

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §116.114 and §116.194. Section 116.114 is adopted *with changes* to the proposed text as published in the January 15, 2010, issue of the *Texas Register* (35 TexReg 355). Section 116.194 is adopted *without changes* and will not be republished.

Sections 116.114 and 116.194 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

This rulemaking is one of several concurrently adopted to address deficiencies identified by EPA in its review of the commission's public participation rules for approval as a revision to the SIP. The adopted amendments to Chapter 116 would update a cross-reference, delete outdated references, and clarify the public notice requirement citations for plant-wide applicability limit (PAL) permit applications.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 39, Public Notice; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 60, Compliance History. This rulemaking is adopted to address deficiencies identified by EPA in its review of the commission's public participation rules for approval as a revision to the SIP, and additional background information for this rulemaking project is included in those preambles. It includes significant changes to the existing public participation process for air quality permit applications. The new and amended rules in these chapters should be considered together, since all changes in Chapters 39, 55 and 116 are necessary to achieve the goal of SIP approval and the increased public participation opportunities.

EPA REVIEW OF SUBMITTED RULES

On November 26, 2008, the EPA proposed simultaneous limited approval and limited disapproval of revisions to the applicable implementation plan for the State of Texas which relate to public participation for air quality permit applications for new and modified sources (*Federal Register* notice of November 26, 2008, hereinafter referred to as "Public Participation Notice"). In the Public Participation Notice, (73 *Federal Register* 72012) regarding the review of the commission's public participation rules, and in its September 23, 2009, notice (74 *Federal Register* 48474 - 48475) regarding the review of the commissions's rules for the PAL permitting program, EPA commented that for PALs for existing major stationary sources, there is no provision that PALs be established, renewed, or increased through a procedure that is consistent with 40 Code of Federal Regulations (CFR) §51.160 and §51.161, including the requirement that the reviewing authority provide the public with notice of the proposed approval of a PAL permit and at least a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR §51.165(f)(5) and (11) and §51.166(w)(5) and (11). EPA stated that the commission's rules for PAL permit applications were deficient, specifically because the rules do not include a 30-day period for submittal of public comment, consistent with the Federal PAL rules at 40 CFR §51.165(f)(5) and (11) and §51.166(w)(5) and (11). EPA commented that the rule applicability section in §39.403 does not include PALs, despite the cross-reference to Chapter 39 in §116.194. 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 CFR §51.166(w)(5). To ensure that the commission's rules include sufficient authority for PALs, the commission is adopting to amend §116.194. Concurrently, the commission is adopting new

and amended rules in Chapters 39 and 55 that include the specific public participation requirements for applications for the establishment or renewal of, or an increase in, a PAL.

In the Public Participation Notice, EPA identified several rules in Chapter 116 for which it is proposing limited approval/limited disapproval. In two notices published on September 23, 2009, (*74 Federal Register* 48467, regarding New Source Review, and *74 Federal Register* 48480, regarding Flexible Permits) EPA proposes disapproval of §116.194 and §116.740, and proposed no action on §116.406. The commission is adopting to address EPA's review as follows. This rulemaking addresses the concerns expressed by EPA found in §116.114 and §116.194. The commission is not adopting to withdraw previously submitted amendments to §116.114. Since proposal of these amendments, EPA proposed direct final approval of those amendments as revisions to the SIP on March 8, 2010 (*75 Federal Register* 10416, 10449) and the amendments became final on May 7, 2010. The commission submits adopted §116.114 and §116.194 to EPA for inclusion in the SIP.

The text in existing §116.111 and §116.116 (although subsequently amended and submitted to EPA in prior rulemakings) refers to Chapter 39. The commission is addressing the concerns specified by EPA with the changes to Chapter 39 adopted in this rulemaking. These two sections refer only to Chapter 39 and not specific sections within that chapter. Therefore, the commission is not withdrawing any versions of these sections previously submitted to EPA, nor making any changes to those sections. Section 116.312 refers only to Chapter 39 and not specific sections within that chapter. Therefore, the commission is not withdrawing this section, nor adopting amendments to it.

