamble.

TOGAP and an individual commented that the commission's lack of stakeholder involvement points out the lack of public participation and involvement in the regulatory process.

Based on EPA's notice and its agreement to take action on the commission's rules, the commission proposed rule changes primarily to address EPA comments. Because these rules have been pending review by EPA for over ten years, the commission wants resolution and clarity as soon as possible. Further, although no stakeholder meetings were held, nor are required, a public hearing was held, and the comment period was open for over two months from the date the commission proposed the rule changes, which allowed adequate time for review and comment.

Environmental Groups II commented that §55.210 appears to contradict the other proposed rules requiring a public meeting (e.g., major and minor NSR permits) because the text of §55.210 states that a case which has been referred to SOAH shall not be subject to the public meeting requirements of §55.154. The rules imply that a public meeting is discretionary when a matter is directly referred regardless of what type of permit application is directly referred.

Section 55.210(c) is open for comment in this rulemaking, and provides that public meetings held under that section are subject to certain procedures, which are outlined in subsection (c)(1) - (6). Section 55.210(c)(1) specifically states that the executive director shall hold a public meeting when required by law.

Other General Comments

Several individual comments related to health issues that the commenter or someone close to them is suffering. One person complained about suffering from eye redness since moving to Dallas from south Texas. Another person said that the issues raised were very personal to them and their family due to asthma, allergy, and health issues and that this is important to the state's economy because businesses would not move to a state that is not responsible regarding health issues. Another person commented that many people with compromised health due to air pollution probably never realize that is the cause. Another person commented that air quality is of the utmost concern to them because they have a brother and daughter-in-law with asthma. Another individual commented that they have a son and grandsons with asthma and that science has long ago established the link between poor air quality and poor health, especially among young children and in recent years, the number of adults developing asthma has also increased dramatically. This commenter's grown son has developed asthma. Another commenter said that

it is of particular interest to the commenter since they suffer from asthma and find it difficult to breathe comfortably some days. This commenter has friends who suffer from either asthma or COPD and states that the lack of air quality affects them tremendously. One commenter said that they work in a nursing home and they see people affected by poor air quality in their facility all the time and that the air permitting actions taken by the TCEQ have real consequences for the health and welfare of the commenter, their family, and community. Another person commented that Houston needs to have cleaner air and that too many people are suffering, including the commenter. One commenter stated that he is a professional biologist and is well aware of the toxic cellular effects of ozone, mercury, benzene and other organics, particulates, CO, and a host of other industrial air pollutants. Another commenter said he is a physician and public health scientist, and are greatly concerned about the impact of air pollution to our health, especially with regard to common medical conditions such as asthma and emphysema. This commenter believes we need strong, coherent, scientifically-based regulatory actions that protect the public's health which will strengthen families' economic means since too much is spent on medical problems. Another commenter stated that changes need to be made to ensure the health of future Texans and that to sacrifice the health of future generations and ensure escalating healthcare costs, while stalling changes in the health insurance industry for the short term benefit of large campaign contributors is appalling and repugnant. One commenter stated that as a child they contracted histoplasmosis which left their lungs scarred and weakened. They urged the commission to help protect the citizens of Texas by affording more protection, rather than less, from polluters and that emission standards need to be made more stringent rather than less so. Another commenter states that they have a family history of asthma and have a hard enough time breathing regularly as is and that they would love the opportunity to have cleaner air. Another commenter states that she is a career-long public health nurse and former member of numerous public health promotion groups, including the Texas Department of State Health Services and

she is very concerned about the permitting issues being considered. Another commenter stated that it is important that the commission does the right thing and that our children need actions that protect their health and well being. Another commenter stated that because her husband has pulmonary disease and she works for a hospice organization, she understands that the air permitting actions taken by the TCEQ have very real consequences for the health and welfare of them, their family, and their community. Another commenter stated that Houston has the fifth worst air quality of any city in the United States and that the Houston-Dallas-San Antonio triangle threatens to become an unbreatheable megapolis like the Los Angeles area. This commenter stated that they feel sorry for people in that area who suffer from the same chronic cough and health problems as people in Calcutta. Another commenter stated that they are a lymphoma cancer survivor and that there is no history of cancer in their family, that they have never smoked and that they believe the cancer was caused by air pollution in Houston. One individual commented that the issue of air quality is very personal to them and their extended family due to asthma, allergy, and COPD health issues. One person commented that they have a heart condition that is impacted by polluted air. One commenter stated that the commission should be aware that it is not only their health but ours and our family's health that is being affected by our decision. The urged the commission to help us work together not against each other for the health and financial benefit of all. One individual commented that they have just moved from Hawaii where clean air is almost a given. He stated that his wife suffers from asthma, so what they breathe is more important than normal. One person commented that they suffer from allergies and asthma and the TCEQ over the last two decades had almost forced them to leave the Dallas area and that they know in a personal way that the air permitting actions taken by the TCEQ have real consequences.

The commission has made no changes in response to these comments. The commission appreciates the efforts of these commenters to share these important health concerns and takes very seriously its responsibilities regarding air quality and public health. In THSC, §382.002, the commission is charged by the legislature to safeguard the state's air resources consistent with the protection of public health. The commission is also required by THSC, §382.0518(b)(2) to ensure when considering whether to grant a permit, that emissions from facilities will meet the intent of the THSC which includes protection of the public's health and physical property.

One commenter stated that morale is low and confidence in TCEQ is lacking. One person commented that the TCEQ has a long way to go to restore their confidence that it works in the best interest of the public and not the oil and gas industry. Another commenter stated that the city and state let industry dominate and pollute. This commenter also stated that it is getting worse by manipulation of power money lobbies and by continued building of coal power plants pushed by Governor Perry and money from developers. One individual commented that with the gas drilling controversy and environmental problems drilling has produced, the state is at risk of serious, permanent damage. One commenter stated that controls on air quality by the agency are not good enough. One commenter states that incompetence of the commission's environmental programs is matched only by the rudeness and total lack of intelligence and integrity of its personnel department. One commenter stated that the TCEQ is supposed to stand for Texas Commission on Environmental Quality not Texas Commission on Environmental Degradation. This commenter encouraged the commission to make sure that what the agency does protects and enhances our environment and does not destroy it. One individual commented that the TCEQ is responsible for this abysmal record that neglects basic health hazards to Texas residents like him who pays taxes that support TCEQ administration in relatively clean Austin. One individual commented that actions such as those

mentioned in the form letter (requiring emission limits to be included in a single permit; 30-day notice of permits and utilizing electronic notice, and placing permits online) would help to restore trust in the agency and be a step toward more transparency. Another commenter stated that the commission's lack of care for the citizens of Texas is blatantly apparent and questioned why the commission holds contested case hearings if the judge's ruling can be ignored by the permitting committee. This commenter also stated that this is proof that the commission just does not care and that money is more important than the health of citizens. One individual commented that they have attended various public meetings held by TCEQ and have been appalled by the attitude of the members, appalled by the underhanded manner of informing the public about these meetings, and in general, disgusted with their performance. This individual commented that the TCEQ needs an overhaul and that at long last it appears that some common sense is on the scene. One commenter stated that they were writing because the time has come for our officials in government to protect the citizens of Texas and that special interests have had way too much influence to the detriment of the common citizen. One commenter stated that it is important that the commission do the right thing, that their children need actions that protect their health and well being. Another commenter stated that as a mother, grandmother, teacher and resident of Houston, she is concerned about TCEQ's policies. Another commenter urged the commission to please do everything in its power to protect and preserve wildlife and resources. Another commenter stated that they are very concerned and alarmed that the TCEQ is making decisions that are not beneficial or safe. Another person commented urged the commission to please be concerned for clean air in Texas. One commenter stated that we need to hold true to the motto: Government of the people, for the people and by the people. This commenter urged the commission to do what is right and ensure that these five provisions set forth in the form letter are included. Another individual commented that Texas' air quality problems did not get here overnight, and they realize that we will not fix them overnight, but that they will not rest while the TCEQ

sits on its haunches and blows smog into once-clean air. One individual commented that now is the time to think seven generations out. They urged the commission to use wisdom and forethought. Another individual commented that Texans have a big problem that is growing larger and exponentially more difficult to handle, and we need to fix it. One person commented that they will continue to fight this environmental deterioration, and the future breakdown of the physical well being of their kids. They further commented that this world is important to them and that it should be to the commission as well. One individual stated that this is so important for the health of all Texans, not to mention the environment. Another commenter stated that as a Texan, they want to be certain that their state authoritative agency is taking every precaution to preserve the best air quality possible for them and others. One commenter stated that from a moral and ethical perspective it is the right thing to do. This commenter stated that they hope the commission will do the right thing now that it has an opportunity to do so. One individual commented that they have to breathe this air and they do not want it polluted. One individual stated that they would love the opportunity to have cleaner air. Another commenter stated that they have tried to participate and felt the deficiencies of the process currently in place. This individual stated that as a citizen, they want to assure that our state makes choices that truly benefit our communities rather than allow greater pollution. One individual commented that it is easy to let polluting industries and car manufacturers off the hook for meeting their responsibilities to invest in clean emissions because the impacts of pollution are not evident right away. They further stated that many people with compromised health due to air pollution probably never realize that is the cause. They urged the commission to do the responsible thing and hold polluters accountable by following the comments set forth in form letter. Another individual commented that the permitting process by the TCEQ to pollute the air affects the health and welfare of the commenter, their family, and community and that this is especially true as we age. One individual commented that they are a long term citizen of Texas who strongly believes the

commission's current polices will have detrimental effect on the world's future and they implored the commission to take action now. One individual stated that emission standards need to be made more stringent rather than less so. One person commented that polluting industries need to pay full price of their operation, rather than discharge health affecting pollutants, reap hefty profits and leave health costs to the taxpayer. Another individual commented that it is their personal opinion that Texas representatives in state and local government represent the worst of the political system in terms of the influence of businesses that contribute to their respective campaigns that are otherwise outright dangerous and unhealthy neighbors to them and their family. This individual further commented that changes need to be made to ensure the health of future Texans and that to sacrifice the health of future generations and ensure escalating healthcare costs, while stalling changes in the health insurance industry for the short term benefit of large campaign contributors is both appalling and repugnant. Another individual encouraged the commission to help protect the citizens of Texas by affording more protection, rather than less, from polluters.

The commission has made no changes in response to these comments. The commission appreciates the comments and responds that it is doing its best to carry out its responsibilities as set forth by the legislature. The commission's processes are transparent and fair and that there is ample opportunity for public input; however, the commission recognizes that there are members of the public who may not agree. In addition to assisting the public with agency processes, the commission's OPA is responsible for distributing the TCEQ Customer Satisfaction Survey which encourages customers' feedback on their experiences with the agency. Every two years OPA summarizes the most recent biennium's survey responses in a Report on Customer Service to the

Legislative Budget Board. The director is the agency's customer service representative and OPA is the point of contact for all complaints against the agency.

Many individuals commented about the condition of air quality in their particular city or part of the state. One commenter stated that they are very concerned about the status of Mountain Creek Lake in Dallas. One commenter stated that they believe the problem they are experiencing with redness of the eyes since moving to Dallas eight months ago is a direct result of the level of air pollution in the Dallas/Fort Worth area. One commenter raised concerns about a nearby amine gas processing plant permitted under a PBR in Robertson County, Texas. This commenter also stated that there are 75 sour gas wells (with much unpermitted processing equipment at the well sites) surrounding home and the gas plant. They further commented that there are two compressor stations and commingling stations are also present nearby, and that the resulting emissions are numerous, and that there is a pending registration for another similar gas plant and a compressor station adjacent to the prior mentioned gas plant which will be approximately a 1/4 mile from their home. The commenter also stated that the resulting allowed emissions will more than double, along with the noise from the compressor station which includes the very damaging Low Frequency Noise (LFN), and those emissions have been allowed without any public input, that this is wrong and a significant and serious shortcoming of the TCEQ. One commenter raised concerns about the quality of life and health of the public and air quality in the already nonattainment to EPA standards in the North Texas region from point source emissions from activity in the Barnett Shale. One commenter stated that they know about the issues set forth in the form letter because of their efforts to stop a coal-fired power plant in their county a couple of years ago. The commenter referred to the plant as one of the ones illegally put on a 'fast track'. One individual commented that Houston needs to have cleaner air and that too many people are suffering, including the commenter. One commenter stated that for the first time in

many years, the air quality in College Station where the commenter lives has been lowered in quality. Another individual stated that they are counting on TCEQ to take care of the air we breathe. They also stated that they have worked for a chemical plant, a refinery, and a steel mill and that none of those companies can be trusted to decide how much pollution is acceptable, that the TCEQ must do that for all. One commenter commented that Corpus Christi is already facing health problems due to emissions from existing chemical plants. The commenter urged the commission to not allow the building of the Los Brisas plant in that area. The commenter stated that it will put them over the limit and expose the community to more pollution. The commenter stated that they have high winds as a regular event in addition to hurricanes that could cause a spill of the petroleum coke used that could completely contaminate the area to the point that no one could live there for years. One individual commented that they once had a pilot tell them that he and other pilots always knew when they were in Fort Worth air space, because the air became clear. The commenter further stated that this is no longer true and how sad for all citizens of Texas. One commenter stated that they have both lived and worked near the chemical industry on the Houston ship channel. This commenter stated that although these companies are the state's lifeblood, they cannot be allowed to make money on our blood and that poisoning the citizens of Texas is wrong. Another commenter said that air quality models have shown that air pollution from Houston is carried across the state to Dallas within 24 hours and that they lived in Denton where air pollution from Dallas gave us some of the worse air quality in the state. This commenter also said that they could not jog or exercise outdoors in the summer without feeling lightheaded from the bad air. Another individual commented that as a resident of Brazoria County, where illegal emissions are let loose frequently by Dow and other chemical manufacturers in the area, the air permitting actions taken by the TCEQ have real consequences for the health and welfare of them, their family, and community. One individual commented that the changes recommended by the form letter are particularly important in Corpus Christi

where the Las Brisas Energy Corporation wants to build a toxic waste incinerator. Another individual commented that air quality in Houston area is the worst of any city in the Union. Another individual stated that as an individual who will be directly affected by the potential coal fired power plan in Matagorda County, White Stallion, and that they have real concerns with how the TCEQ operates. Another person commented that they are very concerned that new permits are being issued for coal plants in Texas and that this is very bad pollution which we certainly do not need in Texas. One commenter stated that they live within 200 feet of an ENRON gas well with two compressors and ten water disposal tanks and that it is a matter of grave importance to them and their family to expect that industries in Texas follow all the rules of the EPA. Another individual stated that they have grown increasingly concerned about the condition of the air in Texas, not only in the metropolitan areas, but in spots like McCamey, Pecos, and other West Texas towns. One person commented that they live in Lajitas, Texas, next to Big Bend National Park, which is one of the most polluted national parks in the United States. They stated that they love the park and want it protected from contamination. This individual further commented that much of the pollution affecting this area comes from central Texas and the Texas Gulf Coast and that industrial companies polluting this area need to cease operation, obey strict regulations, or pay the social costs of their pollution. One commenter urged the commission to reconsider the ruling made regarding the air permit requirements and further commented that they are a resident of Pisgah Ridge in southern Navarro County and are subjected daily to the toxic emissions that are blown that way from both Limestone and Freestone Counties. Another individual commented that the TCEQ is not doing enough to protect the residents of Texas from our polluted air. They further stated that in Flower Mound there is a possibility that a rise in childhood leukemia cases may be the result of unregulated or poorly regulated natural gas wells and that we cannot continue to do this to our children. They also stated that they did not realize that Texas has the largest number of large, industrial, air pollution sources and that if we continue

to allow large corporations to controls the toxic emissions that flow from their industrial sources, without allowing appropriate citizen input, then not only the health of Texas residents but, also the State's economy will be in jeopardy. This person also commented that the TCEQ needs to step up to the plate and actually monitor these emissions and that they do not believe that is happening now. They commented that if monitoring is occurring, it is not covering all the industries and especially up in North Central Texas and that natural gas wells go up without much regulation at all. This commenter also inquired whether the commission would like your child to go to school every day next to a gas well that has never been checked for benzene emissions. One individual commented that the air in the DFW area is very dirty and that many days in the summer it is unsafe to work or play outside due to bad air. This individual commented that the commission can help fix this. One individual commented that air pollution is the major problem in Texas and especially in Houston and that it is no wonder, because Texas has the largest number of air-polluting industries, nestled among some of the densest vehicle emissions in the country. Another individual commented that they are sending this message because they are not at all certain TCEQ is concerned about the health and welfare of the majority of Texans. One person commented that with their asthma in the Arlington area they cannot go outside without needing an inhaler and infections have been increasing and more severe. One individual commented that air quality is critical to the health of citizens of Houston, Texas and will ultimately effect the health of the economy and that if we do not make Houston more habitable, only those companies that are too slipshod to run a clean operation and don't care about the harm their operations cause will come and stay here. They further stated that Houston deserves better than that and urged the commission to attract the highest quality businesses by providing a well-controlled environment.

The commission has made no change in response to these comments. The commission responds that although it is not confirming the specifics of the concerns raised by the commenters, it understands that many involve serious matters of great importance to the commenters and other members of the public. The specific issues raised are outside the scope of this rulemaking which is related to limited changes to the public participation process of the air quality permitting program.

One person provided the following suggestions: 1) raise gas taxes to total $4.00; as it is regressive, put money into easy group transportation wherever possible; 2) check emissions; give free repair to low income, training auto students to do so; they will then be prepared to offer this service; and 3) add on to personal annual car taxes a user tax for all vehicles designated 25 mpg; vehicles used directly in work exempted at this time.

The commission has made no changes in response to these comments. The commission appreciates the effort by the commenter to develop these suggestions and to share them with the commission. However, the comments are beyond the scope of this rulemaking.

One commenter stated that the commission should make the party responsible for ALL the consequences, for the atmospheric pollution, such as truck traffic in and around this location. This commenter also stated that the commission should take this entity out of the picture on the roadway to and from this entity will show you who is responsible for that pollution (NO_X, particulate, etc.). This person also stated that maintaining that only the truck operators/owners are responsible does not solve the problem, nor is it solved by public hearings (from personal experience). Another person commented that what they lack in funding they make up for in numbers of concerned citizens and stubbornness. One commenter stated that

air pollution at major airport terminals needs to be addressed and areas where there is much traffic and where smoking is allowed which makes breathing difficult and smelly. This commenter also wants measurements taken in those locations and wants measurement and control of emissions from aircraft. One individual commented that we must elect Bill White to be our next Texas governor, that he has made great progress in Houston and has great ideas for Texas. This individual went on to say that he gets things done. One individual commented that they are sick and tired of 'Grandfathered' corporate criminals getting away with causing the premature deaths of thousands of Texans and others with their murderous pollution crimes and unsafe working conditions. This individual went on to say that the CEOs "Criminal Embezzlement Officers" reward themselves for their treason with multi-millions in bonuses, always extremely undeserved and that neo-con demons do not give a damn, as long as their mansions are not next to their deadly plants. This commenter further stated that it is time to reward the innovative, clean, and conscientious corporate citizens who do not murder their neighbors. This commenter also stated that as it stands now, they cannot compete with the socialist subsidy (of other citizens and government paying for the health and property crimes of the grandfathered aristocratic scumbags) and the commenter urged the commission to please get a conscience and a backbone and enforce the laws to the maximum possible. One person commented that the commission should look at Russia where more than 75% of water is ruined by industry, the military, and failure to maintain sanitary conditions. This individual questioned whether Texas will be like Russia in 50 years. Another person commented that they are tired of being intimidated and ignored only to have gas well leaks blow up in their face and lungs and that they are ready to vote out all state leaders if things do not change immediately. One individual commented that it is important to our state economy and that no longer are businesses willing to move to a state that is not responsible as to health issues. They urged the commission to act now or resign and let someone who cares operate TCEQ. They further commented that this issue will hurt Governor Perry. One commenter

stated that air knows no boundaries and that we cannot continue to allow coal-fired power plants, cement plants, and other such industries to spew toxic chemicals into the atmosphere. They commented that it is time for TCEQ to tighten its regulations in accordance with the federal Clean Air Act and to take responsibility to the air quality of Texas.

The commission has made no changes in response to these comments. The commission responds that as discussed elsewhere, this rulemaking involves changes to address issues that relate to EPA approvability and to meet federal public participation requirements and the requirements of the existing Texas SIP and Texas law. These comments are beyond the scope of the rulemaking.

Judicial Review

CEJ stated that the rules should allow judicial review for members of the public who cannot or do not participate in the contested case process. Environmental Groups II stated that although EPA recommended taking no action on several rules in Chapter 55 regarding contested case hearings, EPA should disapprove the contested case hearing rules because these rules undermine public participation and ultimately judicial review of commission action on air permits. Environmental Groups II stated that in some cases the contested case hearing rules are more restrictive than federal law and the "affected person" requirement has restricted access to judicial review of commission matters that have proceeded under the contested case hearing process. Environmental Groups II stated that the commission's rules do not make clear what action must be taken, when the action must be taken, and how a citizen will be notified of the need to take action so that the commission's action is still subject to judicial review.

The commission respectfully disagrees with this comment, and no changes have been made to the rules in response to this comment. The public participation rules allow for an opportunity for an affected person to participate in a contested case hearing before SOAH. If a permit is issued to an applicant after the contested case hearing process is completed, affected persons then have an opportunity for judicial review of the commission's actions. These rules do not unfairly restrict access to the contested case hearing process and judicial review by requiring a protestant to demonstrate affected person status, because that is not more restrictive than federal requirements. For a protestant to participate in the EPA's Environmental Appeals Board (EAB) process, or in federal court, they must demonstrate standing. Standing is analogous to the Texas requirement that a protestant demonstrate that they are an affected person.

For a party to have standing to participate in the EAB review process, only those persons who participated in the permit process leading up to the permit decision, either by filing comments on the draft permit or by participating in the public hearing, may appeal a permit decision (40 CFR §124.19(a)). The EAB process applies to permits issued by EPA, and does not apply to SIP-approved states (40 CFR §124.1(e) and §124.41). Such persons have "standing" to appeal, and may raise in the appeal any issue that is reviewable under the regulations, even if the petitioner did not previously comment on that particular issue. A petitioner with standing may only raise issues that are eligible for review under the regulations. Any issues raised in the petition must have been previously raised by someone (either petitioner or another commenter) during the public comment period (including any public hearing), provided that they were "reasonably ascertainable" at that time (40 CFR §124.13 and §124.19).

Similarly, for review in federal district court, a person must demonstrate standing to be a party to a lawsuit. Article III, section 2 of the United States constitution requires that there must be a "case" or "controversy" for an issue to be referred to the federal judicial courts; potential parties must also demonstrate that they will be sufficiently affected by the matter at hand, and that the case or controversy can be resolved by legal action. The United States Supreme Court, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, at 560-61 (1992), has ruled that a plaintiff must show: 1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be addressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The Supreme Court reaffirmed this position in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), and furthermore clarified that the relevant showing for purposes of Article III standing is not injury to the environment, but injury to the plaintiff. *Laidlaw*, at 181. The Texas Supreme Court has stated in *Texas Assoc. of Business v. Texas Air Control Board*, 852 S.W.2d 220 (Texas, 1993) that "The general test for standing in Texas requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Board of Water Engineers v. City of San Antonio,* 283 S.W.2d 722, 724 (Tex. 1955). This case also adopted the United States Supreme Court requirement for associational standing. Furthermore, in *Brown v. Todd*, 53 S.W.3d 297 (Tex. 2001), the Court stated "Our decisions have always required a plaintiff to allege

some injury distinct from that sustained by the public at large. *Blum v. Lanier,* 997 S.W.2d 259, 261 (Tex.1999); *Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex.1984) (citing cases)."

The commission's requirements that a protestant demonstrate affected person status to participate in a contested case hearing as a party are, therefore, fully consistent with both federal and state law regarding the necessity of proving standing before being allowed into court as a party. Furthermore, the existence of the commission's contested case hearing process actually gives an affected party two opportunities for review of the commission's decision on a draft air quality permit. If a party is not satisfied with the outcome of the contested case hearing process, they may then avail themselves of the judicial review opportunities in district court. This robust process ensures that the public has full and fair access to impartial review of decisions to grant air quality permits.

If a permit is uncontested, and a contested case hearing is not held, interested parties may still challenge a permit. The commission's rules allow for a 30-day request for reconsideration during which a party may request a contested case hearing after the filing of the response to comments. If a permit is issued by the executive director without commission review, because no requests for a contested case hearing are received, then an interested party may still request that the commission overturn the permit through a motion to overturn. Information about these opportunities is included with the mailing of the executive director's response to comments, which is transmitted to everyone who made comments or asked to be on a mailing list, as is discussed in more detail later in this preamble, as well as in the preamble to the concurrent rulemaking for Chapter 55.

In summary, these rules are compliant with state and federal law with regard to the requirements for standing and appeal of a commission action for which there is an opportunity for participation. Commission rulemaking cannot overturn federal rulemaking or federal or state court decisions.

In support of the immediately preceding comments, Environmental Groups II commented that the proposed public participation rules still have problems, specifically the rules do not comply with 40 CFR §51.166(q)(2)(vi), which provides all timely written comments and comments received at a public hearing shall be considered in making the final decision on the approvability of the application. The comments included specific examples of four contested applications that were subject to contested case hearing. Specific concerns stated there are burdens imposed that restrict ultimate judicial review as a direct result of the contested case hearing process.

First, Environmental Groups II stated that in at least one contested matter, none of the notices informed the public that unless the person takes certain actions at certain times in the process, the person will not have an opportunity for judicial review. Commenters also stated that for appeals by groups who failed to request and participate in the contested case hearings, because of missing or unclear language in notices or due to lack of notice, and thus do not exhaust their administrative remedies, the issues on appeal in the district court are questions of law. These are questions which would never be subject to a contested case hearing because contested case hearings are provided only for disputed fact issues. One commenter also stated that, in some cases, citizens have to take extra steps, in addition to the requirements in Chapter 55 to seek party status to preserve their right to judicial appeal of the eventual commission final action.

Second, Environmental Groups II stated that a contested matter cannot be settled if the RTC contains anything the public contests. They further stated that based upon the position of the Texas Attorney General and the rulings of Texas Courts, the public must still participate fully in a contested case proceeding in order to ultimately have judicial review on items raised in the RTC, even if the public and the applicant have reached an agreement.

