The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§55.152, 55.154, 55.156, and 55.210.

Section 55.154, 55.156, and 55.210 are adopted *with changes* to the proposed text as published in the January 15, 2010, issue of the *Texas Register* (35 TexReg 341). Section 55.152 is adopted *without change* to the proposed text and will not be republished.

The adopted amendments to §§55.152(a)(1), (2), (5) and (6) and (b), 55.154(a), (b), (c)(1) - (3) and (5), and (d) - (g), and 55.156(a), (b), (c)(1), (e) and (g), will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

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. 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 §§55.1; 55.21(a) - (d), (e)(2), (3) and (12), (f) and (g); 55.101(a), (b), (c)(6) - (8); 55.103; 55.150; 55.152(a)(1), (2), and (5) and (b); 55.154; 55.156; 55.200; 55.201(a) - (h); 55.203; 55.205; 55.206; 55.209; and 55.211.

To ensure that current versions of the necessary and appropriate rules are submitted to EPA as revisions to 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: §§55.152(a)(1), (2), (5), and (6) and (b); 55.154(a),

(b), (c)(1) - (3) and (5), and (d) - (g); and 55.156(a), (b), (c)(1), (e) - (g). In addition, §55.150 will be submitted to the EPA as a revision to the SIP. In addition, §55.152(b) as adopted in 1999, would not be withdrawn as revisions to the SIP and therefore remain for EPA review and consideration.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 30 TAC Chapter 39, Public Notice. 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 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 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 were implemented primarily 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 on air permits for new and modified sources. 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 the rules adopted under HB 801 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, committed to the proposal of this rulemaking on December 9, 2009. This adoption is intended to address EPA's concerns and 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 concerns.

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 EPA's November 26, 2008 proposal for limited approval and limited disapproval, 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

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 stated "for a new or modified source subject to {Prevention of Significant Deterioration} 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 for §55.156, Public Comment Processing, discusses in greater detail EPA's issue regarding access to the RTCs.

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 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 where 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 a newspaper of general circulation in the county where the facility is proposed to be located, which is also mailed to persons who timely filed public comment or hearing requests and to persons on the mailing list. The NAPD contains the same information as the NORI 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 is 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 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 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 received in the 30 days 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 hearings are considered at the commissioners' 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. If the commissioners decide 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 facts and conclusions of law, which is submitted for formal consideration by the commissioners. The commissioners then approve, deny, or modify 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, or NORI, staff 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 commissioners 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 commissioners 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 commissioners' 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 persons who timely filed public comment. If the commission adopts a change to the executive director's original RTC, the rules requires 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 basic support for judicial review of a permit issued by the Texas PSD permitting program, as well. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accord 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

The amendments to Chapter 55 require the executive director to hold a public meeting when a request for such is received by an interested person for applications for PSD and nonattainment air quality permits and for hazardous air pollutant permits, and update the citation for 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 or nonattainment permit is approved, the executive director shall prepare a response to all comments received and make the RTC available electronically on the commission's Web site. The commission is also to withdraw certain sections previously submitted to EPA 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.

Concurrently with this adoption, and published in this issue of the *Texas Register*, the commission is adopting amendments to Chapters 39. 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 Notice of Preliminary Decision 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, and, 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 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 proposed to be submitted as a SIP revision. Rather, the commission adopts those sections, of portions of sections, that meet minimum federal requirements or meet the requirements of the existing Texas SIP, as revisions to the SIP.

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

Finally, the commission is also concurrently adopting amendments to certain sections in Chapter 116, Control of Air Pollution by Permits for New Construction or Modification, to ensure that the public participation requirements for Plant-wide Applicability Limit (PAL) permits meet state and federal public participation requirements. In addition, the adopted amendments update cross-references.

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

SECTION BY SECTION DISCUSSION

This rulemaking revises the commission's rules to obtain SIP approval for its air quality permitting program (exclusive of the Federal Clean Air Act (FCAA) Title V portion). This rulemaking also updates cross-references and makes non-substantive changes to update rule language to current Texas Register style and format requirements.