Section 116.124, which has subsequently been repealed by the commission, concerns compliance history

and is beyond the scope of this rulemaking. EPA proposed no action on §116.183, which was repealed and readopted by the commission as §116.406; this section addresses notice for hazardous air pollutant permits which implement Federal Clean Air Act (FCAA), §112(g), which is a process separate from the SIP process. Therefore, the commission is not adopting any action regarding §39.406 at this time.

However, concurrently adopted rulemaking in Chapter 39 addresses the public notice requirements for this type of permit.

SECTION BY SECTION DISCUSSION

The commission adopts §116.114(a)(2)(C) to update a cross-reference based on the adopted amendments to §39.419, Notice of Application and Preliminary Decision.

The commission adopts §116.114(c)(2) to delete the obsolete reference to initial issuance of voluntary emission reduction permits and electric generating facility permits. The deadline for submitting these types of permit applications was September 1, 2001 and September 1, 2002, respectively. There are no pending applications for these types of permits. In a concurrent rulemaking, the commission is adopting amendments to Chapter 39 that also acknowledge these now-outdated notice requirements.

The commission adopts §116.194 to clarify the public notice requirement citations for PAL permit applications. The amendment clarifies, in adopted designated subsection (a), that the public notice requirements apply to applications for establishment or renewal of, or an increase in, a PAL permit. The remaining existing text is adopted for deletion, except for the last sentence which is adopted as designated subsection (b). Adopted subsection (b) provides that this section does not exempt an applicant for a new source review (NSR) permit from the requirements of Chapter 116, Subchapter B, New Source Review

Permits.

When the commission adopted §116.194, effective February 1, 2006, the public participation requirements for PALs were designated by reference in this section to various sections in Chapter 39. However, at the time §116.194 was adopted (2006), the commission did not amend Chapter 39 to include any reference to PAL applications. Therefore, the commission is adopting this amendment to §116.194 as well as concurrently adopting amendments to Chapter 39 that ensure that PAL applications are subject to adequate public participation requirements. Specifically, those include publication of notice of the executive director's draft permit, and providing the public an opportunity to comment for which the executive director will provide a response to comments (RTCs). The commission is adopting these amendments to obtain SIP approval for its public participation requirements and process for the commission's NSR air quality permitting program. Additional background regarding the issues associated with the commission's rules for public notice for air quality permit applications is included in the adopted Chapter 39 preamble.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking 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 rulemaking is to clarify the public notice

requirement citations for PAL permit applications, delete obsolete language and update a cross-reference to a rule in Chapter 39. In a concurrent rulemaking, the commission is adopting amendments to Chapter 39, which will necessitate amendments to these rules to ensure that the amended rules are correct. The primary purpose of the adopted amendments is to address deficiencies in the public notice requirements of the rules as identified by the EPA in the Public Participation Notice. Correction of these deficiencies is necessary to ensure that the rules can be a federally approved part of the Texas SIP. The rulemaking will not 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 because the rulemaking merely corrects the changed cross-reference.

As defined in 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 39 and Chapter 116 were developed to correct deficiencies in the public notice requirements for air quality permit applications identified by EPA in the Public Participation Notice. This adopted rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the FCAA, and authorized under Texas Health and Safety Code (THSC), §§382.002, 382.011, 382.012, 382.017, 382.0291, 382.040, 382.051, 382.0512,

382.0515, 382.0518, 382.055, and 382.056 and FCAA, 42 United States Code, §§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 prepared a takings impact assessment for this adopted rules in accordance with Texas Government Code, §2007.043. The following is that assessment. The adopted rules clarify the public notice requirement citations for PAL permit applications, delete obsolete language, and update a cross-reference to a rule in Chapter 39. The adopted rulemaking does not affect a landowner's rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding 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): CEJ, 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; and TPOWER. Comments were also received from over 1,000 individuals who submitted a form letter; more than 70 of whom provided additional comments.

EPA proposed disapproval of §116.194 in its September 23, 2009 notice (74 *Federal Register* 48467) and §116.740 in its September 23, 2009 notice (74 *Federal Register* 48480). These sections were submitted as separate submittals from the rules discussed in the Public Participation Notice. As part of this rulemaking, EPA provided no specific comment on the commission's proposal to revise §116.194, nor regarding the text of any other rules regarding the specific references to PAL permits or flexible permits in its comments submitted as part of this rulemaking, including in Chapter 39. Section 116.194, as submitted with this rulemaking, and §116.740(a), submitted to EPA in 1999, both reference the requirements in Chapter 39. Therefore, the commission understands that these revisions to the rules regarding these permitting programs should be approvable as revisions to the SIP.