No changes have been made in response to these comments, and the commission respectfully disagrees with the comments. The commission has no comment on the legal sufficiency of the arguments presented by the commenter or on whether the fact scenarios presented in these comments are reviewable by a court. The commission further responds that the text of the NORI and NAPD state that after the final deadline for the public to file public comments, the executive director will consider the comments and prepare a response to all relevant and material, or significant comments. The notice text further provides that the commission will consider all public comments in developing a final decision on the application. In 2008, the commission revised its letters that transmit permits issued by the commission and the executive director, the Motion for Rehearing and Motion to Overturn letters, respectively, to better inform the public about the appeals process and the applicable filing deadlines.

The use of the term "public hearing" in 40 CFR §51.166(q)(2)(vi) is understood to be EPA's notice and comment style hearings, not contested case hearings which are available under the TCAA. The FCAA and EPA's implementing regulations do not provide for bench trial-type proceedings, which is what a contested case hearing is analogous to. Therefore, the commenters' concerns regarding judicial review are not relevant to whether the commission's rules comply with 40 CFR

§51.166(q)(2)(vi). Those issues are discussed previously in this preamble in the commission's response to comments from CEJ and Environmental Groups II in the section "Judicial Review."

Effective date of the rules

EPA commented that it is concerned about the July 1, 2010, applicability date included in rule language, and, as proposed, the rules would apply to air permit applications submitted on or after that date. EPA stated that, assuming the full 90 days allowed under §116.114(a)(1) is necessary for processing applications, that permit application review could continue under the old rules until October 2011 without providing public notice consistent with federal requirements. EPA stated that the proposed compliance timeframe perpetuates the current problems with Texas' air permitting public notice process for an unacceptable amount of time. EPA stated that the commission should revise the rules to apply to applications submitted on or after April 1, 2010. Further, the commission should implement and actively promote a voluntary program for applicants to comply with proposed rules now. TACA agrees with the proposed delayed implementation timeline.

Absent a compelling reason to adopt a retrospective rule, the commission's general practice concerning effective dates for rules affecting permit applications is to apply them prospectively. For this rulemaking, the commission is revising the rules in Chapters 39 and 55 from the proposal to indicate that the new requirements are effective and applicable to applications filed on or after the date that all of the rule changes are effective. Only applications submitted on or after that date will be subject to the new requirements. Under the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001 and the rules for the *Texas Register* in 1 TAC Chapter 91, the rules become effective 20 days after submission by the commission to the Secretary of State for

publication in the *Texas Register*. The proposed date of July 1 was only an estimate of the effective date at the time of proposal.

Retroactive application of laws or rules is generally discouraged because it does not provide fair notice to affected persons. On the issue of giving laws retroactive effect, the United States Supreme Court has said that basic fairness considerations dictate that individuals should have the opportunity to know what the law is and conform their conduct accordingly (*See General Motors Corp. v. Romein,* 112 S.Ct. 1105, 1112 (1992)). To retroactively apply requirements to applications that have already been in the process for as long as three months could cause applicants to incur additional expense and could result in delays in the process as they work to determine what they need to do to adjust to the changes. The existing air quality permits public participation program is a robust one. While the new provisions contained in this rulemaking are important, they will serve to enhance an already robust system. These additional provisions have been a topic for discussion between the EPA and the commission for several years. There have been numerous opportunities to provide affected persons notice that there might be an effective date that is earlier than the date of adoption of the rules. The proposed rules for this rulemaking were made public in December of 2009, without any indication that the effective date was going to be moved up by a matter of months. The entire process for notice and review of air quality permit applications generally takes anywhere from several months to two years before a final decision is made. A few months gained by moving the effective date for these additional provisions is insignificant by comparison. Assuming that EPA's estimated time frame of October 2011 during which applications might continue under the old rule is accurate, EPA's suggested effective date of April 2010 would still have applications subject to the former rules until approximately June 2011. Given the length of time these issues

have been pending, the potential for adverse impact on applicants of a retroactive application, and the absence of a compelling reason in light of the commission's already robust public participation process, the commission does not find it reasonable to apply these changes retroactively.

THSC, §382.0291(e) provides that if an air quality permit application is pending at a time when changes take effect concerning notice requirements imposed by law, the applicant must comply with the new requirements. This provision was originally enacted in 1991 as part of Senate Bill 2 which orchestrated the merger of the Texas Air Control Board, the Texas Water Commission and certain programs from the Texas Department of Health to form the new TNRCC (Texas Natural Resource Conservation Commission), predecessor to the TCEQ. An identical provision was adopted in the same article of the bill that pertained to Texas Department of Health applications. THSC, §382.0291 was part of a larger effort to provide a consistent structure for pending applications during the transitional period of agency mergers. There is nothing to suggest that the legislature intended to require that all future notice changes affecting air quality permit applications have immediate effect. With the passage of HB 801 in 1999, the legislature did not follow THSC, §382.0291(e), but instead provided its own effective date language, *applications declared administratively complete on or after {September 1, 1999} the effective date of the Act.* THSC, §382.0291(e) does not mandate that the public participation rules apply to pending applications and does not restrict the commission's authority to determine an appropriate effective date for the public participation rules to be applied to air quality permit applications.

EPA also suggested that the commission implement and actively promote a voluntary program for applicants to comply with the proposed rules now. It would be premature for agency staff to

encourage applicants to comply with rules that have not been formally approved by the commission because the commission has not had an opportunity to review the public comments, consider staff's responses to those comments, make any changes to the proposed rules it might deem necessary, or act on the rules as proposed. Additionally, for many regulated entities, active promotion of a measure by the regulatory agency might look more like a mandate than a truly voluntary program. The staff has no authority to encourage compliance with rules that are not approved by the commission and that could subsequently be changed by the commission after consideration and deliberation during its open meeting some months later. Rulemaking by state agencies in Texas is a very formal process consisting of several significant steps which are set forth in Texas Government Code, Chapter 2001, Subchapter B of the Administrative Procedure Act. These steps are very similar to those in the federal Administrative Procedure Act. To bypass a long established and legally required process by having staff attempt to anticipate the commission and encourage applicants to comply with rules not yet in place would undermine the intent of the Administrative Procedure Act.

Finally, commission staff needs time to revise internal procedures and forms to be ready to implement the rules when they become effective. It would be confusing to implement the changes on a voluntary basis. The internal procedures and forms used as part of the process need to be consistently used.

EPA stated that the commission could issue permits through October 2011 without providing notice consistent with federal requirements. The commission's position is that the revised rules in Chapters 39, 55, and 116 meet or exceed federal requirements, and EPA can and should act as

quickly as possible to approve them as revisions to the SIP, which could be accomplished much sooner than an effective date of October 2011.

Permitting Process

TCC commented that the technical review of permit applications should continue and the public participation process should not disrupt that review to ensure timely issuance of the permit.

No changes were made in response to this comment. The commission has years of experience in ensuring that the technical review process and the public participation process, including the scheduling of public meetings and preparing RTCs, are conducted in a timely manner.

Environmental Groups I commented that the commission should utilize electronic access to information, and asked that the agency include all permits, amendments, and other authorizations, including PI-7 forms, and applications on its Web site, searchable by regulated entity number. Individuals commented that the commission should make all applications, permits and amendments available in an easily searchable online format.

The commission agrees with the goal to provide electronic access of permit-related information to interested parties. However, significant funds, resources, and development time are needed to reach this goal to dramatically change the air quality permitting process. Permit-related information is available now, both in a public location near a proposed site and at the TCEQ central and applicable regional offices. Today, copies of issued air permits are available electronically through the Remote Document Server (RDS). The RDS is a system that stores permit documents and is

accessible by the public from the commission's Web page; it is currently accessible under the link "How Do I . . . Find the Status of a Permit, License," which leads to "Status of Air Permits and Permit Applications," and finally to "Air Permits Remote Document Server." However, the search function of the RDS is limited to a text search and cannot be filtered by other parameters.

As part of the commission's Information Strategic Plan, the TCEQ has developed the e-Permits system to allow for electronic submittal of multimedia permit applications. The e-Permits system is in the initial stages of development, so the system can only accept simple permits and registrations, and none related to air at this time. There is ongoing effort to expand e-Permits capability to accept more complex permit applications in the future. In addition, the commission is evaluating ways to convert the central file room to accommodate electronic records. To ensure that limited funds and resources are used efficiently, various paths forward are under evaluation through targeted pilot programs.

Individuals commented that the commission should provide electronic notice of permitting actions.

No changes were made in response to this comment. The commission already provides electronic notice of permitting actions. Both the NORI and the NAPD for permit applications are posted on the commission's integrated database (CID) at the same time that the notice packages are mailed to applicants. The full text of both the NORI and the NAPD are available, as are notices of public meetings, scheduled commission meetings regarding contested case hearing requests for permit applications, and notice of the SOAH preliminary hearing for applications referred to SOAH for a

contested case hearing. The CID is searchable by permit number, regulated entity number, customer number, and company name.

CEJ and Environmental Groups I commented that changes made to the terms and conditions of a permit should be made on the face of the permit, as otherwise it is difficult for the public to know what the facility is supposed to do. Also, if the changes are not made to the face of the permit, the facility may have a permit, but because other things may change permit limits it is hard for the public to figure out what the actual limits are. Environmental Groups I commented to further object to off-permit changes, and state that a number of rules allow facilities to alter terms and conditions of a permit without incorporating those changes into the face of the permit for extended periods of time, if at all. Commenters asked that TCEQ implement rule changes that would require any changes affecting the conditions or representations of a permit to be made to the face of the permit.

No changes were made in response to these comments. All of the comments concern the permit application review and issuance process, which is governed primarily by the rules in Chapter 116. Except for a cross-reference update and one rule regarding public notice for PAL permits, no rules in Chapter 116 were opened for comment, and therefore, the comments are beyond the scope of this rulemaking. Further, these comments address permit application review and permit issuance processes, which are also beyond the scope of this rulemaking.

Individuals commented that the commission needs to require that all limits, monitoring and other requirements applicable to a particular emission unit be included in a single permit. The commission

needs to require companies to amend the face of that permit if changes are made that affect existing permit terms or conditions.

No changes were made in response to this comment. Texas has a two-permit program: NSR Program (for both major and minor sources) and Title V Federal Operating Permit Program. This rulemaking generally concerns the applicability and components of the types and duration of public participation for the NSR program, not the design or content of the permits or authorization mechanism. The primary rules for these permit programs are found in 30 TAC Chapters 116 and 122, which are not open for review of rules regarding this topic, therefore, this comment is beyond the scope of this rulemaking.

CEJ and the Environmental Groups I commented that nothing in a permit should be confidential and that TCEQ's procedure for dealing with permitting documents labeled as confidential often deprives the public of fair public participation; instead all the information should be public so that the public is able to enforce the permit. CEJ further commented that having to refer questions about confidential documents to the Attorney General is problematic when the public is dealing with a 30-day period in which to submit timely comments. Environmental Groups I asked for the definition of what constitutes "emissions data" in the rules, and asked for a rule provision (similar to NPDES permits) that prohibits information submitted pursuant to an air application or information within a permit from being held confidential.

No changes were made in response to these comments. The commission agrees that the permit requirements contained in the general and special conditions and the maximum allowable emission

rate table should not be labeled confidential. However, all representations included in a permit application become part of the permit, including information submitted as "confidential."

The THSC, §382.041 provides that the commission may not disclose information submitted to the agency that relates to secret processes or methods of manufacture or production if so labeled when submitted as part of an application. If any part of an application appears to be improperly labeled, the commission staff asks the permit applicant to re-submit the information without the confidential designation. The commission treats the information as confidential unless and until the Attorney General or a court finds that the information is not confidential. Any request made to the commission for production of confidential information is submitted to the Attorney General for determination of whether the information is confidential. The commission must submit the request for an opinion within ten business days. Pursuant to Texas Public Information Act, Texas Government Code, §552.306, the attorney general must render an open records decision not later than the 45th business day after the date the attorney general received the request for a decision. If the attorney general cannot render a decision by the 45-day deadline, the attorney general may extend the deadline by ten business days by informing the governmental body and the requestor of the reason for the delay. Finally, the attorney general must provide a copy of the decision to the requestor.

Emissions data is not confidential (Op. Tex. Att'y Gen. Nos. H-539 (1975) and H-836 (1976); 42 United States Code, §7414(c)). The commission respectfully declines to add a definition of what constitutes "emissions data" in this rulemaking because it beyond the scope of this rulemaking, nor has there been any opportunity for comment on a proposed definition.

With regard to the public participation process, applicants are required to place a copy of their applications in the local area; any part of an application that is omitted due to confidentiality should be noted as such in the application. Section 39.405(g) already requires applicants to indicate in the public file that there is additional information in a confidential file. For all major sources, and, with the changes in this rulemaking that extends the comment period for all minor source applications, comments can be made until after the draft permit is available. Commenters who seek access to confidential information that make their requests early in the notice process may request the information and an opinion may be provided by the Attorney General prior to close of the comment period.

EPA commented that the commission should remove duplicative items from Texas PSD supplement since they will be in the rule. Specifically, EPA mentioned the inclusion of increment consumption in public notice, and the requirement that a copy of the public notice will be sent to comprehensive land planning agencies.

The PSD supplement adopted by the Texas Air Control Board by order dated July 17, 1987, was included with EPA's comment. EPA used the PSD supplement, in part, to approve the Texas PSD permitting program, and, therefore it predates the program approval in 1992, and subsequent changes to the commission's PSD permitting rules that have been approved by EPA as part of the Texas SIP.

The commission specifically acknowledges that two of the commitments in paragraph (7) regarding notification are now enforceable through these rules. Specifically, those notice requirements are: a) the degree of increment consumption from the source or modification will be included in the public notice; and b) a copy of the public notice will be sent to any state land manager and to any other affected agencies.

The commission's order adopting these rules acknowledges this update to the SIP, and specifically requests EPA to remove these two commitments from the SIP.

EPA commented that the definition of "new facility" is not SIP-approved.

EPA approved of the definition of "new facility." (*See* 75 *Federal Register* 19469 (April 14, 2010)).

EPA commented that the definition of "modification of existing facility" is not SIP-approved, and that its comments do not reflect any intent or future action by the EPA to grant SIP approval to the definition, and will be evaluated separately from the action on the Chapter 39 rules.

The commission agrees that EPA action on the submitted definition is not necessary for evaluation of the rules in Chapter 39.

Since 1967, the TCAA has included a definition for "modification," and was defined as: any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source into the atmosphere for which results in the

emission of any air pollutant not previously emitted. Insignificant increases in the amount of any air pollutant emitted are not intended to be included, nor is maintenance or replacement of equipment components which do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted to the atmosphere.

The 1974 SIP revision included the term, "modification," in Part IV of its submittal to EPA Region VI. "Modification" appeared in Texas' legal authority, Section V, and Section V--as a unit of Part IV --was approved by EPA in 1974. Therefore, for years the commission has been subject to this definition for its minor NSR program. The exemptions in the last sentence were codified as subparagraphs (A) and (C) in 1995 by SB 1126. That bill added other exemptions, which are changes to the commission's minor NSR program. In a separate rulemaking and proposed revision to the SIP, the commission has proposed rule amendments that clarify that the exemption in subparagraph (E) applies to the commission's minor source program that implements the qualified facilities program and does not interfere with attainment or maintenance of the NAAQS (April 16, 2010, issue of the *Texas Register* (35 *TexReg* 2978)). Also, the commission is currently scheduled to consider rule amendments for the minor NSR flexible permit program in Chapter 116, Subchapter G; that will include discussion about the exemption in subparagraph (F). As discussed earlier, modifications are subject to notice in §39.402. However, as the commission adopts rules and demonstrates that certain exemptions are appropriate under minor NSR, the necessary demonstrations will be made.

Environmental Groups I commented that the commission has not demonstrated that its exemptions from the definition of modification will only authorize changes with *de minimis* impacts; these modification

exemptions are not in the SIP and should not be exempt from public participation requirements. The rules still provide that numerous permitting actions are exempt from public notice and participation requirements, therefore, the rules fall short of federal requirements. The commission has not received EPA approval to exempt these sources, that the commission has not demonstrated that such actions have *de minimis* impacts, that these are changes that do not require an amendment, that changes that are not modifications; and that §116.119 exempts *de minimis* changes.

No changes were made in response to this comment. With regard to the comments regarding exemptions from the statutory definition of "modification," the commission responds that these exemptions are not in violation of the requirements of 40 CFR Part 51. Since 1967, the TCAA has included a definition for "modification," and was defined as "{a}ny physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source into the atmosphere for which results in the emission of any air pollutant not previously emitted. Insignificant increases in the amount of any air pollutant emitted are not intended to be included, nor is maintenance or replacement of equipment components which do not increase or tend to increase the amount or change the characteristics of the air contaminants emitted to the atmosphere."

The 1974 SIP revision included the term, "modification," in Part IV of its submittal to EPA. "Modification" appeared in Texas' legal authority, Section V, and Section V--as a unit of Part IV--was approved by EPA in 1974. Therefore, for years the commission has been subject to this definition for its minor NSR program. The exemptions in the last sentence were codified as subsections (A) and (C) in 1995 by SB 1126 (74th Legislature). The commission's rules regarding

notice for modifications of existing facilities are approved as part of the SIP in §§116.130 - 116.137. Adopted new §39.402 continues the notice requirements for modifications. Therefore, there is no backsliding from the existing SIP.

SB 1126 added other exemptions, which are changes to the commission's minor NSR program. In a separate rulemaking and proposed revision to the SIP, the commission has proposed rule amendments that clarify that the exemption in Subchapter (E) applies to the commission's minor source program that implements the qualified facilities program and does not interfere with attainment or maintenance of the NAAQS (April 16, 2010, issue of the *Texas Register* (35 *TexReg* 2978)). Also, the commission is currently scheduled to consider rule amendments for the minor NSR flexible permit program in Chapter 116, Subchapter G; that will include discussion about the exemption in Subchapter (F). As discussed earlier, modifications are subject to notice in §39.402. However, as the commission adopts rules to implement any exemption from the definition of modification is appropriate under minor NSR, the necessary demonstrations will be made.

FutureGen Rules

EPA commented that the rules regarding FutureGen permits, including rules regarding notice, are not SIP-approved, and that its comments do not reflect any intent or future action by the EPA to grant SIP approval to the definition, and will be evaluated separately from the action on the Chapter 39 rules.

Since the commission submitted these rules, which implement THSC, §382.0565, adopted by the Texas Legislature in the 79th Legislative Session (2005), to EPA in March 2006, no FutureGen

permit applications have been received. Because these rules are not SIP-approved, the references to FutureGen permitting are continued in separate subsections or paragraphs within the rules.

Multiple-Plant Permits

EPA commented that the rules in Chapter 116, Subchapter J regarding MPPs were not submitted for SIP approval. EPA stated it has no record of receiving the multiple plant permit program as a SIP revision and asked the commission to clarify whether the MPP program has been submitted, or will be submitted, for EPA review.

The commission adopted the MPP rules but did not submit them as revisions to the SIP. The basis for the MPP program is explained in the adoption preamble. 25 *TexReg* 8668 (September 1, 2000). To date, the commission has received only one application for an MPP, and it was resubmitted under a different type of application, so no MPPs have been issued. The commission is required by THSC, §382.05194 and §382.05197 to adopt rules for this program and therefore retains the references to MPP applications in the public participation rules. Because these rules are not SIP-approved, the references to MPP are set forth in separate subsections or paragraphs within the rules.

Permit Alterations

Environmental Groups I commented that alterations can be used to authorize emissions with significant environmental impacts and should be subject to public participation requirements. The alteration requirements of §116.116(c)(2) should require types of alterations that increase actual emissions or change monitoring requirements be subject to public participation requirements.

No changes were made in response to this comment. Section 116.116 was not proposed for change and thus not open for comment. Further, the commission is not electing to require alterations to be subject to notice as part of the adoption of these rules. Such a change should be subject to a rulemaking notice and comment opportunity.

A permit alteration is a decrease in allowable emissions, or any change from a representation in an application, general condition, or special condition in a permit that does not cause a change in the method of control of emissions, a change in the character of emissions, or an increase in the emission rate of any air contaminant. 30 TAC §116.116(c). An alteration is not used to authorize any increase in emissions, therefore there are no significant environmental impacts associated with an alteration. An increase in emissions or a change in character of emissions must be authorized by an amendment. 30 TAC §116.116(b). As noted by the commenter, alterations can be used to change monitoring requirements. EPA's approval of the alteration rule specifically states that the commission is not required to provide opportunity for public comment on permit alterations. 67 *Federal Register* 58697, at 58706 (September 18, 2002); for additional discussion regarding EPA's approval of the alteration rule and process, see specifically pages 58705-58706. Alterations may be used to change monitoring requirements or to incorporate periodic monitoring and compliance assurance monitoring (CAM) in NSR permits.

Permits By Rule (PBR)

An individual commented that PBRs used by the TCEQ should be largely eliminated or be limited to very small sources.

No changes were made in response to this comment. The rules regarding PBRs are located in 30 TAC Chapter 106, and that chapter was not open for comment. Therefore, this comment is beyond the scope of this rulemaking.

Environmental Groups I commented that PBRs can be used to authorize emissions with significant environmental impacts and should be subject to public participation requirements. PBRs can be used to allow sources to vary from permit representations and conditions without a permit amendment, and these are later consolidated into the facilities' permit at amendment or renewal without public participation. Using a PBR to authorize increases in emissions allows sources to avoid public participation requirements for minor NSR changes that should be subject to at least a 30-day comment period. Environmental Groups I also commented that because PBRs do not identify an applicable source category, they fail to provide public with adequate notice that a facility could authorize emissions through PBRs. CEJ commented that PBRs should not be used to change permit terms. Further, PBRs should be like standard permits, and should include everything that applies to a permit. TCC commented that PBRs should continue to be excluded from, and should not be held to, the public participation requirements for case-by-case permit applications.

No changes were made in response to this comment. The rules regarding PBRs and standard permits are located in 30 TAC Chapters 106 and 116, respectively, and those chapters were not open for comment, with two exceptions which are amended to address other, unrelated issues. All except four of the more than one hundred PBRs are source category specific (*See* 30 TAC Chapter 106, Subchapters B - X). Therefore, these comments are beyond the scope of this rulemaking.

Environmental Groups I commented that a notice and comment period at the time PBR issued is not adequate to satisfy federal public participation requirements, and that PBRs do not include sufficient information to allow informed public comment.

No changes were made in response to this comment. In addition, PBRs are subject to notice at the time that each PBR is adopted by the commission. PBRs are adopted under the rulemaking process in the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, which requires notice of the proposed rule and an opportunity to comment, including that opportunity at a public hearing. Because Chapter 106 is not currently open for rule changes, these comments are beyond the scope of this rulemaking. As discussed later in this preamble, EPA has approved the commission's PBR program without requiring notice for any individual claims for PBRs.

Environmental Groups I commented that it is not possible to evaluate the effect of individual PBRs on NAAQS.

No changes were made in response to this comment. The rules regarding PBRs are located in Chapter 106, and that chapter was not open for comment as part of this rulemaking. Therefore, this comment is beyond the scope of this rulemaking.

De Minimis Changes

Environmental Groups I commented that when the commission adopted §116.119, the adoption preamble stated "{t}hroughout its comments on the revisions to Chapter 116, EPA asked the commission to analyze

the adopted rules to determine how specific sections of these rules meet the provision of 40 CFR Part 51, Subpart I. … The sections concerning *de minimis* facilities and sources and multiple plant permits were not submitted as SIP revisions. … If and when these sections are submitted as a SIP revision, the commission will address the EPA's questions regarding the applicability of 40 CFR Part 51, Subpart I " (September 1, 2000, issue of the *Texas Register* (25 *TexReg* 8672)). To the commenters' knowledge, TCEQ has never addressed EPA's questions yet continues to implement the *de minimis* rules. While some of the sources on EPA's *de minimis* list are truly very small emissions, it is unclear what emissions TCEQ may have declared *de minimis* on a case-by-case basis. Before any emissions may be exempted from minor NSR permitting requirements, Texas must meet the requirements of 40 CFR Part 51, Subpart I and demonstrate that the emissions will not interfere with control strategies or adversely affect attainment or maintenance of the NAAQS. While Texas can almost certainly make this demonstration for some of the exclusions on its *de minimis* list, it is unclear that it can do so for all of the exclusions. In addition, such a demonstration must be submitted to EPA and made subject to public review and comment before it is incorporated into the SIP. Until such time, Texas should not implement it *de minimis* provisions**.**

No change was made in response to this comment. Section 116.119 was not open for comment, nor proposed for inclusion in the SIP as part of this rulemaking. Therefore, this comment is beyond the scope of this rulemaking.

§39.402 Applicability to Air Quality Permits and Amendments

OPIC commented that while the TCAA and the commission's PBR program do not require notice for amendments when there is no increase above *de minimis* levels, notice is not prohibited if necessary to maintain federal approval of the minor NSR permitting program.

No changes were made in response to this comment. The commission's changes are made to ensure compliance with both the TCAA and federal notice requirements and to provide clarity with regard to applicability. The commission maintains that no change in the thresholds as previously adopted by the commission in now repealed §39.402 is necessary for EPA to approve the notice rules as part of the SIP. This is discussed in greater detail elsewhere in this preamble.

TOGAP commented that although the proposed rules are designed to expand the requirements for notice to new minor sources, it does not expand the notice requirements to renewal applications.

No change was made in the rules to the requirements for notice of permit renewal applications. There are no requirements for renewal of permit under the EPA's general permit rules, and therefore, there are no accompanying notice requirements. The commission is prohibited by THSC, §382.056(g) from seeking comment for renewal applications for which there is no increase in allowable emissions beyond the comment period for NORI as required by §39.418. Further, the commission's existing rules do not require publication of NAPD for any amendment application for which there is no increase in allowable emissions and no new air contaminants not previously emitted.

EPA commented that the proposed §39.402(a)(2)(D), which is adopted as §39.402(a)(2)(C) and (4)(D)(i), can be interpreted to exempt *all* minor NSR permits from the public participation requirements, and, if so, this is not acceptable for approval by EPA as a SIP revision. Alternately, the proposal could be interpreted as requiring public notice for any permit that does not qualify as a SIP-approved PBR or standard permits.

If the intent of proposed §39.402(a)(2)(D) is to require notice for all permits except for SIP-approved PBRs and standard permits, then this intent is acceptable under the FCAA and the SIP-approved PBR and standard permit rules. To meet this intent, the commission must revise the rule so that it is clear that only PBRs and standard permits are exempt from the public participation requirements. All other minor NSR, i.e., case-by-case, permits must be subject to the public participation requirements.