§55.152, Public Comment Period

The commission adopts the amendment to §55.152(a)(2) that updates the type of applications for concrete batch plants that are subject to public comment. Specifically, the adopted amendment adds text that identifies that authorization as a concrete batch plant without enhanced controls authorized by a air quality standard permit adopted by the commission under Chapter 116, Subchapter F, unless the plant is

to be temporarily located in or contiguous to the right-of-way of a public works project, is subject to the rules of this subchapter. The existing text refers to a concrete batch plant exemption from permitting or permit by rule in Chapter 106, Exemptions from Permitting.

§55.154, Public Meeting

The commission adopts the amendment to §55.154(c) that adds a paragraph (3), which states that the executive director will hold a public meeting regarding the draft permit and air quality analysis for PSD and nonattainment permits if requested by an interested person. This is in response to EPA's concerns that for a new or modified source subject to PSD or nonattainment requirements, the rules do not require the TCEQ to provide an opportunity for any interested person to give oral comments on PSD and nonattainment air quality draft permits. The provision in §55.154 that provides the executive director with discretion to hold a public meeting if the executive director determines that there is a substantial or significant degree of public interest in an application is not consistent with the federal requirements. Under the Texas rule, the decision to grant a public hearing is within the executive director's discretion and must be based upon substantial or significant public interest. In contrast, the rules adopted by EPA provide for the opportunity of interested persons to request a public hearing and public notice of that opportunity. Prior to these amendments, under §55.154, the public was not guaranteed notice of such opportunity or that such an opportunity will be provided upon request.

The commission adopts the amendment to §55.154(c) that adds paragraph (4), which states that the executive director will hold a public meeting regarding the draft permit and air quality analysis for hazardous air pollutant permits if requested by an interested person. The commission's rules for a public meeting for these permits are similar to the federal rules for hearings for PSD and nonattainment permits.

This requirement is in a separate paragraph because this paragraph will not be submitted to EPA as a revision to the SIP.

In addition, the commission adopts rule text in §55.154(c)(3) and (4) 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.

A public meeting is conducted by TCEQ in the same way that a notice and comment hearing is conducted, and is an equivalent opportunity for the public to participate in the permitting process for air quality permit applications.

Subsection (c)(5) is re-designated from subsection (c)(3). Subsection (d) is relettered from existing subsection (e), and updates a cross-reference to add adopted §39.411(g), Text of Public Notice. Subsection (e) is relettered from existing subsection (d). Finally, the commission adopts subsection (f), which consists of the last sentence of existing subsection (d), regarding recordation of the meeting.

§55.156, Public Comment Processing

The commission adopts the amendment to §55.156(b)(1), which provides that before any air quality permit application for a PSD or nonattainment permit subject to Chapter 116, Subchapter B, or for air quality permit applications for the establishment or renewal of, or an increase in, a PAL permit subject to Chapter 116, is approved, that the executive director shall prepare a response to all comments received.

This is in response to EPA that for a new or modified source subject to PSD or nonattainment permitting rules in Chapter 116, Subchapter B, the commission's rules do not provide that a response will be provided for all comments. EPA also stated that for PALs for existing major stationary sources, the commission's rules do not include a requirement that all material comments are addressed before taking final action on the permit, consistent with 40 Code of Federal Regulations (CFR) §51.166(w)(5). In addition, the text in §55.156(b)(1) 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 the amendment to subsections (c) and (d) to update cross-references. In subsection (c) in the existing reference to §39.420(c) - (e) are adopted as §39.420(f) and (g). In addition, subsection (c) is divided into paragraphs (1) and (2); this is ensure that rules submitted for the SIP do not include cross references to rules that are not submitted as revisions to the SIP. In subsection (d), the existing reference to §39.420(a) is adopted as §39.420(a) and (c)(4). These updates are necessary because of the commission's concurrent revisions to its public participation rules for air quality permit applications.

The commission also adopts the amendment to subsection (d) to delete paragraph (1), and renumber paragraphs (2) - (5) to paragraphs (1) - (4). The existing text in subsection (d)(1) - (5) is now adopted as §39.420(c)(1)(D)(ii), which specifies the text that must be included regarding instructions for requesting a contested case hearing for certain types of permit applications. The commission also adopts subsection (e), which is identical to subsection (d) except for the references to §39.420; this is ensure that rules

submitted for the SIP do not include cross-references to rules that are not submitted as revisions to the SIP.