RESPONSE TO COMMENTS

General Comments

CEJ, Environmental Groups I, and Environmental Groups II supported efforts to improve transparency and public access to permitting process. HCPHES supported the process to address public comment and participation, and supported strengthening it to allow Texas citizens to meaningfully participate in the process. TCC supported the proposed revisions to the public participation rules. An individual thanked the commission for protecting and ensuring that our great state will be enjoyed by generations to come;

and that we can set an example for the rest of the nation and Washington. OPIC commented that it supported change which will allow the public to conduct a more informed review of the commission's analysis of the application and to provide more constructive comments, and that it agreed with the concept of allowing the public to comment following the technical review of all NSR applications, regardless of whether someone filed a contested case hearing request soon after the application was filed.

The commission appreciates the support.

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

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

Public Participation Process

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

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

Zephyr recommended that the commission be very judicious and submit to EPA as revisions to the SIP only those rules that are absolutely necessary to satisfy federal requirements. Specifically, Zephyr stated that the requirement for the Notice of Receipt of Application and Intent to Obtain Permit (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 of Public Interest Counsel 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 the Office of Public Interest Counsel. Assistance is available to anyone who is affected by a particular permit application or other agency authorization. The staff of the Public Interest Counsel also assists people with questions about enforcement proceedings.

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

and their families. One commenter encouraged the commission to ignore comments from outside sources that only serve to bring havoc to the Texas economy. One individual commented that the commission should allow the public to participate, use the press to notify, and plan hearings on days the public can attend.

The commission has made no changes in response to these comments. For air permitting matters, the commission receives numerous public comments and hearing requests and significant numbers of persons attend public meetings. In its many years of experience with the process, the commission's position is that the air quality permitting public participation program does encourage public participation. The commission supports the right of the public to voice its opinion and the air quality permitting process provides ample opportunity for citizens to participate in matters affecting them and their families. The commission is required by law to consider all relevant comments and respond to all timely comments received in response to a proposed rulemaking. Regarding the suggestion to use the press to notify, the first notice for air applications subject to this rulemaking is required to be published in the newspaper. Additionally, for most of the applications subject to this rulemaking, a second newspaper notice is required. The commission further responds that any member of the public can submit written comments on an application and can provide oral or written comments at public meetings. Public meetings are usually scheduled after normal business hours, specifically to accommodate the public. Finally, the adopted amendments strengthen the air quality permitting public participation process, as discussed in the *OVERVIEW OF THE AMENDMENTS AND RELATED RULEMAKING* section of the preambles for concurrent rulemakings in Chapters 39 and 55.

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 chronic obstructive pulmonary disease 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 is 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. The commenter 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 stated 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 stated 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 chronic obstructive pulmonary disease 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 stated 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 commenter 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 policies will have detrimental effect on the world's future and they implored the commission to take action now. One individual stated that emission standards need to be made more

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

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

Many individuals commented about the condition of air quality in their particular city or part of the state. One commenter stated that they are very concerned about the status of Mountain Creek Lake in Dallas. One commenter stated that they believe the problem they are experiencing with redness of the eyes since moving to Dallas eight months ago is a direct result of the level of air pollution in the Dallas/Fort Worth area. One commenter raised concerns about a nearby amine gas processing plant permitted under a permit by rule 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, 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 plant 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 control 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 (nitrogen oxides, particulate, etc.). This person also stated that maintaining that only the truck operators/owners are responsible does not solve the problem, nor is it solved by public hearings (from personal experience). Another person commented that what they lack in funding they make up for in numbers of concerned citizens and stubbornness. One commenter stated that air pollution at major airport terminals needs to be addressed and areas where there is much traffic and where smoking is allowed which makes breathing difficult and smelly. This commenter also wants measurements taken in those locations and wants measurement and control of emissions from aircraft.