EPA also commented that the intent of proposed §39.402(a)(2)(E), adopted as §39.402(a)(2)(B) and (4)(D)(ii), must also be clarified. It appears that the proposed rules establish a *de minimis* threshold below which public notice is not required for permitting actions on certain types of agricultural permits. The proposal could be interpreted as exempting from public notice *all* minor NSR permits for an "agricultural products handling" facility at which grain, seed, legumes, or vegetable fibers are handled, loaded, unloaded, dried, manufactured, or processed (as defined in THSC, §382.020). As proposed, this provision is not acceptable for approval by EPA as a SIP revision. Further demonstration must be made to EPA on the validity of this approach before EPA can contemplate approvability of this new provision.

EPA commented that although it agrees in principle that the public notice requirements at 40 CFR §51.161 provide for tailoring of the public participation process for less environmentally significant sources and modifications, the commission has not provided an analysis that demonstrates first, how the *de minimis* thresholds in proposed in §39.402(a)(2)(D) and (E), adopted as §39.402(a)(2)(C) and (4)(D)(ii), were established, or, second, how emissions below these levels will not cause or contribute to a violation of the applicable National Ambient Air Quality Standards (NAAQS) or PSD increment. The commission must provide a demonstration before EPA can consider approving an exemption from public notice requirements as described in the proposed rules.

EPA cited to an August 31, 1995, *Federal Register* notice in which EPA articulated the principles for limitations on full public participation requirements. EPA commented that an acceptable tiered minor NSR program must include specific, objective, and replicable criteria for determining when a minor NSR permit is exempt from, or subject to less than, the full public participation requirements at 40 CFR §51.161. Therefore, the categorization of the types of minor NSR permits that a state can exempt from or subject to less than full public participation depends on the potential for environmental and public health concerns.

EPA commented that for approval, the commission must specifically include certain information for EPA's consideration of any thresholds that are applied to minor NSR. Specifically, the commission must identify the types of minor sources and minor modifications that will be covered by these thresholds, and the anticipated source population and estimates of future growth. The commission must also demonstrate that the identified sources and or changes are not environmentally significant, and that the current emission levels and predicted future emission levels will not cause or contribute to a violation of the NAAQS or PSD increments in the applicable areas. Further, the minor NSR public notice exemption process or public notice tiering process must be reasonable and adequate for the statutory and regulatory purposes of the minor NSR program and be consistent with the *de minimis* exemption criteria set forth in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). The commission must also submit an analysis that demonstrates how these exemptions from, and categories of, public notice requirements were established, and how the exemptions and the types of public participation categories will not cause or contribute to a violation of the applicable NAAQS or PSD increments.

TCGA commented that it is concerned that the combination of requirements in §39.402(a)(2)(C) - (E), which are currently located in §39.402(a)(1) - (3) and is proposed for repeal, with the requirements in §39.402(a)(2)(A) and (B). The purpose of proposed subparagraphs (C) - (E), which were added by HB 2518 is to streamline the permit system by allowing minor amendments to be processed without the added burden of public notice. The important issue is whether there is an emissions increase, not whether a facility is modified or a new facility is added. Including subparagraphs (A) and (B), concerning the construction of a new facility or modification of existing facilities, may render subparagraphs (C) - (E) useless. Therefore, subparagraphs (A) and (B) should be relocated so they do not override the intended effect of subparagraphs (C) - (E).

TIP commented that the revisions to §39.402(a)(2) are unclear as to the status of the *de minimis* amendments, and that the revisions need to clearly state that the levels in §39.402(a)(2)(D) and (E) are the triggers for public participation. This would simplify the rule and could be achieved by moving the text of subparagraphs (D) and (E) to be the first subparagraphs in the rule, clarifying the commission's intent.

Environmental Groups I commented that §39.402 violates minimum federal requirements of 40 CFR Part 51 because it exempts changes authorized by PBRs and non-modification changes from public participation requirements. Environmental Groups I commented that §39.402 limits the availability of public notice and comment and ask for clarification of the difference between the types of permits that would fall under §39.402(a)(1)(A) and (B) and (2)(A) and (B). Environmental Groups I requested confirmation that §39.402(a)(2)(A) - (F) provides alternate methods for triggering subchapters H and K and that if the conditions in any of subparagraphs (A) - (F) are met the requirements of Subchapters H and K are applicable; in particular, can a facility not affected by THSC, §382.020 where the facility's total

emissions increase from all facilities to be authorized does not exceed the listed *de minimis* levels still trigger Subchapters H and K by meeting criteria under §39.402(a)(2)(B) or (C). Environmental Groups I commented that the requirement of §39.402(a)(1)(B) that amendments constitute modifications to trigger public participation requirements illegally limits public participation.

TOGAP commented that although the proposed rules are designed to expand the requirements for notice to new minor sources, it does not expand the notice requirements to minor modifications that consist of construction of a new facility or modification of a facility that results in an increase in allowable emissions of less than 250 tpy of CO or NO_X or 25 tpy of VOC or SO_2 or PM_{10}, minor modifications of existing sources.

The commission has revised the rule in response to these comments. The intent of proposing the new applicability section was to combine the portions of §39.403(b) regarding applicability to air quality permit applications, and §39.402, which implemented HB 2518 (77th Legislature, 2001). The commission agrees that, as proposed, it appeared that the inclusion of the word "amendment" in subsection (a)(1) and the combination of subsection (a)(2)(A) and (B) together with subparagraphs (C) - (E), all of which were tied to amendment applications, was confusing and did not accurately reflect the commission's notice process. Proposed §39.402(a)(2)(D) and (E), relocated to new §39.402(a)(3(B) and (C) and (5)(B) and (C), were not intended to be interpreted as exempting all minor NSR permits from the public participation requirements. Rather, they exempt permit amendment applications from notice only when strict thresholds are met. While the rule has been restructured to ensure that overall applicability is the same as the commission's rules and practice prior to these amendments, this restructuring of §39.402 does not change the current notice

requirements for major NSR or minor NSR, with the exception of changes made to address the availability of the draft minor NSR permit absent receipt of a request for contested case hearing in response to the NORI, and other changes as discussed in the *OVERVIEW OF THE AMENDMENTS AND RELATED RULEMAKING* section earlier in this preamble. And, EPA is correct that PBRs and standard permits, with the exception of the concrete batch plant standard permit application, are not subject to the notice requirements in Chapter 39, Subchapters H and K.

Explanation of Rule Revisions

Section 39.402(a)(1) was revised from adoption to clearly separate new permit applications from permit amendment applications, now in subsection (a)(3) for permits under Chapter 116, Subchapter B. New subsection (a)(1) applies to applications for new permits under Chapter 116, Subchapter B. Federal permit applications are segregated as new subsection (a)(2). Because certain amendments are not subject to notice, subsection (a)(3) and (5) implement HB 2518, as discussed in further detail later in this preamble. Because the commission's flexible permit program is not yet approved by EPA as a minor NSR authorization, the notice requirements for new permit applications and permit amendment applications are in new subsection (a)(4) and (5); these two subsections track subsection (a)(1) and (3), respectively. This will allow EPA to approve subsection (a)(1) - (3) as a revision to the SIP separately from subsection (a)(4) and (5). The commission understands that EPA is expected to evaluate this rulemaking independently from the any rules regarding flexible permits. Therefore, the rules in this rulemaking that concern notice of flexible permit applications could be considered together if the commission adopts revised flexible permit rules, which are scheduled for consideration for proposal on June 16, 2010.

New subsection (a)(6) - (12), proposed as subsection (a)(3) - (9), is not changed from proposal. Each of these are specific authorizations under the commission's air quality permitting program, and are segregated in this applicability section primarily due to the status of each as to whether they are intended to be part of the commission's permitting program in the Texas SIP.

New subsection (a)(6) carries forward the commission's permit renewal program for which notice requirements are unchanged.

While the hazardous air permitting program under FCAA, §112(g) is a separate program from NSR permitting in the FCAA, it is nevertheless subject to the same notice requirements in the TCAA. Therefore, it is included but segregated into its own subsection (a)(7) which is not proposed as a revision to the SIP. Similarly, new subsection (a)(9) lists MPPs which are not part of the rules submitted to EPA.

New subsection (a)(8), (10), and (12) regarding PAL permits, FutureGen projects, and the change of location or relocation of a portable facility relates to permit programs for which the commission has submitted authorization rules to EPA as revisions to the SIP. As of the date of adoption of these rules, EPA has not taken final action on those specific rules.

Finally, new subsection (a)(11) describes the one standard permit, for concrete batch plants without enhanced controls that are not temporarily located in or contiguous to the right of way of a public works project, that is subject to individual notice requirements in Chapter 39, unlike other standard permits. Standard permits are authorized by THSC, §382.05195 and the rules in Chapter

116, Subchapter F. Although the issuance of new standard permits is subject to public notice and comment process, some of the individual standard permits contain notice requirements for each claimant to perform, including the standard permits for Animal Carcass Incinerators, Concrete Batch Plants with Enhanced Controls, and Permanent Rock and Concrete Crushers.

The commission's permitting system is a long-established tiered system, and, has a tiered notice process also. The following discusses both of these and provides sufficient demonstration that the portions of the public participation rules submitted as revisions to the SIP meet the requirements of the FCAA and thus are approvable by EPA.

Major Source Authorizations

The permitting program includes permits for new major sources and major modifications, those that are subject to PSD or nonattainment permitting (Chapter 116, Subchapter B, Divisions 5 and 6), and the applications for these permits are subject to the notice requirements of Chapter 39, Subchapters H and K. The rules adopted in this rulemaking and submitted to EPA as a revision to the SIP include the necessary elements of notice as found in 40 CFR §51.166(q), relating to notice for PSD applications, as well as the additional requirements imposed by the TCAA, namely, sign posting, alternate language publication and sign posting, and the opportunity for contested case hearing. Except where alternate language requirements are not triggered, these applications are subject to all notice requirements in Subchapters H and K. In addition, the commission's HAP permit program is subject to notice requirements in Subchapters H and K.

Minor Source Tiered Authorizations – First Tier

The commission has a multi-tiered minor NSR permitting program, and EPA acknowledges the approved portions in a recent notice (*see* September 23, 2009, issue of the *Federal Register* (74 *Federal Register* 48480, 48485, Footnote 2)). The first tier is authorization by an individual permit, and applications for these are subject to a case-by-case review. The applications for these permits and permit amendments are subject to the requirements of Chapter 116, Subchapter B (except Subdivisions 5 and 6), and notice requirements of Chapter 39, Subchapters H and K. The rules adopted in this rulemaking and submitted to EPA as a revision to the SIP include the necessary elements of notice as found in 40 CFR §51.161, as well as the additional requirements imposed by the TCAA, namely, sign posting, alternate language publication and sign posting, and the opportunity for contested case hearing. As discussed elsewhere in this preamble, the commission is extending the requirement for publication of the NAPD and opportunity to request a public meeting to meet 40 CFR §51.161 for these applications. The remaining minor NSR authorization tiers are discussed later.

Exemptions from Notice for First Tier (Case-by-Case Minor NSR Applications)

There are two categories of exceptions to notice requirements for these applications. First, if alternate language requirements are not triggered, then no alternate language publication or sign posting are required. Both sign posting and alternate language are requirements unique under state law and have no counterpart in the applicable federal rules. As discussed elsewhere in this preamble, the requirement to publish the NAPD is now required for minor NSR applications for which a request for contested case hearing is not received in response to the NORI, as required by federal rule.

Second, if the amount of the total emissions will be less than the established thresholds in new §39.402(a)(3)(B) and (C) and (5)(B) and (C), then notice is not required for permit amendment applications that meet these criteria. This rulemaking, in establishing the criteria, actually strengthens the SIP by adding specific criteria for notice of permit amendment applications where none previously existed. It should be noted that under the commission's existing rules as well as adopted new §39.402, permit amendment applications for authorization of a change in character of emissions or release of an air contaminant not previously authorized under the permit are not exempt from notice. Amendment applications where there is a change in the method of control are also subject to notice if there is also an increase in the emission rate that is greater than *the de minimis* thresholds in new §39.402(a)(3)(B) and (C) and (5)(B) and (C).

History of Notice Requirements for Permit Amendments

For air quality permit applications filed prior to the effective date of HB 801, the public notice requirements for air quality permits were located in §§116.130 - 116.137. These rules were most recently amended in 1998, and were approved by EPA as a revision to the SIP in 2002. Specifically, the applicability requirement is in §116.130(a), which states "{a}ny person who applies for a new permit or permit renewal shall be required to publish notice of the intent to construct a new facility or modify an existing facility or renew a permit. The notice shall be published in a newspaper in general circulation in the municipality where the facility is located or to be located. Any person who applies for a permit amendment shall provide public notification as required by the executive director."

For a new permit, the requirements in new §39.402(a)(1) and (2) adopted in this rulemaking are the same as in §116.130(a). For permit amendment applications, no criteria were specified in §116.130(a), yet EPA approved the rule as part of the Texas SIP. When §39.403 was adopted in 1999, which relocated the notice requirements and corresponding air quality applicability rules for applications filed on or after September 1999, the commission included subsection (b)(8)(B) that was intended to incorporate the informal criteria used for determining when notice would be required for amendment applications. The criteria was based on the insignificant levels that are in §106.4. Section 39.403(b)(8)(B), now proposed for repeal, provided that the modification of an existing facility, under a new permit or amendment application, which results in an increase in allowable emissions of any air contaminant emitted equal to or greater than the emission quantities defined in §106.4(a)(1) (relating to Requirements for Permitting by Rule) and of sources defined in §106.4(a)(2) and (3) would be subject to notice. The emission quantities in §106.4(a)(1) are no greater than 250 tpy of CO or NO_X; or 25 tpy of VOC or SO_2 or inhalable PM_{10}; or 25 tpy of any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen. Section 106.4(a)(2) and (3) provides that any facility or group of facilities, which constitutes a new major stationary source or any change which constitutes a major modification under the NSR requirements of FCAA, Parts C or D, Prevention of Significant Deterioration and Nonattainment, respectively, must meet the permitting requirements of Chapter 116, Subchapter B and cannot qualify for a PBR under this chapter. EPA proposed limited approval and limited disapproval of this rule in the Public Participation Notice.

Two years later, HB 2518 was adopted which provides authority to establish criteria notice of amendment applications. Codified in THSC, §382.0518(h), the statute provided further specificity

with regard to notice for air quality permit amendments. In response to HB 2518, the commission adopted new §39.402, but did not repeal or amend §39.403(b)(8)(B). This statute, as now implemented in adopted new §39.402(a)(3)(B) and (C) and (5)(B) and (C) for flexible permits, provides greater specificity than the current SIP-approved rule, and meets federal requirements for the types of notice that can be approved by EPA as revisions to the SIP under Title I of the FCAA, as demonstrated herein.

The commission's adoptions in 1999 and 2001 of the criteria for notice of amendments in §39.403(b)(8)(B) and §39.402, respectively, provided specific criteria to the general requirement in the SIP at §116.130. Although EPA previously approved the commission's rule that the executive director determine when any notice of a permit amendment application was subject to notice requirements without any criteria in the rule, the commission is now re-adopting such criteria and presenting these to EPA as revisions to the SIP.

Standards for Approval of Notice Exemptions

To meet the test established by EPA in its comments for approval of these criteria, the commission understands that the rule text and the accompanying preamble must demonstrate that the rules include specific, objective, and replicable criteria for determining when a minor NSR permit is exempt from, or subject to less than, the full public participation requirements at 40 CFR §51.161, and this categorization depends on the potential for environmental and public health concerns. Specifically, the commission must identify the types of minor sources and minor modifications that will be covered by these thresholds; the anticipated source population and estimates of future growth; demonstrate that the identified sources or changes are not environmentally significant; and

demonstrate that the current emission levels and predicted future emission levels will not cause or contribute to a violation of the NAAQS or PSD increments in the applicable areas. Further, the minor NSR public notice exemption process or public notice tiering process must be reasonable and adequate for the statutory and regulatory purposes of the minor NSR program and be consistent with the *de minimis* exemption criteria set forth in *Alabama Power Co. v. Costle,* 636 F.2d 323 (D.C. Cir. 1979).

EPA also stated that the commission must submit an analysis that demonstrates how these exemptions from, and categories of, public notice requirements were established, and how the exemptions and the types of public participation categories will not cause or contribute to a violation of the applicable NAAQS or PSD increments.

In *Alabama Power*, the D.C. Court of Appeals recognized that categorical exemptions may be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered *de minimis*. The opinion states that "{c}ourts should be reluctant to apply the literal terms of statute to mandate pointless expenditures of effort." The court also states that to exempt *de minimis* situations from a statutory command is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design. Determination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and as permitted by *Alabama Power* and by the FCAA. In *Alabama Power*, the court examined the exception allowed in FCAA, §165(b) that allows increases for Class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after application of best available

control technology (BACT), will be less than 50 tons per year and for which the owner or operator of such facility demonstrates that emissions of PM_{10} and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the secondary NAAQS for either of those pollutants. The court rejected EPA's attempted expansion of this exemption to also include new sources, but stated that it would allow a narrow exemption in other situations if based on the particular facts that lend themselves to those in which circumstances that in context may fairly be considered *de minimis*. The court emphasized that while the difference is one of degree, but the difference of degree is an important one. There is likely a basis for an implication of the *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value, unless the statute is extraordinarily rigid.

The principle of *de minimis* circumstances explained in *Alabama Power* is that the law does not concern itself with trifling matters including those in the administrative context, and allows exemption of *de minimis* matters as a tool to be used in implementing the legislative design. The opinion specifically notes that this principle has found application in the administrative context, and is available for sound application to administration by the government of its regulatory programs. The opinion further states that courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort.

In 1995, EPA proposed changes to 40 CFR §51.161 that would allow states to vary the procedures for and timing of public review of applications where the prospective emissions increases from any physical changes or changes in the method of operation of a source that is also subject to the requirements of 40 CFR Part 70 (the EPA regulations that implement the Federal Operating

Permit Program, also known as Title V), considered by themselves, would be a significant emissions increase of any pollutant subject to regulation under FCAA, Title I, Parts C and D (the PSD and nonattainment permitting programs).

The proposed rule change would have also allowed states to designate, with EPA approval, certain categories of changes as being *de minimis,* and *de minimis* changes may forego altogether review by the public. This is because, as EPA acknowledges in the 1995 notice, that since states may exempt *de minimis* changes from minor NSR altogether, it follows that states may provide a partial or full exemption from the full public process requirements for major modifications, consistent with the environmental significance of the change. The preamble for this proposed rule recognized the *de minimis* exemption criteria from *Alabama Power,* provided that the changes are not environmentally significant, and the program is reasonable and adequate for the purpose of the program.

TCEQ's Demonstration

The commission agrees that the focus of the public and the commission should be on the more environmentally significant applications. The notice thresholds not only provide that applications that are for genuinely *de minimis* changes are not subject to full notice procedures as other minor and major source applications, but benefit the public so that they can focus their resources on those applications that may have the potential to raise environmental and public health concerns. Therefore, the notice thresholds eliminate the notice burden when there would be little or no value to mandate pointless expenditures of effort. Therefore, to apply the *de minimis* principles from *Alabama Power,* with consideration given to EPA's interpretation as articulated in the 1995 notice,

the commission provides the following explanation of how new §39.402(a)(3)(B) and (C), and (5)(B) and (C), meet that test, as well as the statutory directive of HB 2518.

First, the exemptions do not apply to any application for a new major source or major modifications; those applications are in the applicability rule at §39.402(a)(2). Second, these notice thresholds for minor NSR amendment applications are below permitting thresholds established by EPA, as discussed in greater detail later in this preamble. The FCAA requires states to implement a minor source program under FCAA, §110(a)(2)(C). As the EPA recognizes, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the national ambient air quality standards (NAAQS). States have significant discretion to tailor minor NSR requirements that are consistent with the requirements of 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans), and may also provide a rationale for why the rules are at least as stringent as the 40 CFR Part 51 requirements where the revisions are different from 40 CFR Part 51. These amendments ensure that the rules are at least as stringent as the notice requirements in the commission's SIP-approved minor NSR permitting program, and meet the *de minimis* criteria of *Alabama Power*. The exemptions from notice include the circumstances that in the context of protection of air quality can be considered *de minimis*. This rule specifically identifies the types of minor NSR permit amendment applications that are subject to the specific, objective, and replicable criteria for determining which are subject to notice. The commission provides the following in support of the requirements EPA articulated in its comments.

Clarification of Total Emission Increases

This section complements the subsequent discussion regarding the *De Minimis* and Insignificant Notice requirements, which immediately follow this section of the preamble. For purposes of determining the total emission increases in a permit amendment application, the total emission increase is the net sum of emission increases and emissions decreases in the amendment application. For all cases, emission increases or decreases are considered after the application of BACT or other additional voluntary control technology. The commission intends that the total emission increases for each pollutant category defined in the rule may include, but is not limited to: 1) increases in emissions as a result of new facilities at an existing permitted site; 2) changes to permitted allowable emission rates as a result of physical or operational changes to existing facilities; 3) changes to permitted allowable emission rates as a result of incorporation of a previous authorization when actual emissions are above that authorization's current limitations or authorized actual emission rates; 4) changes to allowable emission rates due to sampling when actual emissions are above that facility's current limitations or authorized allowable emission rates; and 5) emissions due to planned maintenance, start-up, or shutdown at only the new or modified facilities when these emissions are required to be included in permits. The commission does not intend the total emission increases for each pollutant category defined in the rule to include: 1) consolidation or incorporation of any previously authorized facility or activity (PBR, standard permits, existing facility permits, etc.); 2) changes to permitted allowable emission rates when those changes are exclusively due to changes to standardized emission factors; or 3) actual existing emissions due to planned maintenance, start-up, or shutdowns at permitted facilities, where those emissions were not previously listed on a Maximum Allowable Emission Rate Table (MAERT). It is important to understand that if a permit application proposes an amount of an air contaminant above any applicable threshold, then the application is subject to notice. Stated another way, if any proposed

air contaminant alone is below the notice threshold, that does not exempt an application from notice if the application is for any other air contaminant that exceeds the applicable notice threshold. Further, the published notice will include the name of all of the primary proposed air contaminants, including those that if considered alone would be below the threshold for notice.

Facilities and Public Notice De Minimis Requirements (For Facilities Not Affected by THSC, §382.020)

The commission adopts new §39.402(a)(3)(B) and (5)(B) to address public notice requirements for permit amendment applications (i.e., those involving facilities not affected by THSC, §382.020) by establishing public notice *de minimis* thresholds to determine whether an air quality permit amendment application that includes facilities not affected by THSC, §382.020 (which relates to facilities which handle certain agricultural products), is subject to Chapter 39 public notice requirements.

The commission initially established these criteria by the adoption of new §39.402 in 2001, which is repealed as part of this rulemaking. The original §39.402 was subject to notice and comment rulemaking procedures as required by the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001. Comments were received and addressed by the commission as part of that rulemaking, which was adopted in 2001. In addition, the thresholds were subject to notice and comment in this current rulemaking. However, no specific comments were received as to the commission's selection of the specific thresholds, or regarding the values set for each threshold. The commission therefore makes no change to the criteria when adopting new §39.402(a)(3)(B) and (5)(B).

The rationale stated for the *de minimis* thresholds adopted in new §39.402(a)(3)(B) and (5)(B) is the same as the rationale for when they were first adopted in 2001. The commission has reviewed the original factual basis for the rule as adopted in 2001 and as proposed in this rulemaking to ensure it demonstrates a rational connection between the factual basis for the rule and the rule as adopted, and also to ensure that the thresholds meet EPA's comments for approval as a revision to the SIP. Permit amendment applications are subject to public notice if the total emission increases from all facilities authorized under the amended permit exceed any one of the public notice *de minimis* values, which are adopted as follows: for CO, 50 tpy; for sulfur dioxide (SO_2), ten tpy; for lead (Pb), 0.6 tpy; and for all other air contaminants, including NO_X (as a surrogate for NO_2), VOC, PM_{10}, or any other air contaminant (except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen), five tpy. All of these thresholds are reasonable and adequate for the purpose of permit amendment application notice purposes.

The public notice *de minimis* criteria defined in §39.402(a)(3)(B) and (5)(B) are based on an evaluation of state and federal *de minimis* permitting-related thresholds and annual mass emission rates for major source determinations, BACT and air quality analysis review, and other analyses of the criteria pollutants CO, VOC, SO_2, PM, lead, and NO_2, as discussed later. The commission has adopted *de minimis* for public notice values which are less than or equal to these federal or state definitions of "*de minimis*," which are used for determining whether there will be a *de minimis* impact (*see* 30 TAC §101.1(25)). The concept of *de minimis* in the context of public notice is intended to focus the attention of the public and the commission on proposed emission increases that could have a greater potential for public interest and questions regarding impacts to public

health and welfare. This adoption does not change the requirements for the technical review of a permit application, which include a BACT and emissions impacts review. Rather, this adoption builds on an approach used by EPA's PSD and NAAQS assessment for determining federal major source "*de minimis*" thresholds for criteria pollutants. The *de minimis* notice thresholds established in this rule do not result in the potential for environmental or public health concerns.

The EPA uses mass emission rate "significance levels" to determine if the emissions from a new or modified stationary source must apply for a federal permit. If the net emissions increase meets or exceeds a significance level for a pollutant, a federal review is required. This review includes an evaluation of BACT and an air quality analysis. EPA uses ambient air concentration thresholds to determine the scope of the air quality analysis. EPA refers to these thresholds as "significance levels" and "significant impact levels" (SILs), while the TCEQ refers to them as "*de minimis* impacts" and SILs, respectively. EPA based the significance levels and SILs on a percentage of each NAAQS, as applicable, to determine the scope of the air quality analysis review.

The commission reviewed the EPA report which was the basis for federal *de minimis* impacts evaluation for criteria air pollutants and PSD permitting procedures (*see* EPA-450/2-80-072, *Impact of Proposed and Alternative De Minimis Levels for Criteria Pollutants*; the August 7, 1980 issue of the *Federal Register* (45 FR 52706); and EPA's *New Source Review Workshop Manual*, October, 1990). The EPA evaluation considered impacts from single sources, as well as the cumulative effect on increment consumption of multiple sources. The EPA evaluation used a screening model and data on sources that had been permitted under the PSD program. Because of concerns about over-prediction of lead concentrations, EPA used refined modeling results as a supplementary data base

for the federal *de minimis* lead evaluation. The commission used the federal SILs and corresponding mass emission rates as a starting point to determine mass emissions rates for public notice *de minimis* purposes and adjusted them to account for other limits associated with nonattainment, PSD, and federal operating permit major source definitions, and the general limits for PBR. The EPA established federal mass emission rates based on design concentrations of 2% or 4% of selected NAAQS averaging periods. To be at least as stringent in its evaluation, the commission took into account all averaging periods and applicable levels for each NAAQS.