The commission adopts the amendment to subsection (f) to specify what subsections of §55.156 apply to air quality permit applications and to other permit applications. In addition, the commission adopts rule text in §55.156(f)(1) 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.

Former subsection (f) is added to subsection (d) at adoption.

The commission also adopts subsection (g), which states that notwithstanding the requirements in §39.420, the commission shall make available by electronic means on the commission's Web site the executive director's decision and the executive director's response to public comments.

EPA stated in the Public Participation Notice that for a new or modified source subject to PSD or nonattainment rules, the rules do not require that RTC be available prior to final action on the PSD or nonattainment permit, as required by 40 CFR §51.166(q)(2)(vi) and (viii). These federal rules do not expressly require that the RTC be available prior to final action on the PSD or nonattainment permit; however, TCEQ's current process provides that for permits that are considered directly by the commission, the RTC is filed and available for viewing before the commission considers the permit. If the commission adopts a change to the executive director's original RTC, 30 TAC §50.119 requires that the chief clerk also mail this final RTC. In this event, the public would have the opportunity to file a motion

for rehearing after they receive and have an opportunity to review the revised RTC. Section 50.119 requires that the notice include information about the availability of the motion for rehearing process allowed by 30 TAC §80.272. The amendment to §55.156(b)(1) addresses this comment by requiring the ED to prepare an RTC for all comments received for PSD, nonattainment, and PAL before a permit application is approved.

In the case of an uncontested permit application that is signed by the executive director, the RTC that is prepared by the executive director is filed with the chief clerk's office, and mailed to everyone on the mailing list along with notice that the permit has been signed. A letter detailing the availability of the motion to overturn process is included with the notice and the RTC. Although the permit is effective upon signature, any person still has the opportunity to file a motion to overturn the permit with the commission. Therefore, the ability to challenge the executive director's decision is available after the RTC is mailed. Once an RTC has been filed with the chief clerk's office, it is available as a public document.

Notwithstanding the commission's long-standing rules and practice regarding making the RTC available, the commission adopts subsection (g) to address EPA's comments regarding its rule in 40 CFR §51.166(q)(2)(vi) and (viii) that requires the commission to make available comments and the final determination on the application available 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 §55.156 to codify its plans to make available all RTCs on its Web site. Since proposal, the commission has implemented this electronic availability of RTCs. 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 to §39.420.

§55.210, Direct Referrals

The commission adopts the amendment to §55.210 to update a cross-reference in subsection (e)(1) regarding text of notice for applications other than air quality applications. Specifically, existing reference to §39.411(b)(1) - (3), (4)(A), (6) - (9), (10)(A), (B)(i) - (iii), and (C) - (D), (11), (12), and (14) is adopted as §39.411(b)(1) - (3), (4)(A), (6) - (11), and (13) and (e)(10), (11)(A), (C) and (D), (13) and (14). This is necessary because of concurrent rulemaking to revise the commission's public participation rules for air quality permit applications, as discussed earlier in this preamble.

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 amendments to Chapter 55 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. Correction of these deficiencies is necessary to ensure that the rules can be a federally approved part of the Texas SIP.

The adopted amendments expand the opportunity for public comment by requiring the executive director to hold a public meeting for the purpose of taking public comment for all PSD and nonattainment air quality applications when such a request is made by any interested person. Thus, 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 amendments to Chapter 55 expand opportunity for public notice and comment on air quality permit applications. 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 TWC, §5.1733, Chapter 5, Subchapter M, THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.0291,

382.051, 382.0516. 382.0518, and 382.056; Texas Government Code, §§2001.004, 2001.006, and 2001.142; and FCAA, 42 United States Code (USC), §§7401 *et seq*.

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 amendments to Chapter 55 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. Correction of these deficiencies is necessary to ensure that the rules can be a federally approved part of the Texas SIP. Specifically, the adopted amendments increase the opportunity for public participation in the permitting process for air quality permit applications. Promulgation and enforcement of the adopted amendments will not burden private real property. The adopted amendments 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 amendments 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 amendments 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 amendments 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

These amendments 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 previously discussed. 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 (CEJ). 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.