One individual commented that we must elect Bill White to be our next Texas governor, that he has made great progress in Houston and has great ideas for Texas. This individual went on to say that he gets things done. One individual commented that they are sick and tired of 'Grandfathered' corporate criminals getting away with causing the premature deaths of thousands of Texans and others with their murderous pollution crimes and unsafe working conditions. This individual went on to say that the CEOs "Criminal Embezzlement Officers" reward themselves for their treason with multi-millions in bonuses, always extremely undeserved and that neo-con demons do not give a damn, as long as their mansions are not next to their deadly plants. This commenter further stated that it is time to reward the innovative, clean, and conscientious corporate citizens who do not murder their neighbors. This commenter also stated that as it stands now, they cannot compete with the socialist subsidy (of other citizens and government paying for the health and property crimes of the grandfathered aristocratic scumbags) and the commenter urged the commission to please get a conscience and a backbone and enforce the laws to the maximum possible.

One person commented that the commission should look at Russia where more than 75% of water is ruined by industry, the military, and failure to maintain sanitary conditions. This individual questioned whether Texas will be like Russia in 50 years. Another person commented that they are tired of being intimidated and ignored only to have gas well leaks blow up in their face and lungs and that they are ready to vote out all state leaders if things do not change immediately. One individual commented that it is important to our state economy and that no longer are businesses willing to move to a state that is not responsible as to health issues. They urged the commission to act now or resign and let someone who cares operate TCEQ. They further commented that this issue will hurt Governor Perry. One commenter stated that air knows no boundaries and that we cannot continue to allow coal-fired power plants, cement plants, and other such industries to spew toxic chemicals into the atmosphere. They commented that it is

time for TCEQ to tighten its regulations in accordance with the federal Clean Air Act and to take responsibility to the air quality of Texas.

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

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 at the time all of the rule changes are effective. Only applications submitted on or after that date will be subject to the new requirements. Under the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001 and the rules for the *Texas Register* in 1 TAC Chapter 91, the rules become effective 20 days after submission by the commission to the Secretary of State for publication in the *Texas Register*. The proposed date of July 1 was only an estimate of the effective date at the time of proposal.

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

moving the effective date for these additional provisions is insignificant by comparison. Assuming that EPA's estimated time frame of October 2011 during which applications might continue under the old rule is accurate, EPA's suggested effective date of April 2010 would still have applications subject to the former rules until approximately June 2011. Given the length of time these issues have been pending, the potential for adverse impact on applicants of a retroactive application, and the absence of a compelling reason in light of the commission's already robust public participation process, the commission does not find it reasonable to apply these changes retroactively.

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

does not restrict the commission's authority to determine an appropriate effective date for the proposed public participation rules to be applied to air quality permit applications.

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

Finally, commission staff needs time to revise internal procedures and forms to be ready to implement the rules when they become effective. It would be confusing to implement the changes on

a voluntary basis. The internal procedures and forms used as part of the process need to be consistently used.

EPA stated that the commission could issue permits through October 2011 without providing notice consistent with federal requirements. The commission's position is that the revised rules in Chapters 39, 55, and 116 meet or exceed federal requirements, and EPA can and should act as quickly as possible to approve them as revisions to the SIP, which could be accomplished much sooner than an effective date of October 2011.

Permitting Process

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

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

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

The commission agrees with the goal to provide electronic access of permit-related information to interested parties. However, significant funds, resources, and development time are needed to reach this goal to dramatically change the air quality permitting process. Permit-related information is available now, both in a public location near a proposed site and at the TCEQ central and applicable regional offices. Today, copies of issued air permits are available electronically through the Remote Document Server (RDS). The RDS is a system that stores permit documents and is accessible by the public from the commission's Web page; it is currently accessible under the link "How Do I . . . Find the Status of a Permit, License," which leads to "Status of Air Permits and Permit Applications," and finally to "Air Permits Remote Document Server." However, the search function of the RDS is limited to a text search and cannot be filtered by other parameters.

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

Several 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 Notice of Application and Preliminary Decision (NAPD) for permit applications are posted on the commission's integrated database (CID) at the same time that the notice packages are mailed to applicants. The full text of both the NORI and the NAPD are available, as are notices of public meetings, scheduled commission meetings regarding contested case hearing requests for permit applications, and notice of the State Office of Administrative Hearings (SOAH) preliminary hearing for applications referred to SOAH for a contested case hearing. The CID is searchable by permit number, regulated entity number, customer number, and company name.

