

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

The proposed amendments to §§55.152(a)(1), (2), (5) and (6), 55.154(a), (b), (c)(1) - (3) and (5), and (d) - (g), and 55.156, except §55.210, 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 PROPOSED 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 proposes 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); 55.154(a), (b), (c)(1) - (3) and (5), and (d) - (g); and 55.156. In addition, §55.150 will be submitted to the EPA as a revision to the SIP.

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 emissions authorization 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 these rules do not meet all of the minimum federal requirements that relate to public participation. The TCEQ filed comments in response to this notice. In addition, the executive director's letter to EPA dated October 23, 2009 commits to proposal of this rulemaking on December 9, 2009. This proposal is intended to address EPA's concerns and submit rule amendments that are approvable as a revision to the Texas SIP, and 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, 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 CURRENT 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 applications follows. As there are a

number of possible scenarios depending on the type of permit, this discussion focuses on the basic HB 801 process. Additionally, in its Public Participation Notice, EPA states "for a new or modified source subject to PSD, the revised rules do not contain a definition of a final appealable decision for a PSD permit" (see *73 Federal Register* 72008). EPA goes on to state that it would like "further information about how and when commenters are informed of the agency's final decision, access to the response to comments (RTC) and timing for judicial appeal, in order to provide an opportunity for State court judicial review" (see *73 Federal Register* 72008). The following discussion also addresses those issues. The SECTION BY SECTION DISCUSSION 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. 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 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.

Second notice is currently 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 would expand 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. Currently, 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 will add 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. Currently, 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 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 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 to the TCEQ 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 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 PROPOSED AMENDMENTS AND RELATED RULEMAKING

The proposed 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 Prevention of Significant Deterioration (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. The commission is also proposing to withdraw certain sections and resubmit certain sections in Chapter 55 as revisions to the SIP. The primary objective of this rulemaking is to obtain SIP approval for the public participation requirements and process for the commission's NSR air quality permitting program.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to Chapter 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 concerns 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 currently 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 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 with 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 proposes 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 proposing to amend Chapter 60 to update cross-references that have changed as part of this rulemaking.

Finally, the commission is also concurrently proposing 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 amendments update cross-references.

The new and amended 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 is intended to revise 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). Therefore, the commission will not respond to comments regarding the public participation requirements for other media not addressed in this rulemaking. This rulemaking also updates cross-references and to make non-substantive changes to update rule language to current Texas Register style and format requirements. However, the commission will accept comments regarding the proposed updated cross-references in the rules that are not applicable to air quality permit applications.

§55.152, Public Comment Period

The commission proposes to amend §55.152(a)(2) to update the type of applications for concrete batch plants that are subject to public comment. Specifically, the proposed amendment will add text that identifies that authorization as a concrete batch plant without enhanced controls authorized by an 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 Meetings

The commission proposes to amend §55.154(c) by adding proposed 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 comment that for a new or modified source subject to PSD or nonattainment requirements, the revised 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. Currently, under §55.154, the public is not guaranteed notice of such opportunity or that such an opportunity will be provided upon request.

The commission proposes to amend §55.154(c) by adding proposed 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 state 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 subparagraph because this subparagraph will not be submitted to EPA as a revision to the SIP.

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.

The commission proposes that existing subsection (c)(3) be relettered as subsection (c)(5). The commission proposes that existing subsection (e) be moved to proposed subsection (d), and would update a cross-reference to proposed §39.411(g), Text of Public Notice. Existing subsection (d) would be relettered as subsection (e). Finally the commission proposes that the last sentence of existing subsection (d) regarding recordation of the meeting be proposed as subsection (f).

The commission also proposes subsection (g), which provides that the commission shall make available by electronic means on the commission's Web site the executive director's decision and the executive directors's response to public comment.

§55.156, Public Comment Processing

The commission proposes to amend §55.156(b)(1) to provide 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 comment that for a new or modified source subject to PSD or nonattainment permitting rules in Chapter 116, Subchapter B, the commission's current rules do not provide that a response will be provided for all comments. EPA also commented 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).

EPA also commented 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.

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 also available as a public document.

Notwithstanding the commission's long-standing rules and practice regarding making the RTC available, the commission proposes 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 proposes, in §55.156 to codify its plans to make available all RTCs on its Web site. The commission anticipates this being established by January 2010. This rule change is in addition to its long-standing practices of maintaining a copy of the final permit at the commission's headquarters in Austin and at the appropriate regional offices, and, as required by rule, by mailing a copy of the RTC to all commenters, as well as any other interested persons who have asked to be included on a mailing list for a particular application. This rule change not only satisfies but exceeds the federal rule, and thus is at least as stringent. Concurrently, the commission is proposing similar rule amendments to §39.420.

The commission proposes to amend subsections (c) and (d) to update cross-references. In subsection (c) in the existing reference to §39.420(c) - (e) would be proposed as §39.420(f) and (g). In subsection (d), the existing reference to §39.420(a) would be proposed as §39.420(a) and (c)(4). These updates are necessary because of the commission's concurrent proposal to revise its public participation rules for air quality permit applications.