Although EPA discussed its proposed action with regard to the rules in Chapter 55 that were previously submitted as revisions to the SIP in 1999 in the Public Participation Notice, EPA provided no specific comment with regard to the rule text in response to the commission's proposal to revise §§55.152, 55.154, and 55.156, nor regarding which sections of Chapter 55 the commission proposed for withdrawal and re-submission as revisions to the SIP.

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 and therefore, changes have been made.

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 in this preamble and the preamble for Chapter 39, 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, both the first and second notices for air applications subject to this rulemaking are 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.

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.

Once 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 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 in this preamble, 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.

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 for applications filed on or after 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.

General Comments Regarding Chapter 55

OPIC supported the proposed changes to Chapter 55 providing additional opportunities for public participation for PSD and nonattainment permits. The proposed rules would require the ED to hold a

public meeting on such applications when requested by an interested person. The rules also specify that before any PSD or nonattainment permit is approved, the executive director shall prepare a response to comments.

The commission appreciates these comments in support of the rule.

TACA opposed the changes in Chapters 55, and 60 and 116 to the extent that the changes relate to amendments in Chapter 39.

No changes were made in response to this comment. The changes in Chapter 55 regarding public meetings and processing of public comments, and were made in response to the Public Participation Notice. TACA's opposition to the changes in Chapter 39 centered on the extended opportunity for public comment and public meeting for minor NSR applications. Although for minor NSR permit applications for which no contested case hearing requests are received will be subject to a longer comment period, the commission's processing of those comments will still be subject to a 60-day regulatory deadline for filing the RTC after the close of the comment period. As discussed elsewhere in this preamble, the commission's Office of Public Assistance (OPA) works diligently to schedule meetings as quickly as reasonably possible. In Chapter 116, the PAL notice rule was updated, and a cross-reference in §116.114 was updated. Similarly, only a cross-reference in Chapter 60 was updated. The changes in these chapters do not directly relate to the issue of concern for TACA.

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 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 commission's integrated database is searchable by permit number, regulated entity number, customer number, and company name.

§55.152, Public Comment Period

Environmental Groups I commented that §55.152(a) should require that the end of comment period be identified on the face of the notice.

No change was made in response to this comment. The notice clearly includes when the comment period ends. The specific notice 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 disagrees that it is not possible to determine from the notice when the notice period ends. Given that publication is required to be in a newspaper, the current date is printed on each page, usually at the top of the page, and the end of the comment period would be no earlier than 30 days after that date. 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 commissioners' integrated database, 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 publisher's affidavit, which includes the date of publication, the end of the comment period is also entered into the database. Additionally, although the comment period ends no later 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 add potentially result in errors regarding when the comment period actually ends.

Environmental Groups I commented that the agency clarify what types of permit actions are considered "renewals' in §55.152(a)(2). Commenters object to permitting actions being considered renewals if those actions alter any permit terms or conditions, or incorporate by reference, consolidation or any other means, permits by rule, qualified facility authorizations or standard permits.

No change was made in response to this comment. 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; those rules are in 30 TAC Chapter 116, Subchapter D. The commission's rules regarding permit renewal

are in Chapter 116, Subchapter D and because these rules were not open for revision as part of this rulemaking, no definition is in or is added to the commission's rules.

HCPHES recommended that the comment period in §55.152(a)(2) be extended from 15 days to 30 days to allow sufficient time for review and comment.

No change was made in response to this comment. Renewal applications are not subject to NAPD unless they do not meet the requirement that the application does not include any increase in emissions, or if the applicant has a poor compliance history (THSC, §382.056(g) and (o)). If either of those facts is present, then the application, for notice purposes, is processed as other NSR applications, including NAPD, public meetings, and RTCs. In addition, local air pollution programs, HCPHES, are provided the opportunity to review draft permits for renewal applications and provide comment to the TCEQ during the technical review of the application. The commission and its predecessor agencies have only required a 15-day comment period for renewal applications, and, after HB 801, for the NORI comment period.

§55.154, Public Meetings

Environmental Groups I commented that it supports the changes to §55.154(c) that require the executive director to hold a public meeting when requested for PSD and nonattainment permits, as well as the associated notice for those meetings. However, commenters also state that the requirement should be expanded to all permit applications.