Specifically, the commission adopts §39.402(a)(3)(B)(i) and (5)(B)(i) to establish the public notice *de minimis* criterion for CO at 50 tpy. The commission adopts this threshold after consideration of the federal significance level for CO and the operating permit major source threshold for CO of 100 tpy (*see* 30 TAC §116.12(10) and §122.10(13)(C)). Based on the EPA *de minimis* assessment procedure described above, the commission finds that this rate is too high for public notice *de minimis*. While the commission agrees that the federal CO limit is reasonable and adequate for its purpose, a more restrictive mass emission rate is reasonable, adequate and appropriate for public notice. Because EPA did not use a design concentration to set the 100 tpy rate, the commission applied the EPA process of using between 2% and 4% of the NAAQS for other criteria pollutants to determine the mass emission rate for CO. The federal air quality analysis *de minimis* level for both CO NAAQS is set at 5% of the NAAQS, which corresponds to the federal mass emission rate of 100 tpy. Reducing the public notice *de minimis* criterion to a conservative 50 tpy would relate to a design concentration of two and one-half percent for both CO NAAQS averaging periods. The public notice *de minimis* rate for CO and potential public notice requirements will not affect the technical review of air quality permit amendment applications, including evaluation of BACT, off-

property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention to ensure that public health and the environment are protected.

The commission adopts §39.402(a)(3)(B)(ii) and (5)(B)(ii) to establish the public notice *de minimis* criterion for SO_2 at ten tpy based on consideration of the following facts. First, EPA's federal significance level of 40 tpy was based on a design value concentration of 4% of the 24-hour NAAQS; and second, the lowest significance level threshold for SO_2 is 25 tpy for PBRs under THSC, §382.057, as implemented by 30 TAC Chapter 106 (see §106.4(a)(1)). While the commission agrees that the federal SO_2 significance level is reasonable and adequate for its purpose, a more restrictive mass emission rate is reasonable, adequate and appropriate for public notice. The commission finds that a public notice *de minimis* emission rate of ten tpy is more appropriate because it is based on a design value concentration of 1% of the lowest SIL to NAAQS ratio that would trigger a detailed air quality analysis for any of the three NAAQS for SO_2. The public notice *de minimis* rate for SO_2 and potential public notice requirements will not affect the technical review of air quality permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention to ensure that public health and the environment are protected.

The commission adopts §39.402(a)(3)(B)(iii) and (5)(B)(iii) to establish the public notice *de minimis* criterion for lead at 0.6 tpy, which is the federal significance level (see §116.12(10)) and is the amount at which a PSD BACT and air quality analysis must be conducted. The commission is adopting the public notice *de minimis* rate at the federal significance level. This is based on 1) the EPA's original *de minimis* evaluation conducted for lead; 2)the fact that EPA did not change the

mass emission rate when it updated the NAAQS; and 3) that when EPA significantly reduced the averaging level from 1.5 micrograms per cubic meter to 0.15 micrograms per cubic meter without also reducing the already low federal significance level for lead. Therefore, the commission finds that the criterion for lead is reasonable and adequate for public notice purposes. The public notice *de minimis* rate for lead and potential public notice requirements will not affect the technical review of air quality permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention to ensure that public health and the environment are protected.

The commission adopts §39.402(a)(3)(B)(iv) and (5)(B)(iv)to establish the public notice *de minimis* criteria for all other air contaminants, including NO_X, VOC, PM_{10}, or any other air contaminant (except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen) at five tpy.

For NO_X, the commission adopts a five tpy threshold based on consideration of the following facts. First, EPA's federal significance level of 40 tpy was based on a design value concentration of 2% of the annual NAAQS; second, EPA did not change the mass emission rate when it promulgated a new NO_2 NAAQS; third, the significance level for an air quality analysis for ozone is a mass emission rate of 100 tpy of NO_X; and fourth, the lowest state or federal *de minimis* or significance level for NO_X is five tpy in nonattainment areas and is the threshold test (netting) for major stationary sources (*see* 30 TAC §116.150(a)). While the commission agrees that the federal significance level for PSD is reasonable and adequate for its purpose, a more restrictive mass emission rate is reasonable, adequate and appropriate for public notice. The commission has determined that a five tpy rate is reasonable and adequate to address NO_X and associated impacts on ozone formation.

The public notice *de minimis* rate for NO_X and potential public notice requirements will not affect the technical review of air quality permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention to ensure that public health and the environment are protected.

For VOC, the commission adopts the five tpy threshold based on consideration of the following facts. First, EPA's federal significance level of 40 tpy was set at the same level as NO_2 based on the relationship between NO_2 and VOC in the formation of ozone; second, the significance level for an air quality analysis for ozone is a mass emission rate of 100 tpy of VOCs; and third, the lowest federal or state *de minimis* or significance level for VOC is five tpy in nonattainment areas and is the threshold test (netting) for major stationary sources (see §116.150(a)). While the commission agrees that the federal significance level for PSD is reasonable and adequate for its purpose, a more restrictive mass emission rate is reasonable, adequate and appropriate for public notice. The commission finds that, in view of the link between VOC and NO_X in the formation of ozone, an emission rate of five tpy is reasonable and adequate. The public notice *de minimis* rate for VOC and potential public notice requirements will not affect the technical review of air quality permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention to ensure that public health and the environment are protected.

For PM, the commission adopts the five tpy threshold based on consideration of the following facts. First, EPA's federal significance level of 10 tpy for the $PM_{2.5}$ indicator was based on a design value concentration of 4% of the annual NAAQS (70 *Federal Register* 66038); and second, based on

EPA's federal *de minimis* assessment procedure, the commission finds that an emission rate based on 2% of the annual NAAQS for $PM_{2.5}$ (five tpy) was appropriate for public notice because the PM criteria pollutant includes three indicators. For PM, 25 tpy is the mass emission rate at which a PSD BACT review for PM must be conducted. For PM_{10} and $PM_{2.5}$, 15 tpy and 10 tpy are the mass emission rates for PM_{10} and $PM_{2.5}$, respectively, at which a PSD BACT and air quality analysis must be conducted. Also, the EPA has not finalized SILs for the $PM_{2.5}$ NAAQS. Therefore, the commission finds that the reasonable, adequate and appropriate level for public notice is five tpy. The public notice *de minimis* rate for PM and potential public notice requirements will not affect the technical review of air quality permit amendment applications, including evaluation of BACT, off-property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention to ensure that public health and the environment are protected.

For all other air contaminant categories (such as fluorides, hydrogen sulfide, or other air contaminants not considered a part of a group under criteria pollutants), the commission adopts five tpy as a conservative threshold, which is less than the 25 tpy significance threshold for PBR under THSC, §382.057, as implemented by Chapter 106 (see §106.4(a)(1)). While the commission did not evaluate species of pollutants, the commission finds that, for consistency and based on the analysis for VOC and PM, an emission rate of five tpy should apply for other contaminant categories as well. Therefore, the commission finds that the reasonable, adequate and appropriate level for public notice is five tpy for these other air contaminant categories. The public notice *de minimis* rate for these air contaminants and potential public notice requirements will not affect the technical review of air quality permit amendment applications, including evaluation of BACT, off-

property impacts of air contaminants, or any other review, such as federal applicability or pollution prevention to ensure that public health and the environment are protected.

Facilities and Insignificant Public Notice (For Facilities Affected by THSC, §382.020)

For applications for facilities that are affected by THSC, §382.020, the commission implemented HB 2518 by adopting the insignificant thresholds in Chapter 106. The description of "insignificant thresholds" comes from the statute, although the legal standard for review is whether the program is compliant with *Alabama Power*. The concept of *de minimis,* but designated as "insignificant" in §39.402(a)(3)(C) and (5)(C), in the context of public notice is intended to focus the attention of the public and the commission on emission increases that could have a greater potential for public interest and questions regarding impacts to public health and welfare.

The commission initially established the notice thresholds for certain agricultural amendment applications by the adoption of §39.402, which is repealed by part of this rulemaking. The original §39.402 was subject to notice and comment rulemaking procedures as required by the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001. Comments were received and addressed by the commission as part of that rulemaking, which was adopted in 2001. In addition, the thresholds were subject to notice and comment in this current rulemaking. However, no specific comments were received as to the commission's selection of the specific thresholds, or regarding the values set for each threshold. Therefore, the commission makes no change to the criteria when adopting new §39.402(a)(3)(C) and (5)(C).

The rationale stated for the insignificant thresholds adopted in new §39.402(a)(3)(C) and (5)(C) is the same as the rationale for when they were first adopted in 2001. The commission has reviewed the original factual basis for the rule as adopted in 2001 and as proposed in this rulemaking to ensure it demonstrates a rational connection between the factual basis for the rule and the rule as adopted, and also to ensure that the thresholds meet EPA's comments for approval as a revision to the SIP.

The commission has a long history of its authorization via standard exemptions, later codified in individual rules as "permits by rule." This type of authorization has been demonstrated to be an insignificant source, as a review of the history of this authorization shows. The Texas Air Control Board (TACB), predecessor agency to the commission, originally adopted Standard Exemptions. In 1982, EPA approved §116.6, which referenced the Standard Exemption List, as part of the SIP. The TACB, and its successor agencies, made several other submittals to its SIP revising Regulation VI, now known as 30 TAC Chapter 116, approved by EPA, of which approved §116.6 was a part. In 1993, EPA acknowledged its approval of the exemptions contained in §116.6. The standard exemptions were designated as PBRs with the adoption of new Chapter 106 beginning in November 1996; the majority of the standard exemptions were added to Chapter 106 in February 1997. EPA also acknowledged that while the Chapter 106 rules had not been submitted, the rules in Chapter 106 were substantively similar to prior-approved exemptions in §116.6 (67 *Federal Register* 58697 - 58704 (September 18, 2002)). Prior to the enactment of THSC, §382.05196 in 1999, the commission adopted PBRs under THSC, §382.057, which allows the commission to exempt certain facilities from case-by-case permitting requirements if the changes will not make a significant contribution of air contaminants to the atmosphere.

After all exemptions were codified as PBRs, EPA approved the permitting process as a streamlined mechanism in the permitting process for those sources likely to make insignificant contributions of pollutants to the atmosphere. The commission's individual PBRs are not subject to the notice requirements in THSC, §382.056, except for certain concrete batch plants as required by THSC, §382.058. The commission later repealed the PBR for concrete batch plants and instead adopted a new standard permit, as allowed by THSC, §382.05195, added in 1999. Consequently, it was a logical, reasonable and adequate basis for the notice thresholds to mirror the approved insignificant levels in Chapter 104, specifically §106.4.

A review of the implementation of HB 2518 exemption for permit amendment applications that are affected by THSC, §382.020 for the eight and one-half year period of September 2001 through March 2010 indicates that the commission processed approximately 356 applications that meet this description, located in approximately 88 counties, many of which are rural areas in west Texas, and many of these applications were associated with cotton gins. These amendment applications accounted for about 10% of the amendment applications for all types of facilities (not just these certain agricultural facilities) processed during that time period. Approximately 19 of the 356 were subject to public notice because the emissions would be greater than the insignificant thresholds. The primary air contaminant of concern for these facilities is PM. Based on this data, the commission does not anticipate that the population of these facilities will be in such quantity to interfere with attainment and maintenance of the NAAQS for PM. The only area that is nonattainment for PM in Texas is El Paso, which is classified as a moderate area for PM_{10}. The historical basis for the designation is based on PM_{10} emissions transported into the El Paso area

from the Cuidad Juarez, Mexico area. Results of air dispersion modeling of both the 1990 and 1994 El Paso County PM_{10} emissions inventories demonstrate that the currently designated nonattainment area would be in attainment now and at the 1994 deadline attainment date, if it were not for emissions emanating from outside the United States. PM emissions generated by the handling, loading, unloading, drying, manufacturing or processing of grain, seed, legumes or vegetable fibers are not of concern in El Paso, and none of the permit amendment applications during the applicable time period were for facilities in El Paso County. Further, there are no nonattainment or PSD permits issued for these types of facilities in the El Paso area, and a search of commission records shows there is only one PSD permit for this type of facility in Texas, and that is a brewery.

Therefore, the commission finds that the factual basis for the rule as adopted in this rulemaking demonstrates a rational connection between the factual basis for the rule and the rule as adopted, and also finds that the thresholds meet EPA's comments regarding its basis for approval as a revision to the SIP. These thresholds also comply with THSC, §382.05196 which provides the commission the authority to adopt permits by rule for certain types of facilities if it is found that these types of facilities will not make a significant contribution of air contaminants to the atmosphere. In addition, the commission is prohibited from adopting a PBR that authorizes any facility defined as "major" under any applicable pre-construction permitting requirements of the FCAA.

Summary of Analysis for Exemptions from Notice for Minor NSR Case-by-Case Permit Applications

The thresholds that are established for when notice is applicable for permit amendments clearly meets the test articulated in *Alabama Power,* and as that case has been interpreted by EPA in a proposed rulemaking. The thresholds meet the *de minimis* principle by focusing public and government resources on environmentally significant permit amendment applications, as allowed for in the minor NSR permitting program. The rule includes specific, objective and replicable criteria for determining when notice is required for specific types of permit amendment applications. These thresholds were established by consideration of the potential for environmental and public health concerns, and the application of the thresholds requires the commission to carefully evaluate the application prior to a decision on whether the exemptions would apply. Further, the chosen criteria are not arbitrary and in fact are related to permitting thresholds for which lesser or no review is conducted or is necessary, allowing for reasonable and appropriate application of resources by the government for administration of the NSR permitting program. Application of the notice thresholds does not affect any part of the technical review of these permit amendment applications, and the notice exemptions do not override any notice or technical requirements for PSD or nonattainment permit applications. The exemption from notice does not result in exemption from any other requirements or tools used that are relevant to attainment and maintenance of the NAAQS or protection of PSD increments, such as application of appropriate control technology, reporting when required to the emissions inventory, and analysis of monitoring data.

In addition, because these are procedural rules, whether there is a certain type of notice for amendment applications does not affect air quality. When conducting an analysis of whether rule amendments submitted as part of the SIP can be approved, the analysis under FCAA, §110(l), 42

USC, §7410 has been interpreted to be whether the revision will "make air quality worse" (*Kentucky Resources Council, Inc. v. EPA*, 467 F3d 986 (6th Cir. 2006), cited with approval in *Galveston-Houston Association for Smog Prevention (GHASP) v. U.S. EPA*, 289 Fed. Appx. 745, 2008 WL 3471872 (C.A. 5)). Certainly, these stringent thresholds alone, nor their application, cannot be found to make air quality worse, and as such are approvable as part of the Texas SIP.

Therefore, these *de minimis* and insignificant notice thresholds allow the public and the agency to focus their efforts on projects with the potential for environmental impact and public health concerns that have full public participation opportunities.

Minor Source Tiered Authorizations - Second, Third, and Fourth Tiers

The second tier of authorizations is standard permits, and the third tier is PBRs. With regard to notice for standard permits and PBRs, each of those are adopted via separate processes, and have always been and remain exempt from the notice process for major and minor NSR case by case permits that previously applied in Chapter 116 (specifically §§116.130 - 116.137), as well as the rules adopted that implement HB 801 and HB 2518. The notice process is approved by EPA in the SIP in §116.603; *see* 73 *Federal Register* 53716 (September 17, 2008). There is no requirement for notice for any claim for an individual standard permit, as acknowledged by EPA in its comments. As discussed elsewhere in this preamble, the TCAA, however, does require case-by-case style notice for concrete batch plants without enhanced controls. Adopted new §39.402(c)(2) is included to ensure clarity that the standard permits are not subject to the notice requirements of Chapter 39, Subchapters H and K

The third tier is PBRs. EPA has approved the general requirements for PBRs in 30 TAC Chapter 106, Subchapter A as part of the Texas SIP. There is no requirement for notice for any claim for an individual PBR, as acknowledged by EPA in its comments. Adopted new §39.402(c)(3) is provided to ensure clarity that the PBRs are not subject to the notice requirements of Chapter 39, Subchapters H and K. Therefore, no change was made to the rule in response to the comments by TOGAP and Environmental Groups I that §39.402 violates minimum federal requirements of 40 CFR Part 51 because it exempts changes authorized by PBRs and non-modification changes from public participation requirements.

Finally, the fourth tier of authorization is via §116.119, which was adopted to authorize facilities or sources that the commission considers to be *de minimis,* and for which no registration or authorization prior to construction is required. Section 116.119 is not open for amendment or comment as part of this rulemaking.

Zephyr recommended that the commission clarify the use of the term "new facility" in relation to public notice requirements for NSR permit amendment. Zephyr understands that the term is not intended to mean equipment components such as valves, flanges, pumps, etc. Otherwise, the rules could have the unintended consequence of requiring public notice even for the addition of one valve which emits only 0.0009 pounds per hour of VOC because the valve could be considered a "new facility" as it technically is a point of origin of air contaminants.

The commission has revised §39.402 as discussed in the previous response. Equipment components such as valves, flanges, pumps, etc. are facilities and, depending upon the content of the permit or

permit amendment application, authorization for the construction and operation of these may be subject to the public participation requirements in Chapter 39. An application for a permit amendment that is only for the addition of one valve which is proposed to emit 0.0009 pounds per hour of VOC would meet the *de minimis* threshold under new §39.402(a)(3)(B) or (5)(B) and therefore would not be subject to full notice requirements.

CEJ and the Environmental Groups I commented that all minor source authorizations should have a 30-day notice and comment period, unless the agency demonstrates that the changes are *de minimis*. CEJ stated that this is not currently done for non-category specific PBRs or alterations, and the rule should be changed to add the requirement. Environmental Groups I commented that proposed §39.402(c)(3), should require PBRs to be subject to notice requirements. The Environmental Groups I commented that before *de minimis* exemptions can be exempted from minor NSR requirements, the commission must demonstrate that the emissions will not interfere with control strategies, attainment, or maintenance of the NAAQS, as required by 40 CFR Part 51. Such demonstration must be submitted to EPA and made subject to public review and comment before Texas can incorporate it into the SIP and implement the *de minimis* provisions.

No changes were made in response to these comments. The rules regarding PBRs are located in 30 TAC Chapter 106, and that chapter was not open for comment. Therefore, this comment is beyond the scope of this rulemaking. However, as discussed elsewhere, PBRs are not subject to individual notice, although the adoption of the PBRs are rules subject to the notice and comment process of the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001.

The commenter is correct that there is no notice for alterations. The commission's permit alteration rule, §116.116(c), approved as part of the Texas SIP, is for permit actions that are a decrease in allowable emissions; or any change from a representation in an application, general condition, or special condition in a permit that does not cause a change in the method of control of emissions; a change in the character of emissions; or an increase in the emission rate of any air contaminant. None of these criteria meet any state or federal requirement for notice. Therefore, alterations are not included in this rule as applicable permit actions that are subject to Chapter 39, Subchapters H and K. Further, §116.116(c) was not open for comment and therefore the comment regarding requirements of an alteration is beyond the scope of this rulemaking.

With regard to the comments for the applications that are for *de minimis* exemptions from permitting, the *de minimis* thresholds for notice in new §39.402(a)(3)(B) and (5)(B) are not the *de minimis* thresholds for permitting. The commission's *de minimis* permitting rule, §116.119, was not open for comment as part of this rulemaking, and therefore, this comment is beyond the scope of this rulemaking.

§39.402(a)(8)

TIP supported the revisions to §39.603(a) that exclude PAL permit applications from the requirement to publish the NORI, but requires publication of the NAPD with the opportunity for public comment, specifically applications for the establishment or renewal of or an increase in a PAL permit. These requirements could be clarified by adding text to the end of §39.402(a)(5), re-designated as §39.402(a)(8), which states “with the exception specified in §39.603 of this subchapter.”

No change was made in response to this comment. Section 39.402 is general applicability rule. Not all applications are subject to all requirements in Subchapters H and K, therefore, there is no need to add this specificity with regard to PAL permit applications.

Environmental Groups I commented that in §39.402(a)(5), adopted as new subsection (a)(8), public participation requirements should be required for changes that alter a PAL permit's terms or conditions, including monitoring and reporting.

No changes were made in response to this comment. The scope of what changes to a PAL permit, i.e., the establishment, renewal or increases in a PAL permit, are subject to notice mirror the scope of the federal PAL public participation rule in 40 CFR §52.21(aa)(5), and the commission finds no basis to expand the scope. Commenters did not provide any reasoning for their recommendation that the scope should be expanded. With regard to what an "increase" is for purpose of a PAL, that is determined by the other rules for PAL permits in Chapter 116, Subchapter C, which are beyond the scope of this rulemaking.

§39.402(a)(11)

EPA asked the commission to explain the basis for excluding from public notice concrete batch plants without enhanced controls temporarily located in or contiguous to the right-of-way of a public works, and how this exclusion is consistent with the requirements of 40 CFR §51.161. Any exemption from public notice must be addressed through a demonstration of environmental significance as EPA commented regarding §39.402(a)(2)(D) and (E). EPA also stated that these types of temporary facilities must go through the public participation process for initial construction.

No change was made in response to this comment. This type of authorization has been demonstrated to be an insignificant source, as a review of the history of this authorization shows. As discussed elsewhere in this preamble, the commission's individual PBRs are not subject to the notice requirements in THSC, §382.056, except for certain concrete batch plants as required by THSC, §382.058. The commission later repealed the PBR for concrete batch plants and instead adopted a new standard permit, as allowed by THSC, §382.05195, added in 1999.

The legislature specifically exempted, in THSC, §382.058(b) concrete plants located temporarily in the right-of-way, or contiguous to the right-of-way, of a public works project. As originally adopted by the commission in Standard Exemption 93, then relocated to PBR §106.202, a temporary batch plant is one that occupies a designated site for not more than 180 consecutive days or supplies concrete for a single public works project or for the same contractor for related project segments, but not other unrelated projects. In 1982, EPA approved §116.6, which referenced the Standard Exemption List. The TACB, and its successor agencies, made several other submittals to its SIP revising Regulation VI, now known as 30 TAC Chapter 116, approved by EPA, of which approved §116.6 was a part. In 1993, EPA acknowledged its approval of the exemptions contained in §116.6 and remarked that the commission had not yet submitted its Chapter 106 rules for PBRs; however, EPA also acknowledged that while the these rules had not been submitted, but asserted that the rules in Chapter 106 were substantively similar to prior-approved exemptions in §116.6 (67 *Federal Register* 58697 - 58704 (September 18, 2002)). After all exemptions were codified as PBRs, EPA approved the permitting process as a streamlined mechanism in the permitting process for those sources likely to make insignificant contributions of pollutants to the atmosphere.

The commission's decision to change the authorization from a PBR to a standard permit, with the same exemption from notice for temporarily located plants affiliated with public works projects, does not change the type of source. Therefore, since temporary plants located in or contiguous to the right-of-way of a public works project which have never been subject to full notice requirements like case-by-case authorizations, there is no backsliding with regard to the exemption from notice.

§39.405, General Notice Provisions

HCPHES recommended that §39.405 include additional notification mechanisms to ensure adequate time to interpret and comment on the proposed permit action. Specifically, it suggested including manual notification via flyer to affected persons within one-half mile radius of the facility, and utilizing television and radio to broadcast the permittee's intent.

No changes were made in response to this comment. This rulemaking was conducted primarily to address comments made by EPA that the rules were not approvable as written as a revision to the Texas SIP. EPA did not address any additional types of notice, including the types suggested by HCPHES. The TCAA already requires at least two types of notice that go beyond federal rules, specifically, sign-posting and alternative language newspaper notice. Sign posting has been required for more than twenty years, and the commission finds that it is a very effective notice tool, in part because persons near the proposed location can see it without any specific effort to do so, and do not have to rely on other forms of notice. Further, had the legislature intended these very specific types of notice, it could have so specified. The Solid Waste Disposal Act, THSC, Chapter 361, for

example, specifically requires radio broadcast as part of the notice process for hazardous waste facilities.

Environmental Groups II also stated that the rules fail to require notice to be republished when a problem with notice is discovered in the comment period and that the commission should require notice to be republished.

No changes were made in response to this comment. As discussed elsewhere, compliance with notice requirements is required for permit issuance. Re-publication may be required for compliance.

TIP proposed additional language to §39.405(g)(3) to ensure that the applicant would have to make available the air quality analysis after the NAPD is published. As proposed, the timeframe for making it available appears to be after publication of the NORI. Specifically, TIP suggested that the rule provide that the applicant shall also provide a copy of the executive director's air quality analysis beginning on the first day of news paper publication of the NAPD.

The commission agrees and has made this change in the rule.

RPS commented that the reference to subsection (e) in new subsection (i) should be a reference to subsection (j).

The commission agrees and has made this change.

EPA recommended shortening the existing ten-day period for applicants to inform the commission that publication has occurred to a three-day requirement.

The commission has made no change in response to this comment. Applicants have to rely on newspapers to correctly complete the publisher's affidavit, and applicants submit it and the tear sheet of the notice including the date at the top of the page to the commission for each publication. Often the various documents come in separately or they are delayed because the affidavit takes longer to acquire. If the commission conducted notice instead of delegating this responsibility to applicants, the commission would similarly have to rely on newspapers informing the commission of the exact date notice is published; documentation would likely also be provided via mail. Based on years of experience with this requirement prior to the rule amendments implementing HB 801, three days is not a reasonable time period for newspapers to complete the affidavits and the applicants return them to the commission. And, the commission finds that there is no appreciable delay in receiving confirmation of the publication by the commission's delegation to applicants to be responsible for this task. Further, as discussed elsewhere in this preamble, the 30-day comment period is often effectively longer than 30 days, and notice of it is not limited to newspaper notice. Therefore, the commission finds that the public's opportunity to comment is not adversely affected by the ten-day affidavit requirement.

Environmental Groups I commented that §39.405(j) be amended to require companies to notify TCEQ within 24 hours of publication, require TCEQ to post notice of publication and date of comment deadline in Web site within 48 hours of publication.

No changes have been made in response to this comment because the applicable rule, §39.411(f)(5), already requires the notice to clearly state when the comment period ends. The specific text used in notice templates states "{t}he deadline to submit public comments is 30 days after newspaper notice is published;" it is 15 days for renewal applications. The commission respectfully disagrees that it is not possible to know from the notice when the notice period ends. Given that publication is required to be in a newspaper, the current date is printed, usually at the top of the page, and the end of the comment period would be no earlier than 30 days after that date. Commission rule 30 TAC §1.7 regarding computation of time, which is the standard method used by courts and executive branch agencies, provides that, "except as otherwise specifically provided by commission rules, in computing any period of time prescribed or allowed by commission regulation or orders or by any applicable statute, the period shall begin on the day after the act, event, or default in question and shall conclude on the last day of that designated period, unless it is a Saturday, Sunday, or legal holiday on which the office of the chief clerk is closed, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal holiday on which the office of the chief clerk is closed."