The commission also proposes to amend 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 proposed for addition to §39.420(c)(1)(D), which would specify the text that must be included regarding instructions for requesting a contested case hearing for certain types of permit applications. In addition, subsection (e) is revised to specify what subsections of §55.156 apply to air quality permit applications and to other permit applications.

The commission also proposes 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.

§55.210, Direct Referrals

The commission proposes to amend §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) would be proposed 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The agency will use currently available resources to mail additional notices and to travel to additional public meetings as required by the proposed rules. State agencies and local governments that own or operate major sources and who are required to obtain new or amend existing PSD or nonattainment permits will incur the costs of attending public meetings under the proposed rules. These costs are expected to be travel costs, and they are not expected to have a significant fiscal impact on state agencies or local governments.

The agency is proposing rules in response to concerns expressed by the EPA in their review of the proposed SIP regarding current notice and public meeting requirements found in Chapter 39 and Chapter 55. EPA requested the agency provide for additional notice and opportunity for public participation regarding certain air permits. In a separate, but concurrent rulemaking, the agency is proposing amendments to Chapter 39 regarding the provision of Public Notice for minor sources of air emissions, and the fiscal impact of those proposed rules can be found in a separate fiscal note.

The proposed changes to Chapter 55 provide an opportunity for any interested person to request and receive a public meeting for PSD and nonattainment permits. The agency will use currently available resources to cover increases in postage costs for mailing additional notices and to cover increased travel costs to conduct public meetings under the proposed rules. Based on the number of PSD and nonattainment applications in the past two years, the agency expects an additional 27 PSD permits and two nonattainment permits per year could be subject to a public meeting. Since public interest varies greatly depending on the characteristics of each permit, the size of future mailing lists and increased postage and travel costs is difficult to estimate. However, any increase in costs for the agency as a result of the proposed rules is not expected to be significant.

Local governments that own or operate major sources for air emissions who are required to obtain new PSD or nonattainment permits or amend existing PSD or nonattainment permits will incur the cost of attending a public meeting. If the local government cannot find a free space in which the agency can hold the public meeting, they could incur a cost for renting the space. However, those costs are not expected to have a significant fiscal impact on local governments. Examples of facilities that are required to be authorized through a PSD or nonattainment permit that are owned by local governments are power plants.

Staff estimates that two to three PSD and one to two nonattainment applications could be received from local governments on an annual basis.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be consistency with federal notice and hearing requirements and increased public participation since there will be additional opportunity for the public to request and receive a public meeting related to PSD and nonattainment permits.

The proposed rules are not expected to have a fiscal impact on individuals since they do not typically participate in activities requiring a PSD or nonattainment permit. Individuals that would be interested in attending additional public meetings would be afforded more notice and opportunities to participate, and these individuals would incur travel or other costs on a voluntary basis.

Large businesses that are major sources of air emissions could be applicants for PSD and nonattainment permits. Staff estimates that there will be 24 to 25 PSD and one to two nonattainment permit applications per year that are submitted by large businesses. These businesses will be required to attend public meetings, if requested by an interested person, but cost increases to attend such meetings or rent a space to hold the meeting are not expected to have a significant fiscal impact. Examples of large businesses that might be affected by the proposed rules are power plants, chemical plants, and refineries.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small businesses are not typically considered major sources of air emissions and are not typically subject to PSD and nonattainment permit requirements. If a small business did have to apply for a new PSD permit or to amend an existing PSD or nonattainment permit, it could expect to incur additional travel costs to attend public meetings. However, these costs increases are not expected to have a significant fiscal impact.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with federal regulations and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

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

human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed 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 proposed 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 proposed 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 proposed amendments to Chapter 55 will expand opportunity for public notice and comment on air

quality permit applications. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the FCAA, and authorized under THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.0291, 382.040, 382.051, 382.05101, 382.0512, 382.0515, 382.0516, 382.0518, 382.05186, 382.05192, 382.05194, 382.05195, 382.05199, 382.055, 382.056, 382.057, and 382.058; Texas Government Code, §§2001.004, 2001.006, and 2001.142; and FCAA, 42 United States Code (USC), §§7401 *et seq.*

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period.

TAKINGS IMPACTMENT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments to Chapter 55 amend the procedural requirements for applications for air quality permits. The primary purpose of the proposed 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 proposed amendments will increase the opportunity for public participation in the permitting process for air quality permit applications. Promulgation and enforcement of the proposed amendments will not burden private real property. The proposed 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 proposed 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 proposed 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 proposed 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

These amendments will not require any changes to outstanding federal operating permits.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 25, 2010 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Duron, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-004-039-LS. The comment period closes February 16, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466 or Margaret Ligarde, Environmental Law Division, (512) 239-3426.