No change was made in response to this comment. The commission finds that the criteria for holding meetings regarding minor NSR permit applications is sufficiently covered by the factors in §55.154(c)(1) - (5) when otherwise required by law. New paragraph (3) is added to meet federal requirements.

Environmental Groups I asked for clarification that §55.154(g) requires that the executive director will respond to both written and oral comments.

Yes, §55.154(g) references §55.156(b) and (c), which requires the executive director to prepare a response to all timely, relevant and material, or significant public comment, whether or not withdrawn, and to file the RTC with the Office of Chief Clerk, who is required to transmit the RTC. Existing §55.154 states that a public meeting is intended for the taking of public comment. Accordingly, comments include both written and oral comments made in the formal comment portion of a public meeting. The commission's practice is to respond to all comments.

TIP recommended that only one public meeting 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 requirement for

PSD applications under §55.154(c)(3), 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. OPA has and will make every effort to efficiently schedule meetings, but in certain limited circumstances, more than one meeting may be held.

TCC suggested that if a public meeting is requested in response to the NAPD, that it be scheduled within ten days immediately following the end of the NAPD 30-day comment period. This will make it convenient for the public to know ahead of time when the meeting will occur and ensure timely processing of permit applications for the regulated community. TIP commented that the rule does not provide a time in which a requested meeting will be held and to avoid unnecessary delay, §55.154(c)(3) should be amended and a new subsection (c)(4) should be added to specify that the meeting will be held within 45 days from the publication of the NAPD, or Notice of Opportunity to Comment for minor NSR applications, respectively, for which no contested case hearing has been requested.

No changes were made in response to these comments. Once the commission determines that a public meeting will be held, the commission's OPA works diligently to schedule the meeting as quickly as reasonably possible. Those arrangements consider the applicable timing allowed by rule, as well the logistical considerations such as availability of an appropriate location and availability of both applicant representatives and commission staff. In limited circumstances, a second meeting

may be held as discussed in the previous response, for example, if there were issues associated with adequate notice or capacity of the selected meeting location. In addition, holidays or local events must be considered. Therefore, a rule limit of scheduling within ten days of the end of the NAPD comment period or within 45 days from publication of the NAPD would not be practical.

TCC commented that the rule or the preamble should include information regarding the structure or details of the public meetings. TCC stated that any information regarding the application that is prepared and presented at the public meeting remains the responsibility of the commission, and not the applicant to compile, which is the current practice.

No changes to the rules were made in response to this comment. For many years, the commission's public meetings regarding permit applications have been structured as a bifurcated meeting. The first, informal part of the meeting is for the public to ask questions of the applicant representatives and commission staff. The second part of the meeting is for official comment only, without responses by applicant representatives or commission staff. These official comments are responded to by the commission's executive director's staff in the RTC. In most cases, applicant representatives make a short presentation prior to the first part of the meeting to provide general information about the proposed facilities, and it is common for commission staff to present information concerning the review of the application and the applicable processing procedures.

The commission respectfully disagrees with TCC that the information that is prepared and presented at the public meeting remains the responsibility of the commission, rather than the applicant, and that the TCC's comment accurately describes current practice. The purpose of a

public meeting is to provide the public information about an application and to allow the public to provide comment on the application. The intent of HB 801 was to provide opportunity for the public to obtain information as soon as reasonably available so that the process keeps moving and issues can be resolved. In order to provide the public with complete information about an application, and to answer their questions about the application in the most efficient and convenient manner, the presence of the applicant is necessary to address those aspects of the application and project that are more appropriately addressed by the applicant or that may be beyond the executive director's knowledge. In addition, the legislature amended THSC, §382.056 in 2009 by adding new subsection (k-1) which requires a permit applicant or designated representative to attend a public meeting and to make a reasonable effort to respond to questions relevant to the permit application at the meeting.

TCC agreed that public meetings should be held in the same vicinity as where public notice was circulated.

No changes were made in the rule in response to this comment. THSC, §382.056(k) requires a public meeting to be held in the county in which the facility or the proposed facility is or will be located. OPA works with applicants and citizen groups to locate appropriate venues for public meetings in the area where the facilities are located or are proposed to be located.