Commenters state that when they receive mailed notice they do not know when the actual publication date will occur, and therefore do not know the end date of the comment period. However, they know that it will be at least 30 days out from the time that the notice was mailed, and can be up to several days later, depending upon how quickly the applicant delivers the notice to the newspaper and how quickly publication occurs. Anyone can access the information available in the CID, which includes the date that the notice was mailed out, as well as the text of the notice. When the chief clerk's office receives the required notice notification from the applicant, the end of

the comment period is also entered into the CID. Additionally, although the comment period ends no earlier than 30 days from the date of publication of the NAPD, it is possible for the comment period to be extended. If notice is re-published for any reason, or if a public meeting is held the end of the comment period would be extended. If an actual date for the end of the comment period was included in the notice, it would also be necessary to explain the various scenarios under which the comment period might be extended and the date might be changed. This would be unnecessarily confusing, and could potentially result in errors regarding when the comment period actually ends.

§39.409, Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing

CEJ stated that the face of the notice should include the date of the end of the notice period. Environmental Groups I commented that the face of notice does not identify when public comment period closes, so when mailed notice is received, public has to determine when notice was published to know when the comment period closes. Environmental Groups I commented that §39.409 should include requirements that specify the end of the comment period. CEJ and Environmental Groups I further stated that the public may only effectively have a 14-day comment period; this is because the commission may not receive notification of publication of the notice for more than two weeks after notice is published, and then notification of notice must be added to the commission's Web site. CEJ also stated that an electronic system where notice is posted when it is quickly posted would help the public know when the comment period begins.

No changes have been made in response to this comment because the applicable rule, §39.411(f)(5), already requires the notice to clearly state when the comment period ends. The specific text used in

notice templates states "{t}he deadline to submit public comments is 30 days after newspaper notice is published;" it is 15 days for renewal applications. The commission respectfully disagrees that it is not possible to know from the notice when the notice period ends. Given that publication is required to be in a newspaper, the current date is printed, usually at the top of the page, and the end of the comment period would be no earlier than 30 days after that date. Commission rule 30 TAC §1.7 regarding computation of time, which is the standard method used by courts and executive branch agencies, provides that, "except as otherwise specifically provided by commission rules, in computing any period of time prescribed or allowed by commission regulation or orders or by any applicable statute, the period shall begin on the day after the act, event, or default in question and shall conclude on the last day of that designated period, unless it is a Saturday, Sunday, or legal holiday on which the office of the chief clerk is closed, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal holiday on which the office of the chief clerk is closed."

Commenters state that when they receive mailed notice they do not know when the actual publication date will occur, and therefore do not know the end date of the comment period. However, they know that it will be at least 30 days out from the time that the notice was mailed, and can be up to several days later, depending upon how quickly the applicant delivers the notice to the newspaper and how quickly publication occurs. Anyone can access the information available in the CID, which includes the date that the notice was mailed out, as well as the text of the notice. When the chief clerk's office receives the required notice notification from the applicant, the end of the comment period is also entered into the CID. Additionally, although the comment period ends no earlier than 30 days from the date of publication of the NAPD, it is possible for the comment

period to be extended, typically due to later publication of alternate language notice or the commission holding a public meeting. If notice is re-published for any reason, or if a public meeting is held, the end of the comment period would be extended. If an actual date for the end of the comment period was included in the notice, it would also be necessary to explain the various scenarios under which the comment period might be extended and the date might be changed. This would be unnecessarily confusing, and add additional opportunities for mistakes to be made regarding when the comment period actually ends.

Finally, commenters state that they do not know when the comment period begins, and EPA states that it is impossible to adequately review and comment on a permit when you do not know when the comment period begins or ends. The commission respectfully disagrees that it is not possible to know when the comment period begins from the mailed notice. The comment period effectively begins once the notice package is prepared and sent out. The commission will accept comments as timely before the notice has actually been published, provided that an application for a permit has been filed. Therefore, once mailed notice is received, the public can know that the comment period has begun, and the commission will accept any comments filed, even if the notice has not yet been published.

TIP recommends that only one public meeting will be held per application. The rules are not clear as to how many public meetings may be requested on any individual permit application, and requests for multiple meetings add unnecessary delay to what is already a lengthy permitting process. TIP suggested specific language changes to §39.409 and §55.154(a).

No changes were made in response to this comment. Only one public meeting is held for the majority of applications for which meeting requests are made. And while the commission must conduct certain meetings, including those requested by a legislator and the new requirements for PSD applications under §55.154(c)(3) and HAPs applications under §55.154(c)(4), the commission has determined that a one-meeting limitation in the rule may result in a conflict with the statutory and regulatory requirement if a discretionary meeting has already occurred. In addition, although OPA generally schedules meetings to be held after technical review is complete (i.e., after publication of the NAPD), meeting requests can be made up until the close of the NAPD comment period, and therefore the commission can receive a timely request for a statutory or regulatory required meeting until that time. OPA has and will make every effort to efficiently schedule meetings, but in certain limited circumstances, more than one meeting may be held.

§39.411, Text of Public Notice

CEJ wants to have an additional mailing list option in §39.411(b)(9) that would allow the public to be put on a mailing list for each company by location, instead of only by permit number or count.

The commission has made no change in response to this comment. The commission's Office of Chief Clerk maintains a permanent mailing list for specific permit numbers and a list for all permitting actions for each county. Based on experience, the problems with using a "company name" or regulated entity number (RN) are numerous. Those include: 1) various companies, entities and individuals use different names for various business enterprises; 2) companies change their names from time to time, and not necessarily for all of their businesses; 3) permittees use one name for their air quality permit, and a different name for their water quality permit; and 4) variations of

the name(s) based on permitting and enforcement actions. Also, several names and RNs can be at one address. Permit numbers are more reliable to make sure a person gets the right information. But even permit numbers are not perfect. In some cases, the commission has issued the same permit number for an air permit and for a municipal solid waste permit.

TIP commented that §39.411(d) should be revised to require that the public meeting date, time and location should be included in the text of the NAPD when a public meeting has been requested before the NAPD has been published.

No changes were made in response to this comment. In the past, if the commission determined that a public meeting would be held prior to publication of the NAPD, then that meeting information may have been included in the NAPD. If a meeting is scheduled and the information can be included in the NAPD, that can be done without a rule that requires such arrangements. If the commission were to adopt such a rule, that could delay the preparation and publication of the NAPD. The opportunity to request a public meeting extends to the close of the comment period, and therefore, the determination to hold a public meeting is not made prior to preparation of the NAPD, therefore, this will continue to be addressed on a case-by-case basis.

Environmental Groups I commented that §39.411(e)(4)(A) should require the executive director to respond to all comments; if the executive director believes comment not relevant or material, can say so in response.

The commission has made no change in response to this comment. The requirement to respond to all comments is included in §39.411(e)(4)(A)(i) and (ii) and is specifically written to comply with federal law. In §39.411(e)(4)(A)(iii), the commission's requirement to reply to relevant and material comments implements THSC, §382.056(l). Since the rules implementing HB 801 were adopted in 1999, the commission's practice has been and is to respond to all comments.

Environmental Groups I commented that §39.411(e)(5) is confusing. The paragraph should be restructured, and the PAL provision should be changed to add that amendment of a PAL is subject to a request for a public meeting.

No change was made in response to this comment. The commission respectfully declines to make the change that would require amendments of PAL permits to be subject to a public meeting. As discussed elsewhere, the commission is limiting the public notice requirements for a PAL to those in the federal rules. Further, the suggested language omits that the request for a public meeting must be made by an interested person.

Environmental Groups I commented that §39.411(e)(11) should be changed so that notice for a contested case hearing opportunity should not begin to run until after NAPD is published because there is often insufficient information at the time the NORI is published for the public to fairly evaluate the potential air quality impacts of the project and the potential adverse effects on the public or private property. At a minimum, the public should have the opportunity to request a contested case hearing following NAPD upon a showing that information that was not available at the time of the NAPD forms a basis of the request.

No changes were made in response to this comment. As discussed elsewhere in this preamble, the commission is adopting changes to the rules to meet federal requirements for SIP approval, and these rule changes meet federal requirements. These amendments do not change the existing requirement that a contested case hearing request for minor sources must be filed within 30 days after publication of the NORI, now in §39.411(e)(11)(A)(iv), nor do they change the opportunity for individuals to request a contested case hearing up until 30 days after the date of mailing of the executive director's RTC in cases where a hearing request was made within 30 days after NORI publication. With regard to when a contested case hearing can be requested for minor NSR sources, see the commission's adopted changes to §39.419(e) as well as §55.156(d) and (e).

As further discussed in the proposal preamble for these rules, HB 801 encourages early participation by providing an opportunity for the public to obtain information as soon as reasonably available so that persons can get involved early in the process, the process can keep moving, and issues can be resolved sooner rather than later. The amendments provide that a NAPD will be issued for all applications for minor sources, whereas previously a NAPD was only issued for applications that received a contested case hearing request in response to the NORI. This new NAPD will also serve to extend the opportunity for public comment after the draft permit is available. This will allow for comment on the commission's analysis of the potential air quality impacts of the project and the expected effects on the public or private property. It also extends the opportunity to request a public meeting at which comment can be made on the draft permit and air quality analysis. The new provision can be found in the commission's adopted changes to §39.411(e)(11)(F). The combination of early involvement opportunities in HB 801 in conjunction

with the federal requirement for individuals have an opportunity to be involved once the draft permit and preliminary decision become available create a very robust public participation process with ample opportunities for persons to get involved when the timing is best for them.

EPA commented that it appears there is a typographical error in the last sentence of §39.411(e)(11)(A)(iii), stating that it should refer to the last publication of the NORI instead of the last publication of the Notice of Application and Intent to Obtain Permit.

The commission agrees and has made the correction in the rule.

An individual commented that imposing additional regulatory requirements on small operations or for modifications to an existing permit is an undue hardship.

The commission understands the commenter's concerns, but respectfully does not agree that it is an undue hardship. Not all changes are subject to notice that would result in additional time and financial costs associated with the application. With regard to newspaper notice, §39.603(d), implementing THSC, §382.056(a), provides that certain small businesses do not have to publish the second notice, commonly referred to as a "display notice," as required by §39.603(c)(2).

TIP commented that the proposed revisions regarding the rules, such as in §39.411(e)(11)(F), for minor NSR permit applications use the terms NORI and NAPD in a manner inconsistent with the statutory language in the TCAA. The TCAA requires a NAPD only when there has been a request for a contested case hearing in response to a NORI. TIP noted that THSC, §382.056(p), which provide authority to

require additional notice and opportunity for public comment to the extent necessary to obtain approval of a federal program. However, this section does not mandate that a contested case hearing be provided for any notice promulgated under it. TIP therefore recommends specific language for §39.411(e)(11)(F), and that a different term be used for the notice and comment opportunities associated with this type of application, such as "Notice of Opportunity to Comment."

No changes were made in response to this comment. Although the commenter is correct in stating that THSC, §382.056(b) requires a NAPD only when there has been a request for a contested case hearing in response to a NORI, there is no prohibition in the TCAA for the commission to use that term for a notice is that not subject to a contested case hearing in response to NORI. The commission finds that having a third name for a notice adds confusion to the process.

EPA commented that §39.411(f)(3), to be approvable as a PSD SIP revision, must be revised to include a requirement for a copy or summary of all other materials considered in the preliminary determination to be made available to the public consistent with the requirements of 40 CFR §51.166(q)(2)(ii). This rule states that a copy of all materials the applicant submitted, a copy of the preliminary decision and a copy or summary of other materials, if any, considered in making the preliminary decision must be made available in each region in which the proposed source would be constructed.

The commission revised the rule in response to this comment by specifying that the public location must have internet access. Because the application must be in place in the local area at the time NORI is published and remain there throughout the comment period, PSD and nonattainment air quality permit applicants must select a location with internet access. The adopted rule requires the

following to be made available for public inspection: the initial application submitted by the applicant, the air quality analysis, the draft permit, and the preliminary determination summary. Except for the application, this information will be available on the CID at the time the NAPD is published. The preliminary determination summary includes a summary of all materials and information used by executive director in making the preliminary decision on the draft permit. As the commission discusses in greater detail elsewhere in this preamble, the electronic availability of these permit documents satisfies the requirement to make these documents available as is required by 40 CFR §51.166(q)(2)(viii). The federal rule does not specify the form that the documents must take, and the electronic availability of the documents actually goes beyond the federal requirement to make documents available in the same place as the preconstruction information. Preconstruction information, including the application, are made available at the local regional office and at some public location in which the proposed facility will be built, usually a library or county courthouse. This requirement itself goes beyond the federal requirements of 40 CFR §51.166(q)(2), which only requires that the preconstruction information be available in one location in the region of the proposed facility. The local regional office and the other public location selected for posting the preconstruction information have public internet access, allowing the public to access information that the TCEQ has chosen to make available electronically, either singly or along with hardcopies of the documents. The TCEQ is in the process of expanding the electronic availability of permit documents, however, this in an ongoing process, and currently electronic accessibility of documents supplements the physical availability of documents when such electronic availability is easier and less expensive for both the public and the commission.

EPA commented that §39.411(f)(5) must be revised to ensure rules provide for a minimum 30-day comment period on the NAPD. EPA does not agree that the text of the rule does not guarantee that the close of the comment period is never less than 30 days from initial publication of the NAPD.

The commission agrees that the rule, as proposed, did not clearly indicate that the close of the comment period is never less than 30 days from initial publication of the NAPD and has revised §39.411(f)(5) accordingly.

EPA recommended that §39.411(f)(5) be revised to state that the NAPD include a date to identify the end of the comment period included in the notice. EPA stated that it is impossible to adequately review and comment on a permit if someone is unable to ascertain when the public comment period starts or ends.

No changes have been made in response to this comment because §39.411(f)(5), already requires the notice to clearly state when the comment period ends. The specific text states "{t}he deadline to submit public comments is 30 days after newspaper notice is published;" it is 15 days for renewal applications. The commission respectfully disagrees that it is not possible to know from the notice when the notice period ends. Given that publication is required to be in a newspaper, the current date is printed, usually at the top of the page, and the end of the comment period would be no earlier than 30 days after that date. Commission rule 30 TAC §1.7 regarding computation of time, which is the standard method used by courts and executive branch agencies, provides that, "except as otherwise specifically provided by commission rules, in computing any period of time prescribed or allowed by commission regulation or orders or by any applicable statute, the period shall begin on the day after the act, event, or default in question and shall conclude on the last day of that

designated period, unless it is a Saturday, Sunday, or legal holiday on which the office of the chief clerk is closed, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a legal holiday on which the office of the chief clerk is closed."

Interested persons know that the end of the comment period will be at least 30 days out from the time that the notice was mailed, and can be up to several days later, depending upon how quickly the applicant delivers the notice to the newspaper and how quickly publication occurs. Anyone can access the information available in the CID, which includes the date that the notice was mailed out, as well as the text of the notice. When the chief clerk's office receives the required notice notification from the applicant, the end of the comment period is also entered into the CID. Additionally, although the comment period ends no earlier than 30 days from the date of publication of the NAPD, it is possible for the comment period to be extended, typically due to later publication of alternate language notice or the close of a public meeting. If notice is re-published for any reason, or if a public meeting is scheduled to be held after the end of the comment period. If an actual date for the end of the comment period was included in the notice, it would also be necessary to explain the various scenarios under which the comment period might be extended and the date might be changed. This would be unnecessarily confusing, and add additional opportunities for mistakes to be made regarding when the comment period actually ends.

EPA also encouraged the commission to maintain an up-to-date listing on its Web site about all permits available for comment and the associated comment deadlines.

The CID on the commission's Web site can be searched to find information on specific permits.

TIP recommended that the rule clarify that a request for a public meeting must be made within 30 days after the publication date of the NAPD, or the Notice of Opportunity to Comment for minor sources for which no contested case hearing has been requested.

No changes were made in response to this comment. Section 39.411(f)(5) provides that notices must specify any applicable deadline to request a public meeting, which is the end of the comment period. The end of the comment period may be longer than 30 days for some applications, such as when two newspaper notices are required but are not published on the same day.

EPA commented that §39.411(g)(1) should require that material specified at §39.411(e)(15) be included in the text of notice, i.e, any additional information required by the executive director or needed to satisfy federal public notice requirements.

The commission agrees and has made this change.

§39.418, Notice of Receipt of Application and Intent to Obtain Permit

TIP supported the revisions to §39.603(a) that excludes PAL permit applications from the requirement to publish the NORI, but requires publication of the NAPD with the opportunity for public comment, specifically applications for the establishment or renewal of or an increase in a PAL permit. These requirements could be clarified by adding text to §39.418(c), which specifically excludes applications for PAL permits.

The commission agrees and has made this change to §39.418(c).

§39.419, Notice of Application and Preliminary Decision

CEJ, Environmental Groups I, Environmental Groups II and OPIC supported the expansion of the requirement to publish NAPD to all minor air permits, which will allows greater opportunity for technical review and more meaningful comments regarding the application from the public.

The commission appreciates the support.

Individuals commented that the commission needs to ensure at least 30 days notice and comment for any minor permit actions.

No change was made in response to this comment. The 30-day notice and comment period is adopted in the amendment to §39.419(e). However, if the commenter's reference to "any minor permit actions" includes actions such as *de minimis* authorizations under §116.119, PBRs or standard permits, those are not subject to NAPD. *See* §39.402 and accompanying explanation of the tiered minor NSR permit system elsewhere in this preamble.

TACA opposed the requirement for minor sources to publish the NAPD, stating that the current public participation requirements for minor sources meet, or exceed, federal requirements. The current process referred to is the opportunity to request a contested case hearing in response to the NORI, as well as the opportunity to file an MTO regarding an uncontested permit. TACA specifically mentioned the executive director's comments, made in response to EPA's notice, which stated that current rules meet federal public

participation requirements. Therefore, without an explicit requirement under federal law and despite EPA's proposed limited approval/limited disapproval, the commission should not require additional public notice requirements that will negatively affected business interests of many of Texas' industries, while providing little to no additional positive environmental impact.

No changes have been made in response to these comments. EPA's position is that minor NSR draft permits must be subject to notice which provides an opportunity for comment. The commission's minor NSR permitting program is a part of the Texas SIP, and therefore to obtain full approval of the program, the commission is adding the requirement for minor NSR to be subject to these procedures. Prior to HB 801, minor NSR applications were subject to only one opportunity for notice and comment, as well as the opportunity for affected persons to request a contested case hearing. That notice was provided after the application was administratively complete, but before permit issuance, and a draft permit may or may not have always been available at the time notice was provided. HB 801 provided a more structured system by requiring early notice (the NORI) for all applications, and also a second notice when a contested case hearing request was timely received. The commission interpreted the NAPD requirement as applicable to those applications, as well as for applications that are subject to federal requirements, specifically PSD and nonattainment permits. The commission is now extending the NAPD requirement for applications to meet the federal requirement in 40 CFR §51.161. HB 801 contemplated that the commission may need to adopt rules to provide for additional notice, opportunity for public comment or public hearing to the extent necessary to satisfy a federal requirement or to obtain or maintain delegation or approval of a federal program (THSC, §382.056(p)). When the commission adopted the rules implementing HB 801 in 1999, the intent was to maintain the federal approval of the public

participation requirements for major and minor sources, and understood that the rules accomplished that, and that there was no backsliding from the existing approved SIP. However, EPA's review of those rules indicated that the commission's rules do not adequately implement the federal requirements for minor sources. Therefore, to maintain the SIP and obtain EPA approval, the commission is extending the opportunity for notice and comment regarding minor NSR draft permits.

TACA commented that if NAPD will be a requirement for minor sources, it supports the rules as proposed, which do not lengthen the time to request a contested case hearing beyond the NORI time period. If the opportunity is expanded to the NAPD time period, that would exceed federal requirements as well as slow down and inhibit investment and growth in the aggregates and concrete industries. TACA also noted that protestants will still be allowed under NAPD to have an opportunity for public comment and a public meeting. HCPHES recommends that the NAPD for minor sources provide an opportunity for public comment and to request a contested case hearing because often the NORI is not seen by affected persons and there is insufficient information or details provided regarding the proposed project.

No change was made in response to these comments. The time to request a contested case hearing for minor sources is not changing from the existing practice, which is that at least one request for a contested case hearing must be received before the close of the 30-day comment period provided in response to the last publication of the NORI in order for requests filed later during the comment period to be considered as timely requests (see §39.411(e)(11)(A)(iv)). The new requirement in §39.419 for minor sources to publish the NAPD provides the opportunity for public comment and a public meeting (see §39.411(e)(11)(F)).

Zephyr commented that the commission retain the *de minimis* applicability levels for the NORI and develop higher applicability public notice thresholds for the NAPD that match the significance of the permit amendment to the significance of the permit application processing steps and expected processing timeline. For example, applications for which the *de minimis* levels were developed, the application processing delays are very small and appropriately matched to the significance of the project. The NORI is accomplished in parallel process with technical review and can be expected to create a small delay in the processing timeline unless there is a hearing request, which indicates public interest and therefore automatically makes the project significant and subject to the more significant public notice process associated with the NAPD. In contrast, the NAPD process adds at least 60 - 90 days to the overall processing of an amendment application.

No change was made in response to this comment. The tiered system of permit types is not changed in this rulemaking, and those established tiers were not proposed for any changes. In contrast, the tiered notice requirements that include the thresholds for notice, as discussed elsewhere in this preamble, is one of the subjects of this rulemaking. The commission established these notice thresholds to specifically implement HB 2518 and agrees with the commenter that they are appropriate based on environmental significance. However, the thresholds are not based on application processing time, as the commenter suggests, and therefore the commission respectfully declines to establish separate notice thresholds for the requirement to publish the NAPD. Finally, the commenter provided no specific suggestions with regard to any alternate threshold criteria or values for the applicability of NAPD publication, so it is unclear how those thresholds would meet

the criteria for an exemption from notice under the TCAA, or meet the criteria under which EPA will review the adopted thresholds.

TOGAP and an individual commented that the increased public participation process by publication of the NAPD by minor sources excludes permit renewal applications, and this is not acceptable. Environmental Groups I commented that §39.419(e)(1) should require renewals to be subject to 30-day notice and comment period. The rule should define "renewal" to clearly state that if any changes are made to the permit, including by incorporation, referencing or consolidation of permits by rule, qualified facility authorizations or standard permits, the action is an amendment rather than a renewal.

No changes were made in response to these comments. There are no requirements for renewal of permit under the EPA's general permit rules, and therefore, there are no accompanying notice requirements. The commission is prohibited by THSC, §382.056(g) from seeking comment for renewal applications for which there is no increase in allowable emissions beyond the comment period for NORI as required by §39.418.

THSC, §382.055 prescribes that permits issued on or after December 1, 1991, are subject to review every ten years, and that the commission by rule establish the application deadline and general requirements for renewal of a permit. The term "renewal" has the general meaning of "to make effective for an additional period," and the commission interprets the term as such. Therefore, no definition is in or is added to the commission's rules. The commission's rules regarding permit renewal are in Chapter 116, Subchapter D. These rules were not open for revision as part of this rulemaking.

HCPHES recommended that §39.419 be amended to specifically state that NAPD is required to be published for permit renewal applications by applicants with a poor compliance history rating, with specific criteria included as to when the executive director will require such publication. HCPHES also noted that the commission's compliance history rules do not require that compliance histories compiled by local pollution agencies be included in the commission's compliance history. Local pollution agencies such as HCPHES have unique knowledge of the permitted entities in their jurisdictional areas and when they do not have the opportunity to participate, permit decisions are made without the benefit of crucial relevant data that would likely change the outcome of the permitting decision. Enhanced state-local coordination, together with specific procedures for incorporating local governments' compliance histories would inform and strengthen the permit review process.

No changes were made in response to this comment. The commission establishes a compliance history rating annually, and that rating is considered as part of the permit application review process. Therefore, if the rating is poor, and there is a proposed increase in allowable emissions and/or a proposed emission of an air contaminant not previously emitted, then notice via the NAPD is required. This criteria is included in amended §39.419(e)(1), as moved from subsection (e)(1)(C). In addition, as part of the application review process, local air pollution agencies, such as HCPHES, are provided opportunity to comment on the draft permit for all renewal applications, regardless of whether those applications are subject to the NAPD. The compliance history rules in Chapter 60 were not open for comment other than to update a cross-reference, and therefore the comment regarding composition of the components of compliance history is beyond the scope of this rulemaking.

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

EPA commented that electronic posting of the executive director's RTC and his final permit determination for PSD permit applications as provided for in §39.420(c)(2) does not clearly satisfy federal requirement that the commission make available all comments for public inspection at the same location where preconstruction materials were posted. EPA stated that electronic posting of the RTC can only substitute for making comments available, if full, un-summarized comments are included in RTC. Otherwise, electronic posting of the RTC can only be a supplement to a posted hard copy of RTC in local location where permit documents are available.

With regard to posting of all materials, EPA commented that electronic posting may be okay if the commission revises the NORI and NAPD to state that all materials considered for the permit are available at the same electronic location, and the commission verifies that there is a location in the county with public internet access and maintains a listing of such locations. EPA suggested that the commission maintain an accurate listing of the public locations in each country where public internet access is provided so that the public can easily find a location to access the electronic permitting information.

EPA stated that electronic posting of air permitting information as the primary or sole means of making information available to the public is still a novel concept, but that the intent of the federal rules could be satisfied if the commission develops an online database similar to the Federal Docket Management System used by EPA where all materials associated with a specific permit would be grouped by permit number and easily searchable by the public.

Environmental Groups II commented that the proposed public participation rules still have problems, specifically the rules do not comply with 40 CFR §51.166(q)(2)(vi), which provides all timely written comments and comments received at a public hearing shall be considered in making the final decision on the approvability of the application, and that all comments shall be made available for public inspection in the same locations where the reviewing authority made available preconstruction information relating to the proposed source or modification. The comments included specific examples of four contested applications that were subject to contested case hearing, and commenters stated that the commission failed to make all comments available for public inspection in the same locations.

In response to the comments regarding electronic posting of the RTC, §39.420(c)(2) and §55.156(g) require the commission to post RTCs on its Web site as they are filed with the Chief Clerk's Office. EPA has specified that the comments themselves, as well as the RTC, must be made available to the public.