SUBCHAPTER E: PUBLIC COMMENTS AND PUBLIC MEETINGS

§§55.150, 55.152, 55.154, 55.156

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, that 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, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendments are also proposed under THSC, §382.020, concerning control of emissions from facilities that handle certain agricultural products, THSC, §382.051, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; 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; THSC, §382.055, which establishes the commission's authority to review and renew preconstruction permits. The amendments are also proposed under THSC, §382.05101,

concerning De Minimis Air Contaminants; THSC, §382.0291, concerning Public Hearing Procedures; THSC, §382.040, concerning Documents; Public Property; THSC, §382.0512, concerning Modification of Existing Facility; THSC, §382.0515, concerning Application for Permit; THSC, §382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials; THSC, §382.057, concerning Exemption; THSC, §382.05186, concerning Pipeline Facilities Permits; THSC, §382.05192, concerning Review and Renewal of Emissions Reduction and Multiple Plant Permits; THSC, §382.05194, concerning Multiple Plant Permit; and THSC, §382.05195, concerning Standard Permit; THSC, §382.05199, concerning Standard Permit for Certain Concrete Batch Plants: Notice and Hearing; THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant under Permit by Rule, Standard Permit, or Exemption. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendments are also proposed 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 proposed amendments implement THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.051, 382.0518, 382.056, 382.055, 382.05101, 382.0291, 382.040, 382.0512, 382.0515, 382.0516, 382.057, 382.05186, 382.05192, 382.05194, 382.05195, 382.05199, and 382.058; Texas Government Code, §§2001.004, 2001.006, and 2001.142; and FCAA, 42 USC, §§7401 *et seq.*

§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; [a concrete batch plant exemption from permitting or permit by rule under Chapter 106 of this title (relating to Exemptions from Permitting)];

(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 [APA].

(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; [or]

(3) for applications filed on or after July 1, 2010, 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 July 1, 2010, 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 July 1, 2010, and those rules are continued in effect for that purpose;

(4) for applications filed on or after July 1, 2010, 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 July 1, 2010, 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 July 1, 2010, and those rules are continued in effect for that purpose; or

(5) [(3)] 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) [(d)] 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.

[(e) Public notice of the meeting shall be given as required by §39.411(d) of this title (relating to Text of Public Notice).]

(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 July 1, 2010, 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. 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 §39.420(f) and (g) [§39.420(c) - (e)] of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision). The chief clerk shall provide the information required by this section to the following:

(1) the applicant;

(2) any person who submitted comments during the public comment period;

(3) any person who requested to be on the mailing list for the permit action;

(4) 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;

(5) the Office of Public Interest Counsel; and

(6) the Office of Public Assistance.

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

[(1) for air applications, that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission;]

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

(2) [(3)] 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) [(4)] 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) [(5)] 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) For applications [Subsections (b)(2), (c), and (d) of this section do not apply to a case] referred to State Office of Administrative Hearings [SOAH] under §55.210 of this title (relating to Direct Referrals); [.]

(1) for air quality permit applications filed on or after July 10, 2010, 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.

(f) Subsection (d) of this section does not apply to post-closure order applications.

(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 amendment is proposed under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, that 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, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendment is also proposed under THSC, §382.020, concerning control of emissions from facilities that handle certain agricultural products, THSC, §382.051, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; 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; THSC, §382.055, which establishes the commission's authority to

review and renew preconstruction permits. The amendment is also proposed under THSC, §382.05101, concerning De Minimis Air Contaminants; THSC, §382.0291, concerning Public Hearing Procedures; THSC, §382.040, concerning Documents; Public Property; THSC, §382.0512, concerning Modification of Existing Facility; THSC, §382.0515, concerning Application for Permit; THSC, §382.0516, concerning Notice to State Senator, State Representative, and Certain Local Officials; THSC, §382.057, concerning Exemption; THSC, §382.05186, concerning Pipeline Facilities Permits; THSC, §382.05192, concerning Review and Renewal of Emissions Reduction and Multiple Plant Permits; THSC, §382.05194, concerning Multiple Plant Permit; and THSC, §382.05195, concerning Standard Permit; THSC, §382.05199, concerning Standard Permit for Certain Concrete Batch Plants: Notice and Hearing; THSC, §382.058, concerning Notice of and Hearing on Construction of Concrete Plant under Permit by Rule, Standard Permit, or Exemption. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which provides a time period for presumed notification by a state agency. The amendment is also proposed 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 proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.020, 382.051, 382.0518, 382.056, 382.055, 382.05101, 382.0291, 382.040, 382.0512, 382.0515, 382.0516, 382.057, 382.05186, 382.05192, 382.05194, 382.05195, 382.05199, and 382.058; Texas Government Code, §§2001.004, 2001.006, and 2001.142; and FCAA, 42 USC, §§7401 *et seq.*

§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 [APA]. 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) 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) [§39.411(b)(1) - (3), (4)(A), (6) - (9), (10)(A), (B)(i) - (iii), and (C) - (D), (11), (12), 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.