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)(v) and the rules promote actions that undermine informed public participation. The federal rule states that an opportunity for a public hearing

must be provided for interested persons to appear and submit written or oral comments on the air quality impact of the source, alternatives to it, the control technology required, and other appropriate considerations. Specifically, the commenter discussed experience in a contested case hearing where, although a public meeting was provided, it was held before a complete application was available. The commission accepted additional comments, but the commenters stated that the commission refused to respond to the additional comments.

No change was made in response to this comment. The rule cited by the commenter states that, for PSD applications, an opportunity for a public hearing must be provided for interested persons to appear and submit written or oral comments on the air quality impact of the source, alternatives to it, the control technology required, and other appropriate considerations. The changes proposed and adopted in §55.154(c)(3) specifically address this federal rule, including that the meeting will be held after publication of the NAPD.

An individual commented that the rule changes could require an otherwise legal and permitted operator to be subject to a public meeting, and would also be a hardship on private citizens who may have business interests in such operations to attend these meetings in support of their interests.

No change was made in response to this comment. First, the opportunity to request a public meeting only exists for certain pending permit applications subject to the requirements for public notice and public participation in Chapters 39 and 55. Therefore, permitted facilities are not subject to a public meeting except when seeking a new permit or an amendment to their existing permit that requires public notice.

Secondly, currently, both §55.154(e) and TCAA, THSC, §382.056(k-1) require applicants to attend public meetings held by the commission on their pending permit applications. The TCAA also requires applicants to make a reasonable effort to respond to questions relevant to the permit application at the meeting. Therefore, that requirement currently exists, and would not be the result of these rule changes.

§55.156, Public Comment Processing

HPCHES commented that the rules should specify the criteria utilized for comment consideration with regard to the permit process.

No change was made in response to this comment. The commission's practice in all RTCs is to identify any changes made to the draft permit based on information in the comments, and the reasons for any changes. Changes to the draft permit, as with any permit action, must be within the commission's jurisdiction and the scope of the application (*See* the last sentence of §55.156(b)(1)).

Environmental Groups I supported the requirement of §55.156(b)(1) to respond to all comments for major permits; however it stated that this requirement should be should be expanded to all applications.

No changes were made in response to this comment. The change to §55.156(b)(1) is to ensure that the public notice requirements for PSD and Nonattainment permit applications meet federal requirements. Section 55.156(b) and (c) requires the executive director to prepare a response to all timely, relevant and material, or significant public comment, whether or not withdrawn, and to file

the RTC with the Office of Chief Clerk, who is required to transmit the RTC. Additionally, §55.156(b) has been amended to require the ED to respond to all comments for PSD, nonattainment, and PAL permits to fully comply with federal requirements. Comments include both written and oral comments made in the formal comment portion of a public meeting. The commission's practice is to respond to all comments.

Environmental Groups I stated that the differences in when to request a contested case hearing for major versus other permits in §55.156(d) is unreasonably confusing. Commenters state that the time period to request a contested case hearing 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, nor do they change the opportunity for individuals to request a contested case hearing up until the date of mailing of the executive director's RTC in cases where a hearing request was made within 30 days after NORI publication. 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 for the opportunity to request a public meeting at which comment can be made on the draft permit. 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.

Environmental Groups I supported the requirements of §55.156(d) and asked that the commission make as much information as possible available online, including the NORI and NAPD.

The commission appreciates the support. The NORI and NAPD are currently available on the commission's Web site in the commission's integrated database (CID).

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 §39.411(f)(3) in response to this comment by specifying that the public location must have internet access. For PSD and nonattainment air quality permit applications, 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. The electronic availability of the final 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 these 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. In addition, the commission is adopting new §55.156(g) which provides that the commission shall make available by electronic means on the commission's website the RTC.

§55.210, Direct Referrals

Environmental Groups II commented that direct referrals further confuse the process, and that notices for different actions can be published so close together as to be confusing.

No change was made in response to this comment. Although the rules regarding the direct referral process are part of the rules included in this rulemaking, the commission did not specifically propose any changes to that process, and therefore, declines to make changes without appropriate notice and comment opportunity.