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

No changes were made in response to these comments. All of the comments concern the permit application review and issuance process, which is governed primarily by the rules in Chapter 116. Except for a cross-reference update and one rule regarding public notice for PAL permits, no rules

in Chapter 116 were opened for comment, and therefore, the comments are beyond the scope of this rulemaking. Further, these comments address permit application review and permit issuance processes, which are also beyond the scope of this rulemaking.

Individuals commented that the commission needs to require that all limits, monitoring and other requirements applicable to a particular emission unit be included in a single permit. The commission needs to require companies to amend the face of that permit if changes are made that affect existing permit terms or conditions.

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

CEJ and the Environmental Groups I commented that nothing in a permit should be confidential and that TCEQ's procedure for dealing with permitting documents labeled as confidential often deprives the public of fair public participation; instead all the information should be public so that the public is able to enforce the permit. CEJ further commented that having to refer questions about confidential documents to the Attorney General is problematic when the public is dealing with a 30-day period in which to submit timely comments. Environmental Groups I asked for the definition of what constitutes "emissions data" in

the rules, and asked for a rule provision (similar to NPDES permits) that prohibits information submitted pursuant to an air application or information within a permit from being held confidential.

No changes were made in response to these comments. The commission agrees that the permit requirements contained in the general and special conditions and the maximum allowable emission rate table should not be labeled confidential. However, all representations included in a permit application become part of the permit, including information submitted as "confidential."

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

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

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

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

The PSD supplement adopted by the Texas Air Control Board by order dated July 17, 1987, was included with EPA's comment. EPA used the PSD supplement, in part, to approve the Texas PSD

permitting program, and therefore, it predates the program approval in 1992, and subsequent changes to the commission's PSD permitting rules that have been approved by EPA as part of the Texas SIP.

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

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

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

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

Comments Regarding Chapter 116

TACA opposed the changes in Chapters 55, 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 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, the commission's Office of Public Assistance 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.

Comments Regarding §116.194

Environmental Groups I commented that §116.194(a) should be changed, specifically that PAL public participation should not be limited to establishment, renewal, or increases in a PAL permit, and that public participation should be required for changes that alter the permit's terms or conditions, including monitoring and reporting. Commenters further comment that the rule should clarify that "increase in" means increase in either actual or authorized emissions.

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

scope of this rulemaking.

Comments Regarding Concurrent Rule Amendments

§39.402

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

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

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

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

is determined by the other rules for PAL permits in Chapter 116, Subchapter C, which are beyond the scope of this rulemaking.

§39.411

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

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

§39.603

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

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

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

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

SUBCHAPTER B: NEW SOURCE REVIEW PERMITS

§116.114

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.0291, concerning Public Hearing Procedures, which prescribes certain deadlines; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0512, concerning Modification of Existing Facility, which

prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0518, concerning Preconstruction Permit, which authorizes the commission to issue preconstruction permits; THSC, §382.055, concerning Review and Renewal of Construction Permit, which establishes the commission's authority to review and renew preconstruction permits; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under §382.0518 to publish notice of intent to obtain a permit. 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 standard will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.0291, 382.040, 382.051, 382.0512, 382.0515, 382.0518, 382.055, and 382.056, and FCAA, 42 USC, §§7401 *et seq.*

§116.114. Application Review Schedule.

(a) Review schedule. The executive director shall review permit applications in accordance with the following.

(1) Notice of completion or deficiency. The executive director shall mail written notification informing the applicant that the application is complete or that it is deficient within 90 days of receipt of the application for a new permit, or amendment to a permit or special permit.

(A) If the application is deficient, the notification must state:

(i) the additional information required; and

(ii) the intent of the executive director to void the application if information for a complete application is not submitted.

(B) Additional information may be requested within 60 days of receipt of the information provided in response to the deficiency notification.

(2) Preliminary decision to approve or disapprove the application. The executive director shall conduct a technical review and send written notice to the applicant of the preliminary decision to approve or not approve the application within 180 days from receipt of a completed permit application or 150 days from receipt of a completed permit amendment. If the applicant has provided Notice of Receipt of Application and Intent to Obtain Permit public notification as required by the executive director under Chapter 39 of this title (relating to Public Notice), one of the following shall apply:

(A) if comments are received on the proposed facility and replied to by the executive director in accordance with §39.420 of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision) and §55.156 of this title (relating to Public Comment Processing); and

(B) if no requests for public hearing or public meeting on the proposed facility have been received or the application is otherwise exempt under §39.419(e) of this title (relating to Notice of Application and Preliminary Decision), the executive director shall send a copy of the Preliminary Decision to the applicant; or

(C) if Notice of Application and Preliminary Decision is required under §39.419(e) of this title, the executive director shall authorize this notice and send copies to the applicant and all other persons are required under §39.602 of this title (relating to Mailed Notice).