The TCEQ RTC Process

The federal rule does not require the preparation and availability of a formal RTC document. THSC, §382.056, however, does require that an RTC be prepared and transmitted to those individuals who commented and who have requested to be placed on the mailing list. The adopted rules fulfill this requirement of the TCAA by requiring the RTC as part of the permitting process. The availability of the RTC, however, is not a federal requirement that the commission must comply with. The federal rule at 40 CFR §51.166(q)(2)(vi) simply requires the permitting authority "consider" the comments that are received for PSD and nonattainment air quality permit application. It does not specify what form this consideration should take, nor does it require that

such consideration be made available for the public. The executive director not only prepares an RTC to formally answer the comments submitted, but §55.156(b)(1) requires the RTC to include details of any changes that were made to the draft permit in response to the comments together with the reasons for the changes, or a statement that the permit was not changed in response to comments. Therefore, the commission's RTC specifically complies with the first sentence of 40 CFR §55.166(q)(2)(vi). Regarding the second sentence of that rule, the electronic availability of the RTC as provided by the adopted rules serves to make the RTC available to a larger audience than EPA's proposed requirement to post the RTC and comments in the same local area where the preconstruction information was posted. In addition, the federal rules do not prescribe a specified period of time for which the comments must be available, nor do they require that the availability of the comments for review be included in the notice of the permit application. The TCAA requirement to prepare and transmit an RTC, however, is included in the text of the NAPD, as is the fact that the RTC will be available electronically once it has been prepared and filed by the executive director. Therefore, the adopted rules exceed federal requirements by requiring not only that the executive director consider public comments, but that the executive director respond to comments in writing and make that response available for the public.

For permits that have received a contested case hearing request, the transmittal of the RTC is accompanied by information on how to request a reconsideration of the executive director's decision on the draft permit, and that an additional 30 days is provided in which to request a contested case hearing. RTCs that are prepared for uncontested permit applications are transmitted with information about the process for filing a motion to overturn the executive director's decision on a permit before the commission; the motion to overturn process is in 30 TAC

§50.139, which provides that the commission may consider the motion in open meeting, or it may be overruled by operation of law. Thus, the RTC allows the public to examine the executive director's consideration of the comments that were submitted on an individual permit action, and take further action if there is an issue about the permit that is revealed through the RTC. Historically, the transmittal of the RTC has been accomplished exclusively by mail, and only those individuals who submitted comments or requested to be on the mailing list would receive the RTC and the accompanying information. The adopted rules require that the RTC be posted electronically on the CID upon filing by the executive director. Such posting makes the RTC available to a wider audience that may have concerns about the permit application. Although the requirement to transmit the RTC to commenters and those on the mailing list presumably allows the RTC to be sent to all interested parties, it is possible that there are interested persons who are not on a mailing list. Additionally, people may move, or otherwise change addresses between the time that they request to be on the mailing list and the time that the RTC is posted. These persons may not timely receive a mailed copy of the RTC, but would still be able to access the electronic document.

As part of the research for this rule and in response to EPA's comment that the RTC must include "each submitted comment in its entirety without any summarization or editing," commission staff conducted research and made inquiries of other states to discover how others have implemented this federal requirement. The research also revealed that other states do not necessarily provide the full and complete text of every comment letter received at that same local location where preconstruction information is posted. An RTC, or some equivalent document is usually, although not always, prepared and made available as part of the permit file, and often mailed or otherwise transmitted to those individuals who commented on the permit application; however, the comments

themselves are not individually posted for review. Additionally, other states do not always include the full text of every comment letter unedited within RTCs, as such a task would make a response so large as to be unusable when a large number of comments are received for a permit. To illustrate the potential problems with including the unedited text of every comment letter in the RTC, commission staff reviewed the 184 applications for which comments were received by the commission between September 2006 and February 2010. The number of comment letters received ranged from one to 652, with an average of 17 letters per application. That is approximately one RTC per week on average, excluding withdrawn and voided applications for which the commission received comments and may have prepared an RTC, and it excludes RTCs for Title V applications. Including verbatim comments in the RTC is not reasonable, even when a large number of the letters received are form letters. Very often, form letters are supplemented with additional comments. Further, the executive director is required to complete the RTC within 60 days of the close of the comment period. As an administrative matter, it would require many more resources to prepare an RTC if the executive director was copying, verbatim, a large number of comment letters, or long comments, and attempting to accurately and thoroughly answer every single comment. Therefore, as allowed by *Alabama Power,* discussed earlier in this preamble, there is a basis for an implication of the *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value, unless the statute is extraordinarily rigid. Copying the exact text of comments provides little or no value in the RTC, particularly when the comment documents can be accessed if needed to ascertain whether a summary is accurate.

Availability of Comments for Public Inspection

The commission is in the process of updating the electronic availability of documents that are filed with the chief clerk's office, including comment letters on permits. Currently, all comment letters on permits are available electronically at every regional office of the agency. The public may request agency staff at a regional office for the comment letters will allow an interested party to view the comment letters at the regional office. Accordingly, electronic posting of information is not simply a supplement to hardcopies in the absence of a dedicated and searchable integrated database. The federal rule simply requires that the comments be made available, it does not specify the form of that availability, and indeed, at the time the federal rule was promulgated the ease of electronic availability of information was not contemplated. However, the federal rule can be interpreted in the current context of what is readily available electronic information.

Electronic availability of the comments is not unique to Texas. Other states, including the Region 6 state of Louisiana only make the comments generally available through an electronic database. Electronic availability of the comments is not only equivalent to a hardcopy posting; it provides greater advantages that are not always present with hardcopy documents, especially when a contested permit has a large number of comment letters that an interested party would like to view, and possibly obtain copies of for further review.

In an effort to fully respond to EPA's concerns regarding the posting of the comments themselves in the same local area where the preconstruction information is posted, commission staff contacted permitting agencies in the following states: Oklahoma, Louisiana, Ohio, Florida, Colorado, Washington, and North Carolina. All of these states except for Washington are SIP-approved states

who operate their own air permitting programs, including administering the federal air permitting programs.

All of the states contacted have some form of response to comments document that is prepared for PSD/NA air quality permit applications when comments are received; however, North Carolina responded that the RTC was not a requirement, although it is generally prepared. When RTC documents are prepared they are generally made available, although in Ohio and Colorado the RTC is not necessarily sent to the local area. Most of the states contacted have some method of making the RTC available electronically. All the states contacted also responded that it is not unusual to summarize comments when preparing the RTC, especially if there are many comments, or a comment is particularly long. Some states do not automatically mail out RTCs, even to commenters, including Louisiana and Oklahoma. Louisiana makes all information available online through a database, including the RTC and the comments. Ohio also makes comments available online, and both Florida and Colorado sometimes make comments available online in high profile cases. Generally, all the states contacted are moving toward more electronic availability of information, although only Louisiana is currently making all information available electronically consistently.

Commission staff also researched SIP-approved rules in other states to determine which states had requirements to post comments in the local areas, and which states had public participation rules that are approved without these requirements. Specifically, commission staff examined approved air quality rules of 43 states and the District of Columbia. Of these, only 20 states appear to have SIP-approved rules that require comments to be posted in the same local area as the pre-

construction information, including Louisiana. Five of these 20 states, including one delegated state, have adopted the EPA rules in 40 CFR §51.166(q)(2) by reference. However, 16 other states and the District of Columbia appear to have no SIP approved rules to make the comments available; of these states, two, plus the District of Columbia, are delegated states, while one is a mix of delegated and approved counties. Seven states have no public notice requirements listed as SIP approved; three of these are SIP-approved, two have a mix, and two are delegated states. The commission includes this information to reinforce the point, based on information collected by the commission, that despite EPA's comment that the posting of the comments in the local area is necessary for the public participation rules to be approvable, EPA has not applied this requirement consistently across the country. The adopted rules provide for the RTC to be made available electronically. This availability is much broader than the narrow requirement of EPA to post a hardcopy of the RTC locally. The summarization of comments, particularly for long comments or when many comments are received, is not only practical, it is the general practice among states other than Texas who also must issue PSD/NA air quality permits.

In EPA's preferred case of hardcopy documents, a single set of documents may be available for review. It would be possible for a party to easily remove documents from a large stack of paper, without such removal being obvious when the documents are returned to staff after review. Electronic copies cannot be so removed. Additionally, an interested party may wish to have copies to take and study in further detail. The agency typically charges copy costs, especially if there are a large number of pages to be copied. Electronic documents, however, are easily copied to a memory device such as a disc or flash drive at no cost to either the agency or the party requesting copies of the documents. Indeed, electronic copies of the documents can then be easily shared among

interested parties who might choose to send a single representative to the regional office to examine the comments. Although the commission does not at this time have a database established so that the comments are generally available electronically, such availability has already been contemplated by the commission, and the database is currently being developed. Although the commission is unable to put a definite time frame on when such general availability will come online due to availability of funding, such development is part of the agency's ongoing efforts to improve electronic availability of information filed with the agency.

The commission is also in the process of making more information available electronically. For air quality permit applications, this information will include the draft permit, the air quality analysis, and the preliminary determination summary. See, e.g., §39.420(c)(2). These documents will be electronically available via the CID at the same time that NAPD is mailed out to the applicant for publication. Notice of the electronic availability of these documents will be included in the text of the NAPD, as will the electronic availability of the comments and the RTC. The CID is searchable by permit number, as well as by regulated entity number, customer number, and company name. This information is expected to be available by the effective date of the rules, or as soon as possible after the effective date of the rules. The availability of this information in the same searchable database as the RTC should satisfy EPA's concern that all required information should be available in the same electronic place, although as previously noted, the commission respectfully disagrees with EPA that this is necessary to satisfy federal requirements.

EPA further commented that TCEQ should maintain a listing of sites within a county that have publicly available internet access. The commission respectfully disagrees that this is necessary. The

preconstruction information is available at the agency's regional office within the region in which an applicant proposes to locate a facility. The information is also available at another site within the county, usually a library or county courthouse pursuant to state law. These facilities usually have public access to the internet. To ensure that the public will have internet access to the information, however, the commission has revised §39.411(f)(3) which requires applicants to post the information in a location with at least one publicly available computer that has internet access.

Finally, EPA has commented that electronic posting of information as the primary or sole means of making information available to the public is still a novel concept, but that the intent of the federal rules could be satisfied if the commission develops an online database similar to the Federal Docket Management System used by EPA where all materials associated with a specific permit would be grouped by permit number and easily searchable by the public. The commission respectfully disagrees with this comment. Basic information has been available electronically since at least the late 1990's - more than ten years. Public information sources, such as newspapers and magazines, have an online presence, and electronic search engines are common means of researching most current topics. In fact, many public agencies are in the process of moving more information into electronic formats for ease of use and accessibility. Furthermore, EPA itself contemplated the possibility of electronic availability of public notice at least 15 years ago in the 1995 proposed rule for the Title V Operating Permits Program (60 *Federal Register* 45530). In this proposed rule, EPA proposed to change paragraph (d) of 40 CFR §51.161 to require simple availability of the public notice, rather than copies, be provided to EPA and affected states, stating that the change was "intended to allow the permitting authority the opportunity to provide the required information through other avenues such as computer bulletin boards instead of solely by hard copy." (60

Federal Register **45530, at 45549, August 21, 1995) The final disposition of the rule is irrelevant to the fact that EPA's consideration of electronic availability at least 15 years ago demonstrates that such electronic availability of notice and other information cannot be characterized as novel. The commission is not currently proposing to restrict posting of preconstruction information, or the RTC, to online sources. Such information is always available in hardcopy at the agency's central and appropriate regional offices. However, making such information available electronically in the local areas is practical and efficient for both the agency and for interested parties. The adopted rules requires the applicant to select a local public location to post the required information that has public internet access, ensuring that the information the commission has chosen to post electronically will be accessible. It should also be noted that it is not uncommon for information from public newspapers, including legal notices, to be obtained online, instead of from an actual physical copy of a newspaper. Many, if not most, newspapers, including small local papers, have a Web site that includes a link to legal notices.**

The rules adopted by the commission for posting of the RTC, the draft permit, the air quality analysis, and the preliminary determination summary fully satisfy the provisions of 40 CFR §51.166(q)(2)(vi), as electronically availability includes within it the availability of the RTC at the same local location where the preconstruction information and the final permit are found. These locations include the local regional office of the TCEQ, as well as local libraries and courthouses. Such public venues usually have electronic capabilities, and the local regional offices of the TCEQ certainly have such capabilities. Additionally, requiring the posting of the RTC on the TCEQ Web site makes the RTC potentially available to any interested person in their own home or business. Such electronic availability of documents is a direction that many states, including Texas, are

moving toward for a variety of reasons, including ease of use for the public, and savings to taxpayers.

Environmental Groups I comment that §39.420(c) should allow the opportunity to request contested case hearing after NAPD and ask that the rule limit the definition of renewal.

No changes were made in response to this comment to adopted §39.420(c)(1)(D)(i)(III) and (e). As discussed elsewhere in this preamble, the commission is retaining the existing time periods for the opportunity to request a contested case hearing for minor NSR and renewal applications.

EPA commented that the commission should check the citation in §39.420(e) to subsection (c)(3) and (4) because, as proposed, §39.420 does not have a subsection (c)(3) or (4).

The commission agrees and has revised the rule to now reference §39.420(c)(1)(C) and (D).

EPA commented that the commission should verify that the citation in §39.420(h) to subsection (a)(4) is correct. If so, the commission needs to explain why Future Gen permits would not need instructions for requesting a contested case hearing.

The citation is correct. The THSC, §382.0565, specifically states that the permit processes for a FutureGen project are not subject to the requirements relating to a contested case hearing under the TCAA or Texas Government Code, Chapter 2001, Subchapters C - G.

§39.602, Mailed Notice

EPA recommended that TCEQ revise their provisions for establishing and maintaining public notice mailing lists. Currently the TCEQ chief clerk maintains lists for each specific permit action and a list for all permitting activities of all media within a specific county, or for a particular permit number. EPA stated that expanding the mailing lists to include the option to sign-up for a mailing list on a specific company in a given county would better allow interested parties the ability to track and comment on upcoming permit actions. Environmental Groups I commented that §39.602 should allow a mailing list option for company name and location or by Regulated Entity number. They stated that being on a list for all applications in a county results in a flood of notices, and being on a list of a specific permit may deprive a member of the public of notice of an action on other permits and authorizations related to a facility they are concerned about. Environmental Groups I commented that §39.602 should allow a mailing list option for company name and location.

The commission has made no change in response to this comment. The commission's Office of Chief Clerk maintains a permanent mailing list for specific permit numbers and a list for all permitting actions for each county. Based on experience, the problems with using a "company name" or regulated entity number (RN) are numerous. Those include: 1) various companies, entities and individuals use different names for various business enterprises; 2) companies change their names from time to time, and not necessarily for all of their businesses; 3) permittees use one name for their air quality permit, and a different name for their water quality permit; and 4) variations of the name(s) based on permitting and enforcement actions. Also, several names and RNs can be at one address. Permit numbers are more reliable to make sure a person gets the right information.

But even a system relying on permit numbers is not perfect. In some cases, the commission has issued the same permit number for both an air permit and a municipal solid waste permit.

§39.603, Newspaper Notice

Environmental Groups II asked for further clarification for publishing notice, specifically for clarification about where an applicant can publish notice because the public does not always know. Clarification must be provided as to what qualifies as a "newspaper of general circulation in each region." Without clarification, the public will be forced to daily read every single paper, magazine, journal, etc. available in an undisclosed circumference around the region of the proposed facility. The public should not be subjected to this overly burdensome hurdle, especially when the commission can easily create a listing of papers that qualify for "general circulation in each region."

No changes were made in response to this comment. THSC, §382.056, prescribes that publication be made 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 located or proposed location of the facility. For alternative language, the requirement is publication in additional publication of general circulation in the municipality or county in which the facility is or is proposed to be located. Commenter's reference to "general circulation in each region" apparently is based on 40 CFR §51.166(q); EPA's general notice rule, §51.161 requires "general circulation in the area." The requirement to be in the municipality or in the nearest municipality or county (for alternate language publication) meets these two federal requirements. The application and associated documents, such as notice, are also available at the commission's appropriate regional office. Citizens are generally aware of what newspapers are generally circulated in the municipality in

which they live, or are circulated in the nearest municipality. Note that the requirement is "general circulation," not publication. Therefore, a newspaper published and generally circulated in a small town and a newspaper published in a large city that is also generally circulated in the same small town will qualify as meeting the requirement. For air quality permits, additional newspaper notice in the form of a "display" style notice is required by §39.603(c)(2).

Some newspapers that may be identified as specialized newspapers may also qualify as newspapers of general circulation. Whether a newspaper is one of "general circulation" is a question of fact, and is generally one that has more than a *de minimis* number of subscribers within a specific geographic region, has a diverse subscribership, and publishes some items of general interest to the community (*See City of Corpus Christi v. Jones*, 144 S.W. 2d 388 (Tex. Civ. App.- San Antonio, 1940, writ dism'd, judgm't cor.), and Op. Tex. Att'y Gen. No. JC-0223 (2000)).

For alternate language publications, the commission's experience is that alternate language has been published only in newspapers, not other types of publications such as magazines or journals, although the statute provides this broader group. Commission staff regularly responds to inquiries regarding English-language and alternate language publications.

Therefore, the commission finds no basis to further restrict publication to specific newspapers. And, as discussed elsewhere, newspaper notice is not the only form, nor necessarily the most effective form of notice.

HCPHES commented that single-day newspaper notices are unlikely to reach a significant proportion of affected persons, especially at a time when newspaper readership is at an all time low.

The commission acknowledges that newspaper readership, in general, has declined. However, newspaper notice is specifically required by federal rule, 40 CFR §51.166(q)(2)(iii), and THSC, §382.056. The commission's public participation rules also require notice via sign-posting and alternative language publication, and notice is also available via mail for those who request to be on a mailing list. The notices are also available on the commission's Web site.

Environmental Groups I objected to the exclusion of PAL applications in §39.603(a).

No changes were made in response to this comment. The commission respectfully declines to make the change that would require PAL permits to be subject to publication of the NORI. As discussed elsewhere, the commission is limiting the public notice requirements for a PAL to those in the federal rules.

§39.604, Sign-Posting

HCPHES commented that sign posting at facility fence lines frequently go unnoticed by affected persons.

The commission respectfully disagrees with the commenter. Sign posting has been required by the commission and its predecessor agencies under the TCAA for more than 20 years, and the commission finds that it is a very effective notice tool, in part because persons near the proposed

location can and do see it, and they do not have to rely on other forms of notice as the initial indicator that an application is under review.

§39.605, Notice to Affected Agencies

HCPHES noted that on several occasions it has experienced delays in the receipt of permit notifications, resulting in a short time period for it to respond. The result is that the short time frames combined to make it unduly difficult for potentially affected persons and agencies to conduct a meaningful review and submit informed comments.

No changes were made in response to this comment. The applicant is required to furnish, under §39.605(1)(B), a copy of newspaper notice and affidavit to all local air pollution control agencies with jurisdiction in the county in which the construction is to occur (April 16, 2010, issue of the *Texas Register* (35 TexReg 2978)). If notice via newspaper and sign posting is not practical for local agencies, then they may also receive notice faster by inclusion on mailing lists for the county in which they are located. As discussed elsewhere in greater detail, notice is provided in various ways and, except for permit renewal applications, is never less than a 30-day period. The combination of the various notification methods, including increased electronic availability provides adequate opportunity for submission of informed comments by local agencies as well as potentially affected persons. Finally, local agencies also have an additional opportunity to review draft permits as part of the permit review process.

EPA commented that this rule does not include notice of PSD applications to a state land manager or comprehensive regional land use planning agency. EPA suggested that the Texas General Land Office

and Texas Parks and Wildlife Department may be appropriate agencies that meet these descriptions. Otherwise, the commission must verify that no appropriate substitute exists, and submit a legal analysis explanation as to why this is not included in the rule. Environmental Groups II commented that the proposed public participation rules still have problems, specifically the rules do not comply with 40 CFR §51.166(q)(2)(iv), which requires a copy of the notice be sent to the applicant, and to officials and agencies have cognizance over the location where the proposed construction will occur, including other state or local air pollution control agencies, the chief executives of the city and county, any comprehensive land use planning agency and any State, Federal Land Manager or Indian Governing body whose lands may be affected by the proposed emissions. Environmental Groups II commented that this was not complied with in a particular contested case.

Environmental Groups II commented that the proposed public participation rules still have problems, specifically the rules do not comply with 40 CFR §51.166(q)(2)(iv). Specifically, lack of notice to tribal or other states was mentioned for one particular application.

The commission has revised the rule in §39.605(1)(D) to include a requirement that the applicant furnish a copy of the notices and affidavit to any state land manager. Regarding EPA's suggestion that Texas Parks and Wildlife Department (TPWD) should be considered as a regional land use planning agency, TPWD's stated mission is "to manage and conserve the natural and cultural resources of Texas and to provide hunting, fishing and outdoor recreation opportunities for the use and enjoyment of present and future generations." TPWD's statutory authority supports its primary functions of conservation and recreation. In accordance with Chapter 13, Parks and Wildlife Code, TPWD has control and custody of areas designated as state parks in addition to

certain historical sites. Its authority includes the authority to acquire land for outdoor recreation, acquire historical sites, lease grazing rights, sell products such as timber, hay or livestock, contract with the Texas Department of Transportation for the construction of roads in and adjacent to state parks, set and enforce speed limits on a road in state parks, wildlife management areas or other areas under control of TPWD. With regard to planning, the TPWD is required by §11.104, Parks and Wildlife Code to develop a plan called the Land and Water Resources Conservation and Recreation Plan. In developing the plan, TPWD is required by §11.103, Parks and Wildlife Code to prepare an inventory of all land and water associated with historical, natural, recreational, and wildlife resources in this state that are owned by governmental entities or nonprofit entities that offer access to the land or water to the public. TPWD is required to use that inventory and analyze the state's existing and future land and water conservation and recreation needs, identify threatened land and water resources in the state and establish the relative importance for conservation purposes of particular resources listed in the inventory. Based on that analysis, TPWD prepares a land and water resources conservation and recreation plan that includes criteria for determining how to meet the state's conservation and recreation needs. This plan is focused on conserving resources and allowing for recreation. There are no other uses of the lands that TPWD is required to consider or address. The plan is not a comprehensive land use plan, nor does TPWD's planning function result in a comprehensive plan, but rather, one targeted to the issues of conservation and recreation. Considering the focus of the authority granted TPWD by the legislature, including the limited scope of the Land and Water Resources Conservation and Recreation Plan, the commission does not believe that TPWD can be considered a "comprehensive regional land use planning agency" within the meaning of 40 CFR §51.166(q)(2)(iv).

The adopted change ensures that the rule meets the applicable federal public participation requirements. With this change, public notice and opportunity for participation regarding NSR permit applications not only meets Texas statutory requirements, but also meets the minimum federal requirements.

SUBCHAPTER B: PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

§39.106

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and Texas Health and Safety Code (THSC), §361.024, concerning Rules and Standards, which authorizes the commission to adopt rules concerning the management and control of solid waste. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency.

The adopted amendment implements TWC, §§5.102, 5.103, 5.105, and the Solid Waste Disposal Act, THSC, Chapter 361, and Texas Government Code, §§2001.004, 2001.006, and 2001.142.

§39.106. Application for Modification of a Municipal Solid Waste Permit or Registration.

(a) When mailed notice is required under §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications), the mailed notice shall be mailed by the permit or registration

holder and the text of the notice shall comply with §39.411(b)(1) - (3), (6), (7), (9), and (11) of this title (relating to Text of Public Notice), and shall provide the location and phone number of the appropriate regional office of the commission to be contacted for information on the location where a copy of the application is available for review and copying.

(b) When mailed notice is required by §305.70 of this title, notice shall be mailed by the permit or registration holder to the persons listed in §39.413 of this title (relating to Mailed Notice).

(c) The effective date of the amendment of existing §39.105 of this title (relating to Application for a Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit) and this new §39.106 is June 3, 2002. Applications for modifications filed before amended §39.105 of this title and this new §39.106 become effective, will be subject to §39.105 of this title as it existed prior to June 3, 2002.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§39.402 and §39.406

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The repeals are also adopted under THSC, §382.020, concerning Control of Emissions From Facilities that Handle Certain Agricultural Products, which requires the commission to adopt rules concerning the control of emissions of particulate matter from certain agricultural facilities; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.055, concerning Review and Renewal of Construction Permit, which establishes the commission's authority to review and renew preconstruction permits; THSC, §382.056,

which requires an applicant for a permit issued under §382.0518 to publish notice of intent to obtain a permit. The repeals are also adopted under THSC, §382.05101, concerning De Minimis Air Contaminants; THSC, §382.0291, concerning Public Hearing Procedures; THSC, §382.040, concerning Documents; Public Property; THSC, §382.0512, concerning Modification of Existing Facility; THSC, §382.0515, concerning Application for Permit; THSC, §382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials; THSC, §382.057, concerning Exemption; THSC, §382.05186, concerning Pipeline Facilities Permits; THSC, §382.05192, concerning Review and Renewal of Emissions Reduction and Multiple Plant Permits; THSC, §382.05194, concerning Multiple Plant Permit; and THSC, §382.05195, concerning Standard Permit; THSC, §382.05199, concerning Standard Permit for Certain Concrete Batch Plants: Notice and Hearing; THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant under Permit by Rule, Standard Permit, or Exemption. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The repeals are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted repeals implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.051, 382.0518, 382.056, 382.055, 382.05101, 382.0291, 382.040, 382.0512, 382.0515, 382.0516, 382.057,

382.05186, 382.05192, 382.05194, 382.05195, 382.05199, and 382.058; Texas Government Code, §§2001.004, 2001.006, and 2001.142; and FCAA, 42 USC, §§7401 *et seq*.

§39.402. Applicability to Air Quality Permit Amendments.