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

SUBCHAPTER E: PUBLIC COMMENT AND PUBLIC MEETINGS

§§55.150, 55.152, 55.154, 55.156

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; 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 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. The amendments 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; 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,

§382.051, 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, §382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials; THSC, §382.0518, which authorizes the commission to issue 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. 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 TWC, §5.1733 and Chapter 5, Subchapter M, THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.0291, 382.051, 382.0516. 382.0518, and 382.056; Texas Government Code, §§2001.004, 2001.006, and 2001.142; and FCAA, 42 USC, §§7401 *et seq*.

§55.150. Applicability. {NOTE: No change to TAC, but submitting as a revision to the SIP}

This subchapter applies only to applications filed under Texas Water Code, Chapter 26, 27, or 32 or Texas Health and Safety Code, Chapter 361 or 382 that are declared administratively complete on or after September 1, 1999.

§55.152. Public Comment Period.

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

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

(2) 15 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title, or 30 days after Notice of Application and Preliminary Decision if a second notice is required under §39.419 of this title, for a permit renewal under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or a concrete batch plant without enhanced controls authorized by a air quality standard permit adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits), unless the plant is to be temporarily located in or contiguous to the right-of-way of a public works project;;

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

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

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

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

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

§55.154. Public Meetings.

(a) A public meeting is intended for the taking of public comment, and is not a contested case under the Texas Administrative Procedure Act.

(b) During technical review of the application, the applicant, in cooperation with the executive director, may hold a public meeting in the county in which the facility is located or proposed to be located in order to inform the public about the application and obtain public input.

(c) At any time, the executive director or Office of Public Assistance may hold public meetings. The executive director or Office of Public Assistance shall hold a public meeting if:

(1) the executive director determines that there is a substantial or significant degree of public interest in an application;

(2) a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held;

(3) for applications filed on or after the effective date of this section, for Prevention of Significant Deterioration and Nonattainment permits subject to Chapter 116, Subchapter B of this title (relating to New Source Review Permits), an interested person requests a public meeting regarding the executive director's draft permit or air quality analysis; a public meeting held in response to a request under this paragraph will be held after Notice of Application and Preliminary Decision is published; applications filed before the effective date of this section for Prevention of Significant Deterioration and Nonattainment permits subject to Chapter 116, Subchapter B of this title are governed by the rules as they existed immediately before the effective date of this section, and those rules are continued in effect for that purpose;

(4) for applications filed on or after the effective date of this section, for Hazardous Air Pollutant permits subject to 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), an interested person requests a public meeting regarding the executive director's draft permit or air quality analysis; a public meeting held in response to a request under this subparagraph will be held after Notice of Application and Preliminary Decision is published; applications filed before the effective date of this section for Prevention of Significant Deterioration and Nonattainment permits subject to Chapter 116, Subchapter B of this title are governed by the rules as they existed immediately before the effective date of this section, and those rules are continued in effect for that purpose; or

(5) when a public meeting is otherwise required by law.

(d) Notice of the public meeting shall be given as required by §39.411(d) or (g) of this title (relating to Text of Public Notice), as applicable.

(e) The applicant shall attend any public meeting held by the executive director or Office of Public Assistance.

(f) A tape recording or written transcript of the public meeting shall be made available to the public.

(g) The executive director will respond to comments as required by §55.156(b) and (c) of this title (relating to Public Comment Processing).

§55.156. Public Comment Processing.

(a) The chief clerk shall deliver or mail to the executive director, the Office of Public Interest Counsel, the Office of Public Assistance, the director of the Alternative Dispute Resolution Office, and the applicant copies of all documents filed with the chief clerk in response to public notice of an application.

(b) If comments are received, the following procedures apply to the executive director.

(1) Before an application is approved, the executive director shall prepare a response to all timely, relevant and material, or significant public comment, whether or not withdrawn, and specify if a comment has been withdrawn. Before any air quality permit application for a Prevention of Significant Deterioration or Nonattainment permit subject to Chapter 116, Subchapter B of this title (relating to New Source Review Permits) or for applications for the establishment or renewal of, or an increase in, a plant-wide applicability limit permit 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, is approved, the executive director shall prepare a response to all comments received. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes.

(2) The executive director may call and conduct public meetings, under §55.154 of this title (relating to Public Meetings), in response to public comment.

(3) The executive director shall file the response to comments with the chief clerk within the shortest practical time after the comment period ends, not to exceed 60 days.

(c) After the executive director files the response to comments, the chief clerk shall mail (or otherwise transmit) the executive director's decision, the executive director's response to public comments, and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing. The chief clerk shall provide the information required by this section to the applicant, any person who submitted comments during the public comment period, any person who requested to be on the mailing list for the permit action, any person who timely filed a request for a contested case hearing in response to the Notice of Receipt of Application and Intent to Obtain a Permit for an air application, the Office of Public Interest Counsel, and the Office of Public Assistance. Instructions for requesting reconsideration of the executive director's decision or requesting a contested case hearing are not required to be included in this transmittal for the applications listed in:

(1) §39.420(e) of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision); and

(2) §39.420(f) and (g) of this title.

(d) The instructions sent under §39.420(a) of this title regarding how to request a contested case hearing shall include at least the following statements, however, this subsection does not apply to post-closure order applications:

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

(2) 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;

(3) 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

(4) 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.

(e) The instructions sent under §39.420(c) of this title regarding how to request a contested case hearing shall include at least the following statements:

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

(2) 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;

(3) 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

(4) 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.

(f) For applications referred to State Office of Administrative Hearings under §55.210 of this title (relating to Direct Referrals):

(1) for air quality permit applications filed on or after the effective date of this section subsections (c) and (d) of this section do not apply; and

(2) for all other permit applications, subsections (b)(2), (c), and (d) of this section do not apply.

(g) Notwithstanding the requirements in §39.420 of this title, the commission shall make available by electronic means on the commission's Web site the executive director's decision and the executive director's response to public comments.

SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

§55.210

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; 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 requires the commission to establish public participation procedures for certain permit applications. 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. The amendments 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; 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,

§382.051, 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, §382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials; THSC, §382.0518, which authorizes the commission to issue 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. 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 TWC, Chapter 5, Subchapter M, THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.0291, 382.051, 382.0516. 382.0518, and 382.056; Texas Government Code, §§2001.004, 2001.006, and 2001.142; and FCAA, 42 USC, §§7401 *et seq*.

§55.210. Direct Referrals.

(a) The executive director or the applicant may file a request with the chief clerk that the application be sent directly to State Office of Administrative Hearings (SOAH) for a hearing on the application.

(b) After receipt of a request filed under this section and after the executive director has issued his preliminary decision on the application, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

(c) A case which has been referred to SOAH under this section shall not be subject to the public meeting requirements of §55.154 of this title (relating to Public Meetings). The agency may, however, call and conduct public meetings in response to public comment. A public meeting is intended for the taking of public comment, and is not a contested case proceeding under the Administrative Procedure Act. Public meetings held under this section shall be subject to following procedures.

(1) The executive director shall hold a public meeting when there is a significant degree of public interest in a draft permit, or when required by law.

(2) To the extent practicable, the public meeting for any case referred under this section shall be held prior to or on the same date as the preliminary hearing.

(3) Public notice of a public meeting may be abbreviated to facilitate the convening of the public meeting prior to or on the same date as the preliminary hearing, unless the timing of notice is set by statute or a federal regulation governing a permit under a federally authorized program. In any case, public notice must be provided at least ten days before the meeting.

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

(5) The applicant shall attend any public meeting held.

(6) A tape recording or written transcript of the public meeting shall be filed with the chief clerk and will be included in the chief clerk's case file to be sent to SOAH as provided by §80.6 of this title (relating to Referral to SOAH).

(d) A case which has been referred to SOAH under this section shall be subject to the public comment processing requirements of §55.156(a) and (b)(1) and (3) of this title (relating to Public Comment Processing).

(e) If Notice of Application and Preliminary Decision is provided at or after direct referral under this section, this notice shall include, in lieu of the information required by §39.411(c) and (e) of this title (relating to Text of Public Notice), the following:

(1) the information required by §39.411(b)(1) - (3), (4)(A), (6) - (11), and (13) and (e)(10), (11)(A), (C) and (D), (13) and (14) of this title;

(2) the information required by §39.411(c)(4) and (5) of this title; and

(3) 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, the deadline to file public comments or request a public meeting, and a statement that a public meeting will

be held by the executive director if there is significant public interest in the proposed activity. These 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.