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

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§§39.402, 39.403, 39.405, 39.409, 39.411, 39.418 - 39.420

STATUTORY AUTHORITY

The new section and amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; §5.1733, concerning Electronic Posting of Information, which authorizes the commission to post public information on its Web site; and TWC Chapter 5, Subchapter M, concerning Environmental Permitting Procedures, which requires the commission to establish public participation procedures for certain permit applications. The new section and amendments are also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.020, concerning Control of Emissions From Facilities that Handle Certain Agricultural Products, which requires the commission to adopt rules concerning the control of emissions of particulate matter from certain agricultural facilities; THSC, §382.0291, concerning Public Hearing Procedures, which prescribes certain deadlines; THSC,

§382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.05101, concerning De Minimis Air Contaminants, which provides the commission authority to adopt by rule the criteria to establish a *de minimis* level of air contaminants for facilities or groups of facilities below which a permit, standard permit, or a permit by rule is not required.; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials, which prescribes notice to these persons; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; THSC, §382.05186, concerning Pipeline Facilities Permits, which provides the commission the authority to issue this type of permit; THSC, §382.05192, concerning Review and Renewal of Emissions Reduction and Multiple Plant Permits, which provides authority for the commission to issue this type of permit; THSC, §382.05194, concerning Multiple Plant Permit, which provides authority for the commission to issue this type of permit; THSC, §382.05195, concerning Standard Permit, which provides authority for the commission to issue this type of permit; THSC, §382.05197, concerning Multiple Plant Permit; Notice and Hearing, which provides authority for the commission to issue this type of permit; THSC, §382.05199, concerning Standard Permit for Certain Concrete Batch Plants: Notice and Hearing, which provides authority for the commission to issue this type of permit; THSC, §382.055, concerning Review and Renewal of Construction Permit, which establishes the commission's authority to review and renew preconstruction permits; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit

Review; Hearing, which requires an applicant for a permit issued under §382.0518 to publish notice of intent to obtain a permit; THSC, §382.057, concerning Exemption, which provides that the commission may exempt from the requirement to get a permit changes that are insignificant; and THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant under Permit by Rule, Standard Permit, or Exemption, which provides the commission authority for this type of authorization. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The new section and amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted new section and amendments implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.0291, 382.040, 382.051, 382.05101, 382.0512, 382.0515, 382.0516, 382.0518, 382.05186, 382.05192, 382.05194, 382.05195, 382.05197, 382.05199, 382.055, 382.056, 382.057 and 382.058; TWC, §5.1733, and Chapter 5, Subchapter M; Texas Government Code §§2001.004, 2001.006, and 2001.142; and FCAA, 42 USC, §§7401 *et seq*.

§39.402. Applicability to Air Quality Permits and Permit Amendments.

(a) As specified in those subchapters, Subchapters H and K of this chapter (relating to Applicability and General Provisions; and Public Notice of Air Quality Permit Applications, respectively) apply to applications for:

(1) new air quality permits under Chapter 116, Subchapter B of this title (relating to New Source Review Permits);

(2) a new major source or a major modification for facilities subject to the requirements of Chapter 116, Subchapter B, Divisions 5 or 6 of this title (relating to New Source Review Permits, Nonattainment Review Permits and Prevention of Significant Deterioration Permits);

(3) air quality permit amendments under Chapter 116, Subchapter B of this title when the amendment involves:

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

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

(i) 50 tpy of carbon monoxide (CO);

(ii) ten tpy of sulfur dioxide (SO_2);

(iii) 0.6 tons per year (tpy) of lead; or

(iv) five tpy of nitrogen oxides (NO_X), volatile organic compounds (VOC), particulate matter (PM), or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen;

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

(i) 250 tpy of CO or NO_X;

(ii) 25 tpy of VOC, SO_2, PM, or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen;

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

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

(D) other amendments when the executive director determines that:

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

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

(iii) the application involves a facility in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History); or

(iv) there is a reasonable likelihood of significant public interest in a proposed activity;

(4) new air quality flexible permits under Chapter 116, Subchapter G of this title (relating to Flexible Permits);

(5) air quality permit amendments to flexible permits under Chapter 116, Subchapter G of this title when the amendment involves:

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

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

(i) 50 tpy of carbon monoxide (CO);

(ii) ten tpy of sulfur dioxide (SO_2);

(iii) 0.6 tons per year (tpy) of lead; or

(iv) five tpy of nitrogen oxides (NO_X), volatile organic compounds (VOC), particulate matter (PM), or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen;

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

(i) 250 tpy of CO or NO_X;

(ii) 25 tpy of VOC, SO_2, PM, or any other air contaminant except carbon dioxide, water, nitrogen, methane, ethane, hydrogen, and oxygen;

(iii) a new major stationary source or major modification threshold as defined in §116.12 of this title; or

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

(D) other amendments when the executive director determines that:

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

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

(iii) the application involves a facility in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title; or

(iv) there is a reasonable likelihood of significant public interest in a proposed activity;

(6) renewal of air quality permits under Chapter 116, Subchapter D of this title (relating to Permit Renewals);

(7) applications subject to the requirements of Chapter 116, Subchapter E of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), whether for construction or reconstruction;

(8) applications for the establishment or renewal of, or an increase in, a plant-wide applicability limit permit under Chapter 116, Subchapter C of this title (relating to Plant-Wide Applicability Limits).

(9) applications for multiple plant permits (MPPs) under Chapter 116, Subchapter J of this title (relating to Multiple Plant Permits);

(10) applications for permits, registrations, licenses, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), submitted on or before January 1, 2018, are subject to the public notice requirements of Chapter 91 of this title (relating to Alternative Public Notice and Public Participation

Requirements for Specific Designated Facilities) in addition to the requirements of this chapter, unless otherwise specified in Chapter 91 of this title.

(11) concrete batch plants without enhanced controls authorized by an air quality standard permit adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits), unless the plant is to be temporarily located in or contiguous to the right-of-way of a public works project; and

(12) change of location or relocation of a portable facility, consistent with the requirements of §116.178 of this title (relating to Relocations and Changes of Location of Portable Facilities).

(b) Unless otherwise stated in this chapter, applications for air quality permits and permit amendments declared administratively complete on or after September 1, 1999 and filed before the effective date of this section are governed by the rules in Subchapters H and K of this chapter as they existed immediately before the effective date of this section and those rules are continued in effect for that purpose.

(c) Notwithstanding subsections (a) or (b) of this section, Subchapters H and K of this chapter do not apply to the following applications where notice or opportunity for contested case hearings is not otherwise required by law:

(1) applications under Chapter 122 of this title (relating to Federal Operating Permits Program);

(2) applications under Chapter 116, Subchapter F of this title, except applications for concrete batch plants authorized by standard permit as referenced in subsection (a)(11) of this section; and

(3) registrations under Chapter 106 of this title (relating to Permits by Rule).

§39.403. Applicability.

(a) Permit applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapters H - J, L, and M 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 Injection Well and Other Specific Applications; and Public Notice for Radioactive Material Licenses). Permit applications that are declared administratively complete before September 1, 1999 are subject to Subchapters A - E of this chapter (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; Public Notice of Water Quality Applications; Public Notice of Air Quality Applications; and Public Notice of Other Specific Applications). All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits). The effective date of the amendment of existing §39.403, specifically with respect to subsection (c)(6) and (7) of this section, is June 3, 2002.

Applications for modifications filed before this amended section becomes effective will be subject to this section as it existed prior to June 3, 2002.

(1) Explanation of applicability. Subsection (b) of this section lists all the types of applications to which Subchapters H - J, L, and M of this chapter apply. Subsection (c) of this section lists certain types of applications that would be included in the applications listed in subsection (b) of this section, but that are specifically excluded. Subsection (d) of this section specifies that only certain sections apply to applications for radioactive materials licenses.

(2) Explanation of organization. Subchapter H of this chapter contains general provisions that may apply to all applications under Subchapters H - M of this chapter. Additionally, in Subchapters I - M of this chapter, there is a specific subchapter for each type of application. Those subchapters contain additional requirements for each type of application, as well as indicating which parts of Subchapter H of this chapter must be followed.

(3) Types of applications. Unless otherwise provided in Subchapters G - M of this chapter, public notice requirements apply to applications for new permits and applications to amend, modify, or renew permits.

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

(1) applications for municipal solid waste, industrial solid waste, or hazardous waste permits under Texas Health and Safety Code (THSC), Chapter 361;

(2) applications for wastewater discharge permits under Texas Water Code (TWC), Chapter 26, including:

(A) applications for the disposal of sewage sludge or water treatment sludge under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation); and

(B) applications for individual permits under Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(3) applications for underground injection well permits under TWC, Chapter 27, or under THSC, Chapter 361;

(4) applications for production area authorizations or exempted aquifers under Chapter 331 of this title (relating to Underground Injection Control);

(5) contested case hearings for permit applications or contested enforcement case hearings under Chapter 80 of this title (relating to Contested Case Hearings);

(6) applications for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), except as provided in subsection (d) of this section;

(7) applications for consolidated permit processing and consolidated permits processed under TWC, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing); and

(8) Water Quality Management Plan updates processed under TWC, Chapter 26, Subchapter B.

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

(1) applications for authorizations under Chapter 321 of this title (relating to Control of Certain Activities by Rule), except for applications for individual permits under Subchapter B of that chapter;

(2) applications for registrations and notifications under Chapter 312 of this title;

(3) applications under Chapter 332 of this title (relating to Composting);

(4) applications under §39.15 of this title (relating to Public Notice Not Required for Certain Types of Applications) without regard to the date of administrative completeness;

(5) applications for minor amendments under §305.62(c)(2) of this title (relating to Amendments). Notice for minor amendments shall comply with the requirements of §39.17 of this title (relating to Notice of Minor Amendment) without regard to the date of administrative completeness;

(6) applications for Class 1 modifications of industrial or hazardous waste permits under §305.69(b) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice for Class 1 modifications shall comply with the requirements of §39.105 of this title (relating to Application for a Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 of this title (relating to Text of Public Notice) and §305.69(b) of this title;

(7) applications for modifications of municipal solid waste permits and registrations under §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications). Notice for modifications shall comply with the requirements of §39.106 of this title (relating to Application for Modification of a Municipal Solid Waste Permit or Registration), without regard to the date of administrative completeness;

(8) applications for Class 2 modifications of industrial or hazardous waste permits under §305.69(c) of this title. Notice for Class 2 modifications shall comply with the requirements of §39.107 of this title (relating to Application for a Class 2 Modification of an Industrial or Hazardous Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 and §305.69(c) of this title;

(9) applications for minor modifications of underground injection control permits under §305.72 of this title (relating to Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee);

(10) applications for minor modifications of Texas Pollutant Discharge Elimination System permits under §305.62(c)(3) of this title;

(11) applications for registration and notification of sludge disposal under §312.13 of this title (relating to Actions and Notice); or

(12) applications for registration of pre-injection units for nonhazardous, noncommercial, underground injection wells under §331.17 of this title (relating to Pre-injection Units Registration).

(d) Applications for radioactive materials licenses under Chapter 336 of this title are not subject to §39.405(c) and (e) of this title (relating to General Notice Provisions); §§39.418 - 39.420 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit; Notice of Application and Preliminary Decision; and Transmittal of the Executive Director's Response to Comments and Decision); and certain portions of §39.413 of this title (relating to Mailed Notice).

§39.405. General Notice Provisions.

(a) Failure to publish notice. If the chief clerk prepares a newspaper notice that is required by Subchapters G - J, L, and M of this chapter (relating to Public Notice for Applications for Consolidated

Permits, Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses) and the applicant does not cause the notice to be published within 45 days of mailing of the notice from the chief clerk, or for Notice of Receipt of Application and Intent to Obtain Permit, within 30 days after the executive director declares the application administratively complete, or fails to submit the copies of notices or affidavit required in subsection (e) of this section, the executive director may cause one of the following actions to occur.

(1) The chief clerk may cause the notice to be published and the applicant shall reimburse the agency for the cost of publication.

(2) The executive director may suspend further processing or return the application. If the application is resubmitted within six months of the date of the return of the application, it will be exempt from any application fee requirements.

(b) Electronic mailing lists. The chief clerk may require the applicant to provide necessary mailing lists in electronic form.

(c) Mail or hand delivery. When Subchapters G - L of this chapter require notice by mail, notice by hand delivery may be substituted. Mailing is complete upon deposit of the document, enclosed in a prepaid, properly addressed wrapper, in a post office or official depository of the United States Postal

Service. If hand delivery is by courier-receipted delivery, the delivery is complete upon the courier taking possession.

(d) Combined notice. Notice may be combined to satisfy more than one applicable section of this chapter.

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

(f) Published notice. When this chapter requires notice to be published under this subsection:

(1) the applicant shall publish notice in the newspaper of largest circulation in the county in which the facility is located or proposed to be located or, if the facility is located or proposed to be located in a municipality, the applicant shall publish notice in any newspaper of general circulation in the municipality;

(2) for applications for solid waste permits and injection well permits, the applicant shall publish notice in the newspaper of largest general circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county, the notice must be published in any newspaper of general circulation in the county in which the facility is located or proposed to be located. The requirements of this subsection may be satisfied by one publication if the newspaper is both published in the county and is the newspaper of largest general circulation in the county; and

(3) air quality permit applications required by Subchapters H and K of this chapter to publish notice shall comply with the requirements of §39.603 of this title (relating to Newspaper Notice).

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

(1) A copy of the administratively complete application must be available for review and copying beginning on the first day of newspaper publication of Notice of Receipt of Application and Intent to Obtain Permit and remain available for the publications' designated comment period.

(2) A copy of the complete application (including any subsequent revisions to the application) and executive director's preliminary decision must be available for review and copying

beginning on the first day of newspaper publication required by this section and remain available until the commission has taken action on the application or the commission refers issues to State Office of Administrative Hearings; and

(3) where applicable, for air quality permit applications filed on or after the effective date of this section, the applicant shall also make available the executive director's draft permit, preliminary determination summary and air quality analysis for review and copying beginning on the first day of newspaper publication required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) and remain available until the commission has taken action on the application or the commission refers issues to State Office of Administrative Hearings.

(h) Alternative language newspaper notice.

(1) Applicability. The following are subject to this subsection:

(A) Air quality permit applications that are declared administratively complete by the executive director on or after September 1, 1999, are subject to this subsection; and

(B) Permit applications other than air quality permit applications that are required to comply with §39.418 or §39.419 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit; and Notice of Application and Preliminary Decision) that are filed on or after November 30, 2005 are subject to the requirements of this subsection.

(2) This subsection applies whenever notice is required to be published under §39.418 or §39.419 of this title, 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 has been granted an exception from the requirements to provide the program as provided for in 19 TAC §89.1207(a) (relating to Exceptions and Waivers).

(3) 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.

(4) The notice must 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.

(5) The newspaper or publication must be of general circulation in the county in which the facility is located or proposed to be located. If the facility is located or proposed to be located in a municipality, and there exists a newspaper or publication of general circulation in the municipality, the applicant shall publish notice only in the newspaper or publication in the municipality. This paragraph does not apply to notice required to be published for air quality permits under §39.603 of this title.

(6) For notice required to be published in a newspaper or publication under §39.603 of this title, relating to air quality permits, the newspaper or publication must be of general circulation in the municipality or county in which the facility is located or is proposed to be located, and the notice must be published as follows.

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

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

(i) permit application number;

(ii) company name;

(iii) type of facility;

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

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

(7) Waste and water quality alternative language must be published in the public notice section of the alternative language newspaper and must comply with §39.411 of this title.

(8) 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.

(9) Notice under this subsection will only be required to be published within the United States.

(10) Each alternative language publication must follow the requirements of this chapter that are consistent with this subsection.

(11) If a waiver is received under this subsection on an air quality permit application, the applicant shall complete a verification and submit it as required under §39.605(3) of this title (relating to

Notice to Affected Agencies). If a waiver is received under this subsection on a waste or water quality application, the applicant shall complete a verification and submit it to the chief clerk and the executive director.

(i) Failure to publish notice of air quality permit applications. If the chief clerk prepares a newspaper notice that is required by Subchapters H and K of this chapter for air quality permit applications and the applicant does not cause the notice to be published within 45 days of mailing of the notice from the chief clerk, or, for Notice of Receipt of Application and Intent to Obtain Permit, within 30 days after the executive director declares the application administratively complete, or fails to submit the copies of notices or affidavit required in subsection (j) of this section, the executive director may cause one of the following actions to occur.

(1) The chief clerk may cause the notice to be published and the applicant shall reimburse the agency for the cost of publication.

(2) The executive director may suspend further processing or return the application. If the application is resubmitted within six months of the date of the return of the application, it will be exempt from any application fee requirements.

(j) Notice and affidavit for air quality permit applications. When Subchapters H and K of this chapter require an applicant for an air quality permit action to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice which shows the

date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (i) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

§39.407. Mailing Lists. {NOTE: No change to TAC, but submitting as a revision to the SIP}

The chief clerk shall maintain mailing lists of persons requesting notice of an application. Persons, including participants in past agency permit proceedings, may request in writing to be on a mailing list. The chief clerk may from time to time request confirmation that persons on a list wish to remain on the list, and may delete from the list the name of any person who fails to respond to such request.

§39.409. Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing.

Notice given under this chapter will specify any applicable deadline to file public comment specified under §55.152 of this title (relating to Public Comment Period) and, if applicable, any deadlines to file requests for reconsideration, contested case hearing, or notice and comment hearing. After the deadline, final action on an application may be taken under Chapter 50 of this title (relating to Action on Applications and Other Authorizations).

§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 and K of this chapter (relating to Applicability and General Provisions and Public Notice of Air Quality Permit Applications) for air quality permit applications, those applications are subject to subsections (e) - (h) of this section. When notice of receipt of application and intent to obtain permit by publication or by mail is required by Subchapters H - J and 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, 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 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 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

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

(12) 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; and

(13) for Class 3 modifications of hazardous industrial solid waste permits, the statement "The permittee's 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 - J and L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1) - (11) 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 and Other Authorizations), 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;

(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; and

(7) for radioactive material licenses under Chapter 336 of this title, 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 - J and 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 (11) 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; and

(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.

(e) When Notice of Receipt of Application and Intent to Obtain Permit by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the information in this subsection.

(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:

(i) all comments regarding applications for Prevention of Significant Deterioration and Nonattainment permits under Chapter 116, Subchapter B of this title (relating to New Source Review Permits) and Plant-wide Applicability Limit permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) filed on or after the effective date of this section;

(ii) all comments regarding applications subject to the requirements of Chapter 116, Subchapter E of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), whether for construction or reconstruction, filed on or after the effective date of this section; and

(iii) for all other air quality permit applications, comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any air quality 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 commission'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. Where applicable, 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 if there is substantial public interest in the proposed activity when requested by any interested person for the following applications that are filed on or after the effective date of this section:

(A) air quality permit applications subject to the requirements for Prevention of Significant Deterioration and Nonattainment in Chapter 116, Subchapter B of this title;

(B) applications for the establishment or renewal of, or an increase in, a plant-wide applicability limit subject to Chapter 116 of this title; and

(C) applications subject to the requirements of Chapter 116, Subchapter E of this title, whether for construction or reconstruction;

(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) 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, Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants, Control of Air Pollution from Volatile Organic Compounds, and Control of Air Pollution from Nitrogen Compounds);

(11) If notice is for any air quality permit application except those listed in paragraph (12) of this subsection, the following information must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice:

(A) 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 within the following specified time periods;

(i) for air quality permit applications subject to the requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this

title a statement that a request for a contested case hearing must be received by the commission by the end of the comment period or within 30 days after the mailing of the executive director's response to comments;

(ii) for air quality permit applications subject to the requirements of Chapter 116, Subchapter E of this title, whether for construction or reconstruction, a statement that a request for a contested case hearing must be received by the commission by the end of the comment period or within 30 days after the mailing of the executive director's response to comments;

(iii) for renewals of air quality permits that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted and the application does not involve a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History), a statement that a request for a contested case hearing must be received by the commission before the close of the 15-day comment period provided in response to the last publication of Notice of Receipt of Application and Intent to Obtain Permit; or

(iv) for all air quality permit applications other than those in clauses (i) - (iii) of this subparagraph, a statement that a request for a contested case hearing must be received by the commission before the close of the 30-day comment period provided in response to the last publication of Notice of Receipt of Application and Intent to Obtain Permit. If no hearing requests are received by the end of the 30-day comment period following the last publication of Notice of Receipt of Application and Intent to Obtain Permit, there is no further opportunity to request a contested case hearing. If any hearing

requests are received before the close of the 30-day comment period following the last publication of Notice of Receipt of Application and Intent to Obtain Permit, the opportunity to file a request for a contested case hearing is extended to 30 days after the mailing of the executive director's response to comments;

(B) a statement that a request for a contested case hearing must be received by the commission;

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

(D) 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;

(E) a statement that only relevant and material issues raised during the comment period can be considered if a contested case hearing request is granted; and

(F) if notice is for air quality permit applications described in subparagraph (A)(iv) of this paragraph, a statement that when no hearing requests are timely received the applicant shall publish a Notice of Application and Preliminary Decision that provides an opportunity for public comment and to request a public meeting.

(12) if notice is for air quality applications for a permit under Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities), filed on or before January 1, 2018, a Multiple Plant Permit under Chapter 116, Subchapter J of this title (relating to Multiple Plant Permits), or for a Plant-wide Applicability Limit under Chapter 116 of this title, a statement that any person is entitled to request a public meeting or a notice and comment hearing, as applicable from the commission;

(13) notification that a person residing within 440 yards of a concrete batch plant without enhanced controls under a standard permit adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits) is an affected person who is entitled to request a contested case hearing;

(14) the statement: "The facility's compliance file, if any exists, is available for public review in the regional office of the Texas Commission on Environmental Quality;" and

(15) any additional information required by the executive director or needed to satisfy federal public notice requirements.

(f) The chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.602 of this title (relating to Mailed Notice). When notice of application and preliminary decision by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the information in this subsection:

(1) the information required by subsection (e) of this section;

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

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

(4) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis may be submitted, or a statement in the notice for any air quality 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;

(5) 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. The notice must include a statement that the comment period will be for at least thirty days following publication of the Notice of Application and Preliminary Decision;

(6) if the application is subject to final approval by the executive director under Chapter 50 of this title, 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;

(7) If the executive director prepares a Response to Comments as required by §55.156 of this title (relating to Public Comment Processing), the chief clerk will make the executive director's response to public comments available on the commission's Web site;

(8) in addition to the requirements in paragraphs (1) - (7) of this subsection, for air quality permit applications filed on or after the effective date of this section for permits under Chapter 116, Subchapter B, Divisions 5and 6 of this title (relating to Prevention of Significant Deterioration Review and Nonattainment Review):

(A) as applicable, the degree of increment consumption that is expected from the source or modification;

(B) a statement that the state's air quality analysis is available for comment;

(C) the deadline to request a public meeting;

(D) a statement that the executive director will hold a public meeting at the request of any interested person; and

(E) a statement that the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision; and

(9) in addition to the requirements in paragraphs (1) - (7) of this subsection, for air quality permit applications filed on or after the effective date of this section for permits under Chapter 116, Subchapter E, of this title:

(A) the deadline to request a public meeting;

(B) a statement that the executive director will hold a public meeting at the request of any interested person; and

(C) a statement that the executive director's draft permit and preliminary decision are available electronically on the commission's Web site at the time of publication of the Notice of Application and Preliminary Decision.

(g) When notice of a public meeting by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications filed on or after the effective date of this section, the text of the notice must include the information in this subparagraph. Air quality permit applications filed before the effective date of this section are governed by the rules in Subchapters H and K of this chapter

as they existed immediately before the effective date of this section, and those rules are continued in effect for that purpose.

(1) the information required by subsection (e)(1) - (3), (4)(A), (6), (8), (9), and (15) of this section;

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

(3) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's draft permit and preliminary decision, and, as applicable, preliminary determination summary, and air quality analysis may be submitted and a statement in the notice for any air quality 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.

(h) When notice of a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) by publication or by mail is required by Subchapters H and K of this chapter for air quality permit applications, the text of the notice must include the following information:

(1) the information required by subsection (e)(1) - (3), (6), (9) and (15) of this section; and

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

§39.418. Notice of Receipt of Application and Intent to Obtain Permit.

(a) When the executive director determines that an application is administratively complete, the chief clerk shall mail this determination concurrently with the Notice of Receipt of Application and Intent to Obtain Permit to the applicant.

(b) Not later than 30 days after the executive director declares an application administratively complete:

(1) the applicant, other than applicants for air quality permits, shall publish Notice of Receipt of Application and Intent to Obtain Permit once under §39.405(f)(1) of this title (relating to General Notice Provisions) and, for solid waste applications and injection well applications, also under §39.405(f)(2) of this title. The applicant shall also publish the notice under §39.405(h) of this title, if applicable;

(2) the chief clerk shall mail Notice of Receipt of Application and Intent to Obtain Permit to those listed in §39.413 of this title (relating to Mailed Notice), and to:

(A) the state senator and representative who represent the general area in which the facility is located or proposed to be located; and

(B) the river authority in which the facility is located or proposed to be located if the application is under Texas Water Code, Chapter 26; and

(3) the notice must include the applicable information required by §39.411(b) of this title (relating to Text of Public Notice).

(c) For air quality permit applications, except applications for plant-wide applicability limit permits under Chapter 116, Subchapter C of this title (relating to Plant-Wide Applicability Limits), the applicant shall provide notice as specified in Subchapter K of this chapter (relating to Public Notice of Air Quality Permit Applications). Specifically, publication in the newspaper must follow the requirements under §39.603 of this title (relating to Newspaper Notice), sign posting must follow the requirements under §39.604 of this title (relating to Sign-Posting), and the chief clerk shall mail notice according to §39.602 of this title (relating to Mailed Notice). The applicant shall also follow the requirements, as applicable, under §39.405(h) of this title.

§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) 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 must 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. The applicant shall also publish the notice under §39.405(h) of this title (relating to General Notice Provisions), if applicable.

(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 (relating to Text of Public Notice).

(e) For air applications the following apply.

(1) Air quality permit applications that are filed on or after the effective date of this section, are subject to this paragraph. Applications filed before the effective date of this section are governed by the rules as they existed immediately before the effective date of this section, and those rule are continued in effect for that purpose. After technical review is complete for applications subject to the requirements of requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title (relating to New Source Review Permits), the executive director shall file the executive director's draft permit and preliminary decision, the preliminary determination summary and air quality analysis, with the chief clerk and the chief clerk shall post these on the

commission's Web site. Notice of Application and Preliminary Decision must be published as specified in Subchapter K of this chapter (relating to Public Notice of Air Quality Permit Applications) and, as applicable, under §39.405(h) of this title, unless the application is for any renewal application of an air quality permit that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted and the application does not involve a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History).

(2) If notice under this section is required, the chief clerk shall mail notice according to §39.602 of this title (relating to Mailed Notice).

(3) If the applicant is seeking authorization by permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), any application submitted on or before January 1, 2018, shall be subject to the public notice and participation requirements in Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities).

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

(a) Except for air quality permit applications, 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) When required by and subject to §55.156 of this title, for air quality permit applications, after the close of the comment period, the chief clerk shall:

(1) transmit to the people listed in subsection (d) of this section the following information:

(A) the executive director's decision;

(B) the executive director's response to public comments;

(C) instructions for requesting that the commission reconsider the executive director's decision; and

(D) instructions, which include the statements in clause (ii) of this subparagraph, for requesting a contested case hearing for applications:

(i) for the following types of applications:

(I) permit applications which are subject to the requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title (relating to New Source Review Permits) as described in §39.402(a)(2) of this title (relating to Applicability to Air Quality Permits and Permit Amendments);

(II) permit and permit amendment applications which are not subject to the requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title, and for which hearing requests were received by the end of the 30-day comment period following the final publication of Notice of Receipt of Application and Intent to Obtain Permit, and these requests were not withdrawn as described in:

(-a-) §39.402(a)(1), (3), (11) and (12) of this title; and

(-b-) §39.402(a)(4) and (5) of this title;

(III) applications described in §39.402(7) of this title; and

(ii) the following statements must be included:

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

(III) that a contested case hearing request should include a description of how and why 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;

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

(V) that a contested case hearing request may not be based on issues raised solely in a comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment; and

(2) for applications subject to the requirements of requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title, make available by electronic means on the commission's Web site the executive director's draft permit and preliminary decision, the executive director's response to public comments, and as applicable, preliminary determination summary and air quality analysis.

(d) The following persons shall be sent the information listed in subsection (c) 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.

(e) For air quality permit applications which meet the following conditions, items listed in subsection (c)(1)(C) and (D) of this section are not required to be included in the transmittals:

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

(2) applications for which one or more timely hearing requests are submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and for which this is the only opportunity to request a hearing, and all of the requests are withdrawn before the date the preliminary decision is issued; or

(3) the application is for any 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 is in the lowest

classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History).

(f) 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).

(g) For post-closure order applications under Subchapter N of this chapter (relating to Public Notice of Post-Closure Orders), the chief clerk shall transmit only items listed in subsection (a)(1) and (2) of this section to the people listed in subsection (b)(1) - (3), (5), and (6) of this section.

(h) For applications for air quality permits under Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities), the chief clerk will not transmit the item listed in subsection (a)(4) of this section.

SUBCHAPTER I: PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

§39.501

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, Chapter 5, Subchapter M, concerning Environmental Permitting Procedures, which authorizes the commission to adopt rules governing permitting procedures for various permitting matters including solid waste matters authorized under the Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361; and THSC, §361.024, concerning Rules and Standards, which authorizes the commission to adopt rules concerning the management and control of solid waste. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency.

The adopted amendment implements TWC, §§5.102, 5.103, 5.105, and Chapter 5, Subchapter M; the Solid Waste Disposal Act, THSC, Chapter 361, and Texas Government Code, §§2001.004, 2001.006, and 2001.142.

§39.501. Application for Municipal Solid Waste Permit.

(a) Applicability. This section applies to applications for municipal solid waste permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant for a municipal solid waste permit decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit to the executive director a notice of intent to file an application, setting forth the proposed location and type of facility. The executive director shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must also be mailed to the mayor of the municipality. The executive director shall also mail notice to the appropriate regional solid waste planning agency or council of government. The mailing must be by certified mail.

(c) Notice of Receipt of Application and Intent to Obtain a Permit.

(1) Upon the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete:

(A) notice must be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) and, if a newspaper is not published in the county, then the applicant shall publish notice in a newspaper of circulation in the immediate vicinity in which the facility is located or proposed to be located. This notice must contain the text as required by §39.411(b)(1) - (11) of this title (relating to Text of Public Notice);

(B) the chief clerk shall publish Notice of Receipt of Application and Intent to Obtain Permit in the *Texas Register*; and

(C) the executive director or chief clerk shall mail the Notice of Receipt of Application and Intent to Obtain Permit, along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once as required by §39.405(f)(2) of this title (relating to General Notice Provisions). The notice must be published after the chief clerk has mailed the Notice of Application and Preliminary Decision to the applicant. The notice must contain the text as required by §39.411(c)(1) - (6) of this title.

(e) Notice of public meeting.

(1) If an application for a new facility is filed before September 1, 2005:

(A) the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; and

(B) the applicant shall hold a public meeting in the county in which the facility is proposed to be located. This meeting must be held before the 45th day after the date the application is filed.

(2) If an application for a new facility is filed on or after September 1, 2005:

(A) the agency:

(i) may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(II) if the executive director determines that there is substantial public interest in the proposed facility; and

(B) the applicant may hold a public meeting in the county in which the facility is proposed to be located.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location at which the facility is proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location at which the facility is proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is proposed to be located.

(4) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of paragraph (1)(A) or (2)(A) of this subsection if public notice is provided under this subsection.

(5) The applicant shall publish notice of any public meeting under this subsection, in accordance with §39.405(f)(2) of this title, once each week during the three weeks preceding a public meeting. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). For public meetings under paragraph (1)(B) or (2)(B) of this subsection, the notice of public meeting is not subject to §39.411(d) of this title, but instead must contain at least the following information:

(A) permit application number;

(B) applicant's name;

(C) proposed location of the facility;

(D) location and availability of copies of the application;

(E) location, date, and time of the public meeting; and

(F) name, address, and telephone number of the contact person for the applicant from whom interested persons may obtain further information.

(6) For public meetings held by the agency under paragraph (1)(A) or (2)(A) of this subsection, the chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(f) Notice of hearing.

(1) This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.405(f)(2) of this title.

(3) Mailed notice.

(A) If the applicant proposes a new facility, the applicant shall mail notice of the hearing to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the hearing.

Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes to amend a permit, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(4) Notice under paragraphs (2) and (3)(B) of this subsection must be completed at least 30 days before the hearing.

SUBCHAPTER J: PUBLIC NOTICE OF WATER QUALITY APPLICATIONS AND WATER QUALITY MANAGEMENT PLANS

§39.551

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, Chapter 5, Subchapter M, concerning Environmental Permitting Procedures, which authorizes the commission to adopt rules governing permitting procedures for various permitting matters including water quality matters authorized under TWC, Chapter 26. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency.

The adopted amendment implements TWC, §§5.102, 5.103, 5.105; TWC Chapter 5, Subchapter M, and TWC, Chapter 26; and Texas Government Code, §§2001.004, 2001.006, and 2001.142.

§39.551. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.

(a) Applicability. This section applies to applications for wastewater discharge permits, including disposal of sewage sludge or water treatment sludge applications that are declared administratively complete on or after September 1, 1999. This subchapter does not apply to registrations and notifications for sludge disposal under §312.13 of this title (relating to Actions and Notice).

(b) Notice of receipt of application and intent to obtain permit.

(1) Notice 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 deems an application administratively complete. This notice must contain the text as required by §39.411(b)(1) - (9) and (11) of this title (relating to Text of Public Notice). In addition to the requirements of §39.418 of this title, the chief clerk shall mail notice to the School Land Board if the application will affect lands dedicated to the permanent school fund. The notice shall be in the form required by Texas Water Code, §5.115(c).

(2) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit;

(B) an application for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendments); or

(C) an application for a new permit or major amendment to a TPDES permit that authorizes the discharges from a municipal separate storm sewer system.

(3) For permits listed in paragraph (2)(C) of this subsection, the executive director will require the applicant to post a copy of the notice of receipt of application and intent to obtain a permit. The notice must be posted within 30 days of the application being declared administratively complete and remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located.

(c) Notice of application and preliminary decision. Notice under §39.419 of this title (relating to Notice of Application and Preliminary Decision) is required to be published after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text required by §39.411(b)(1) - (3), (5) - (7), (9), and (11) and (c)(2) - (6) of this title. In addition to §39.419 of this title, for all applications except applications to renew permits, the following provisions apply.

(1) The applicant shall publish notice of application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(2) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(A) For any application involving an average daily discharge of five million gallons or more, in addition to the persons listed in §39.413 of this title, the chief clerk shall mail notice to each county judge in the county or counties located within 100 statute miles of the point of discharge who has requested in writing that the commission give notice, and through which water into or adjacent to which waste or pollutants are to be discharged under the permit, flows after the discharge.

(B) If the notice of the receipt of application and intent to obtain a permit was mailed more than two years prior to the time that notice of application and preliminary decision is scheduled by the executive director to be mailed, the applicant must submit an updated landowner map, landowner list, and any associated information for mailing the notice of application and preliminary decision. Notwithstanding this requirement, the Executive Director may require an updated landowner map, landowner list, and any associated information for mailing the notice of the application and preliminary decision if circumstances in the area have significantly changed that warrant updated lists.

(3) The notice must set a deadline to file public comment with the chief clerk that is not less than 30 days after newspaper publication. However, the notice may be mailed to the county judges under paragraph (2) of this subsection no later than 20 days before the deadline to file public comment.

(4) For TPDES permits, the text of the notice shall include:

(A) everything that is required by §39.411(b)(1) - (3), (5) - (7), (9), and (11) and (c)(2) - (6) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(5) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit;

(B) an application for a new TPDES permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title; or

(C) an application for a new permit or major amendment to a TPDES permit that authorizes the discharges from a municipal separate storm sewer system.

(6) For permits listed in paragraph (5)(C) of this subsection, the executive director will require the applicant to post a copy of the notice of application and preliminary decision. The notice must be posted on or before the first day of published newspaper notice and must remain posted until the commission has taken final action on the application. The notice must be posted at a place convenient and readily accessible to the public in the administrative offices of the political subdivision in the county in which the MS4 or discharge is located.

(d) Notice of application and preliminary decision for certain TPDES permits. For a new TPDES permit for which the discharge is authorized by an existing state permit issued before September 14, 1998, the following shall apply:

(1) If the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the following mailed and published notice is required.

(A) The applicant shall publish notice of the application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(B) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments, to request a public meeting, or to request a public hearing to those listed in §39.413 of this title.

(C) The notice must set a deadline to file public comment, or to request a public meeting, with the chief clerk that is at least 30 days after newspaper publication.

(D) The text of the notice shall include:

(i) everything that is required by §39.411(b)(1) - (3), (5) - (7), (9), and (11) and (c)(2) - (6) of this title;

(ii) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(iii) for applications concerning the disposal of sludge:

(I) the use and disposal practices;

(II) the location of the sludge treatment works treating domestic sewage sludge; and

(III) the use and disposal sites known at the time of permit application.

(2) If the application proposes any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the applicant must follow the notice requirements of subsection (b) of this section.

(e) Notice for other types of applications. Except as required by subsections (a), (b), and (c) of this section, the following notice is required for certain applications.

(1) For an application for a minor amendment to a permit other than a TPDES permit, or for an application for a minor modification of a TPDES permit, under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits),

the chief clerk shall mail notice, that the executive director has determined the application is technically complete and has prepared a draft permit, to the mayor and health authorities for the city or town, and to the county judge and health authorities for the county in which the waste will be discharged. The notice shall state the deadline to file public comment, which shall be no earlier than ten days after mailing notice.

(2) For an application for a renewal of a confined animal feeding operation permit which was issued between July 1, 1974, and December 31, 1977, for which the applicant does not propose to discharge into or adjacent to water in the state and does not seek to change materially the pattern or place of disposal, no notice is required.

(3) For an application for a minor amendment to a TPDES permit under Chapter 305, Subchapter D of this title, the following requirements apply.

(A) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments and to request a public meeting to:

(i) the mayor and health authorities of the city or town in which the facility is or will be located or in which pollutants are or will be discharged;

(ii) the county judge and health authorities of the county in which the facility is or will be located or in which pollutants are or will be discharged;

(iii) if applicable, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR) §124.10(c);

(iv) if applicable, persons on a mailing list developed and maintained according to 40 CFR §124.10(c)(1)(ix);

(v) the applicant;

(vi) persons on a relevant mailing list kept under §39.407 of this title (relating to Mailing Lists); and

(vii) any other person the executive director or chief clerk may elect to include.

(B) For TPDES major facility permits as designated by the United States Environmental Protection Agency on an annual basis, notice shall be published in the *Texas Register*.

(C) The text shall meet the requirements in §39.411(b)(1) - (4)(A), (6), (7), (9), and (11) and (c)(4) - (6) of this title.

(D) The notice shall provide at least a 30-day public comment period.

(E) The executive director shall prepare a response to all relevant and material or significant public comments received by the commission under §55.152 of this title (relating to Public Comment Period).

(f) Notice of contested case hearing.

(1) This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Not less than 30 days before the hearing, the applicant shall publish notice at least once in a newspaper regularly published or circulated in each county where, by virtue of the county's geographical relation to the subject matter of the hearing, a person may reasonably believe persons reside who may be affected by the action that may be taken as a result of the hearing. The executive director shall provide to the chief clerk a list of the appropriate counties.

(3) Not less than 30 days before the hearing, the chief clerk shall mail notice to the persons listed in §39.413 of this title, except that mailed notice to adjacent or downstream landowners is not required for an application to renew a permit.

(4) For TPDES permits, the text of notice shall include:

(A) everything that is required by §39.411(d)(1) and (2) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(g) Notice for discharges with a thermal component. For requests for a discharge with a thermal component filed pursuant to Clean Water Act, §316(a), 40 CFR Part 124, Subsection D, §124.57(a), public notice, which is in effect as of the date of TPDES program authorization, as amended, is adopted by reference. A copy of 40 CFR Part 124 is available for inspection at the agency's library located at the commission's central office located at 12100 Park 35 Circle, Building A, Austin.

SUBCHAPTER K: PUBLIC NOTICE OF AIR QUALITY PERMIT APPLICATIONS

§§39.601 - 39.605

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The amendments are also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.0291, concerning Public Hearing Procedures, which prescribes certain deadlines; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.05101, concerning De Minimis Air Contaminants, which provides the commission authority to adopt by rule the criteria to establish a *de minimis* level of air contaminants for

facilities or groups of facilities below which a permit, standard permit, or a permit by rule is not required.; THSC, §382.0512, concerning Modification of Existing Facility, which prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials, which prescribes notice to these persons; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; THSC, §382.05192, concerning Review and Renewal of Emissions Reduction and Multiple Plant Permits, which provides authority for the commission to issue this type of permit; THSC, §382.05194, concerning Multiple Plant Permit, which provides authority for the commission to issue this type of permit; THSC, §382.05195, concerning Standard Permit, which provides authority for the commission to issue this type of permit; THSC, §382.05197, concerning Multiple Plant Permit; Notice and Hearing, which provides authority for the commission to issue this type of permit; THSC, §382.05199, concerning Standard Permit for Certain Concrete Batch Plants: Notice and Hearing, which provides authority for the commission to issue this type of permit; THSC, §382.055, concerning Review and Renewal of Construction Permit, which establishes the commission's authority to review and renew preconstruction permits; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under §382.0518 to publish notice of intent to obtain a permit; THSC, §382.057, concerning Exemption, which provides that the commission may exempt from the requirement to get a permit changes that are insignificant; and THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant under Permit by Rule, Standard Permit, or Exemption, which provides the commission authority for this type of authorization. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative

action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendments are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendments implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.0291, 382.040, 382.051, 382.05101, 382.0512, 382.0515, 382.0516, 382.0518, 382.05192, 382.05194, 382.05195, 382.05197, 382.05199, 382.055, 382.056, 382.057 and 382.058; Texas Government Code, §§2001.004, 2001.006, and 2001.142; and FCAA, 42 USC, §§7401 *et seq*.

§39.601. Applicability.

Air quality permit applications or registrations that are declared administratively complete before September 1, 1999 are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures) (effective March 21, 1999) or (effective December 24, 1998). Air quality permit applications or registrations that are declared administratively complete by the executive director on or after September 1, 1999 are subject to this subchapter.

§39.602. Mailed Notice.

(a) When this chapter requires notice for air quality permit applications, the chief clerk shall mail notice to:

(1) the applicant;

(2) persons on a relevant mailing list kept under §39.407 of this title (relating to Mailing Lists);

(3) persons who filed public comment or hearing requests on or before the deadline for filing public comment or hearing requests; and

(4) any other person the executive director or chief clerk may elect to include.

(b) When Notice of Receipt of Application and Intent to Obtain Permit is required, mailed notice shall be sent to the state senator and representative who represent the area in which the facility is or will be located.

§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(e) of this title (relating to Text of Public Notice). This notice is not required for Plant-wide Applicability Limit permit applications.

(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(f) of this title.

(c) General newspaper notice. Unless otherwise specified, when this chapter requires published notice of an air quality permit 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 must be published in the public notice section of the newspaper and must comply with §39.411(e) - (g) of this title.

(2) Another notice with a total size of at least six column inches, with a vertical dimension of at least three inches and a horizontal dimension of at least two column widths, or a size of at least 12 square inches, must be published in a prominent location elsewhere in the same issue of the newspaper. This notice must 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 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 Texas Water Code, §5.135 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 Permitting by Rule) 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.

(e) If an air application is referred to State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings), the applicant shall publish notice once in a newspaper as described in subsection (c) of this section, containing the information under §39.411(h) of this title. This notice must 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 must 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 must be provided by the applicant and must substantially meet the following requirements:

(1) Signs must consist of dark lettering on a white background and must be no smaller than 18 inches by 28 inches and all lettering must be no less than 1-1/2 inches in size and block printed capital lettering;

(2) Signs must be headed by the words listed in the following subparagraph:

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

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

(3) Signs must 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 must include the words "for further information contact";

(5) Signs must include the words "Texas Commission on Environmental Quality" and the address of the appropriate commission regional office;

(6) Signs must 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 shall 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 must 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 that 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 §39.405(h) of this title (relating to General Notice Provisions). The applicant shall post additional signs in each alternative language in which the bilingual education program is taught. The alternative language signs must be posted adjacent to each English language sign required in this section. The alternative language sign posting requirements of this subsection must be satisfied without regard to whether alternative language newspaper notice is waived under §39.405(h)(8) of this title. The alternative language signs must meet all other requirements of this section.

§39.605. Notice to Affected Agencies.

In addition to the requirements in §39.405(f)(3) of this title (relating to General Notice Provisions):

(1) when newspaper notices are published under this section, the applicant shall furnish a copy of the notices and affidavit to:

(A) the EPA regional administrator in Dallas;

(B) all local air pollution control agencies with jurisdiction in the county in which the construction is to occur;

(C) the air pollution control agency of any nearby state in which air quality may be adversely affected by the emissions from the new or modified facility; and

(D) if notice is for an application filed on or after the effective date of this section for a Prevention of Significant Deterioration or Nonattainment permit under Chapter 116, Subchapter B of this title (relating to New Source Review Permits), the chief executives of the city and county where the source would be located, and any State or Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the source or modification;

(2) when sign posting is required under this section, the applicant shall furnish a copy of sign posting verification, within 10 business days after the end of the comment period associated with the notice under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), to:

(A) the chief clerk;

(B) the executive director; and

(C) those listed in paragraph (1)(A) - (C) of this section; and

(3) when alternative language waiver verification are required under this section, the applicant shall furnish a copy to those listed in paragraph (2)(A) - (C) of this section.

SUBCHAPTER K: PUBLIC NOTICE OF AIR QUALITY APPLICATIONS

§39.606

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The repeal is also adopted under THSC, §382.020, concerning Control of Emissions From Facilities that Handle Certain Agricultural Products, which requires the commission to adopt rules concerning the control of emissions of particulate matter from certain agricultural facilities; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.055, concerning Review and Renewal of Construction Permit, which establishes the commission's authority to review and renew preconstruction permits; THSC, §382.056,

which requires an applicant for a permit issued under §382.0518 to publish notice of intent to obtain a permit. The repeal is also adopted under THSC, §382.05101, concerning De Minimis Air Contaminants; THSC, §382.0291, concerning Public Hearing Procedures; THSC, §382.040, concerning Documents; Public Property; THSC, §382.0512, concerning Modification of Existing Facility; THSC, §382.0515, concerning Application for Permit; THSC, §382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials; THSC, §382.057, concerning Exemption; THSC, §382.05186, concerning Pipeline Facilities Permits; THSC, §382.05192, concerning Review and Renewal of Emissions Reduction and Multiple Plant Permits; THSC, §382.05194, concerning Multiple Plant Permit; and THSC, §382.05195, concerning Standard Permit; THSC, §382.05199, concerning Standard Permit for Certain Concrete Batch Plants: Notice and Hearing; THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant under Permit by Rule, Standard Permit, or Exemption. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The repeal is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq*., which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted repeal implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.051, 382.0518, 382.056, 382.055, 382.05101, 382.0291, 382.040, 382.0512, 382.0515, 382.0516, 382.057,

382.05186, 382.05192, 382.05194, 382.05195, 382.05199, and 382.058; Texas Government Code,

§§2001.004, 2001.006, and 2001.142; and FCAA, 42 USC, §§7401 *et seq*.

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

SUBCHAPTER L: PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC APPLICATIONS

§39.651, §39.653

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, Chapter 5, Subchapter M, concerning Environmental Permitting Procedures, which authorizes the commission to adopt rules governing permitting procedures for various permitting matters including authorizations relating to injection wells authorized under the Injection Well Act, TWC, Chapter 27 and under the Solid Waste Disposal Act, Chapter 361, of the Texas Health and Safety Code (THSC). Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency.

The adopted amendments implement TWC, §§5.102, 5.103, 5.105, TWC, Chapter 5, Subchapter M, and the Injection Well Act, TWC, Chapter 27; and THSC, Chapter 361; and Texas Government Code, §§2001.004, 2001.006, and 2001.142.

§39.651. Application for Injection Well Permit.

(a) Applicability. This subchapter applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must be mailed to the mayor of the municipality.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, notice must be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain a Permit). This notice must contain the text as required by §39.411(b)(1) - (9) and (11) of this title (relating to Text of Public Notice). Notice under §39.418 of this title will satisfy

the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness).

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, notice must be given to the School Land Board, if the application will affect lands dedicated to the permanent school fund. The notice must be in the form required by Texas Water Code, §5.115(c).

(4) For notice of receipt of application and intent to obtain a permit concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) The chief clerk or executive director shall also mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located and to the county judge and the health authority of the county in which the facility is located.

(6) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and 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. In addition to the requirements of §39.405(h) and §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county that is adjacent or contiguous to each county in which the proposed facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice) and to local governments located in the county of the facility. "Local governments" have the meaning as defined in Texas Water Code, Chapter 26.

(4) For Notice of Application and Preliminary Decision concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title (relating to Application for Industrial or Hazardous Waste Facility Permit).

(6) The deadline for public comments on industrial solid waste or Class III injection well permit applications will be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If an application for a new hazardous waste facility is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(II) if the executive director determines that there is substantial public interest in the proposed facility.

(2) If an application for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit is filed:

(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is located to receive public comment on the application if a person affected files with the chief clerk a request for a public meeting concerning the application before the deadline to file public comment or to file requests for reconsideration or hearing; or

(B) on or after September 1, 2005, the agency:

(i) may hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment on the application; but

(ii) shall hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment concerning the application:

(I) on the request of a member of the legislature who represents the general area in which the facility is located; or

(II) if the executive director determines that there is substantial public interest in the facility.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location in which the facility is located or proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location in which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

(4) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review committee process under subsection (a) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(5) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters).

(6) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of contested case hearing.

(1) Applicability. This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) If the application concerns a facility other than a hazardous waste facility, the applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area that is adjacent or contiguous to each county in which the proposed facility is located.

(B) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(C) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). The notice must appear in the section of the newspaper containing state or local news items. The text of the notice must include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.413 of this title.

(B) For notice of hearings concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(i) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(ii) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(iii) persons who own mineral rights underlying the existing or proposed injection well facility;

(iv) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(v) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(C) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the contested case hearing. Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(4) Radio broadcast. If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title.

(5) Deadline. Notice under paragraphs (2)(A), (3), and (4) of this subsection must be completed at least 30 days before the contested case hearing.

(g) Approval. All published notices required by this section must be in a form approved by the executive director prior to publication.

§39.653. Application for Production Area Authorization.

(a) Applicability. This section applies to an application for a production area authorization under Chapter 331 of this title (relating to Underground Injection Control).

(b) Notice of Receipt of Application and Intent to Obtain Permit. After the executive director determines that the application is administratively complete, notice shall be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit). This notice must contain the text as required by §39.411(b)(1) - (9) and (11) of this title (relating to Text of Public Notice). The chief clerk shall also mail notice to:

(1) persons who own the property on which the existing or proposed production area is or will be located, if different from the applicant;

(2) landowners adjacent to the property on which the existing or proposed production area is or will be located;

(3) persons who own mineral rights underlying the existing or proposed production area;

(4) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed production area is or will be located; and

(5) any groundwater conservation district established in the county in which the existing or proposed production area is or will be located.

(c) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) shall be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and 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. The notice shall specify the deadline to file with the chief clerk public comment, which is 30 days after mailing. The chief clerk shall also mail notice to:

(1) persons who own the property on which the existing or proposed production area is or will be located, if different from the applicant;

(2) landowners adjacent to the property on which the existing or proposed production area is or will be located;

(3) persons who own mineral rights underlying the existing or proposed production area;

(4) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed production area is or will be located; and

(5) any groundwater conservation district established in the county in which the existing or proposed production area is or will be located.

(d) Notice of contested case hearing.

(1) This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.405(f)(2) of this title.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(4) Notice under paragraphs (2) and (3) this subsection shall be completed at least 30 days before the hearing.

SUBCHAPTER M: PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES

§39.709

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and Texas Health and Safety Code (THSC), §401.051, concerning Adoption of Rules and Guidelines, which authorizes the Commission to adopt rules and guidelines relating to control of sources of radiation. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency.

The adopted amendment implements TWC, §§5.102, 5.103, and 5.105; Texas Radiation Control Act, THSC, Chapter 401; and Texas Government Code, §§2001.004, 2001.006, and 2001.142.

§39.709. Notice of Contested Case Hearing on Application.

(a) The requirements of this section apply when an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(b) Except as provided in subsection (d) of this section, for applications under Chapter 336, Subchapter F of this title (relating to Licensing of Alternative Methods of Disposal of Radioactive Material), Subchapter G of this title (relating to Decommissioning Standards), Subchapter K of this title (relating to Commercial Disposal of Naturally Occurring Radioactive Material Waste From Public Water Systems), or Subchapter L of this title (relating to Licensing of Source Material Recovery and By-product Material Disposal Facilities), notice must be mailed no later than 30 days before the hearing. For applications under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste) or Subchapter M of this title (relating to Licensing of Radioactive Substances Processing and Storage Facilities), notice must be mailed no later than 31 days before the hearing.

(c) When notice is required under this section, the text of the notice must include the applicable information specified in §39.411(b)(12) and (d) of this title (relating to Text of Public Notice).

(d) For an application for a new license to dispose of by-product material under Chapter 336, Subchapter L of this title that was filed with the Department of State Health Services on or before January 1, 2007, notice under this section must be provided to the applicant, the office of public interest counsel, the executive director, and any person who timely submitted a request for a contested case hearing by mail at least 10 days in advance of the hearing.