(3) Review schedule for Advanced Clean Energy Projects. In addition to the applicable requirements and deadlines specified in subsections (a) - (c) of this section, the following deadlines apply to permit applications for advanced clean energy projects as defined in Texas Health and Safety Code, §382.003, Definitions:

(A) As authorized by federal law, not later than nine months after the executive director declares an application for a permit under this chapter for an advanced clean energy project to be administratively complete, the executive director shall complete its technical review of the application.

(B) The commission shall issue a final order issuing or denying the permit not later than nine months after the executive director declares the application technically complete. The commission may extend this deadline up to three months if it determines that the number of complex pending applications for permits under this chapter will prevent the commission from meeting this deadline without creating an extraordinary burden on the resources of the commission.

(4) Refund of permit fee.

(A) If the time limits provided in this section to process an application are exceeded, the applicant may appeal in writing to the executive director for a refund of the permit fee.

(B) The permit fee shall be reimbursed if it is determined by the executive director that the specified period was exceeded without good cause, as provided in Texas Civil Statutes, Article 6252-13b.1, §3.

(b) Voiding of deficient application.

(1) An applicant shall make a good faith effort to submit, in a timely manner, adequate information which demonstrates that the requirements for obtaining a permit or permit amendment are met in response to any deficiency notification issued by the executive director under the provisions of this section, or Chapter 39 of this title.

(2) If an applicant fails to make such good faith effort after two written notices of deficiency, the executive director shall void the application and notify the applicant of the voidance and the remaining deficiencies in the voided application. If a new application is submitted within six months of the voidance, it shall meet the requirements of §116.111 of this title (relating to General Application) but will be exempt from the requirements of §116.140 of this title (relating to Applicability).

(c) Notification of executive director's decision.

(1) Notification to applicant. The executive director or the chief clerk shall send to the applicant the decision to approve or not approve the application if:

(A) no timely requests for reconsideration, contested case hearing, or public meeting on the proposed facility have been received; or

(B) if hearing requests have been received and withdrawn before the executive director's Preliminary Decision; or

(C) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted; and

(D) the applicant has satisfied all public notification requirements of Chapter 39 of this title.

(2) Notification to commenters. Persons submitting written comments under Chapter 39 of this title shall be sent the executive director's final action and given an explanation of the opportunity to file a motion under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) at the same time that the applicant is notified. If the number of interested persons who have requested notification makes it impracticable for the commission to notify those persons by mail, the commission

shall notify those persons by publication using the method prescribed by §382.031(a) of the Texas Health and Safety Code.

(3) Time limits. The executive director shall send notification of final action within:

(A) one year after receipt of a complete prevention of significant deterioration or nonattainment permit application, or a complete permit application for an action under Subchapter C of this chapter (relating to Plant-Wide Applicability Limits);

(B) 180 days of receipt of a completed permit or permit renewal application; or

(C) 150 days of receipt of a permit amendment or special permit amendment application.

SUBCHAPTER C: PLANT-WIDE APPLICABILITY LIMITS

DIVISION 1: PLANT-WIDE APPLICABILITY LIMITS

§116.194

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the Texas Water Code; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.0291, concerning Public Hearing Procedures, which prescribes certain deadlines; THSC, §382.040, concerning Documents; Public Property, which provides that all information, documents, and data collected by the commission in performing its duties are state property; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; THSC, §382.0512, concerning Modification of Existing Facility, which

prescribes how the commission will evaluate modifications of existing facilities; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0518, which authorizes the commission to issue preconstruction permits; THSC, §382.055, which establishes the commission's authority to review and renew preconstruction permits; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which requires an applicant for a permit issued under §382.0518 to publish notice of intent to obtain a permit. The amendment is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standard will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.0291, 382.040, 382.051, 382.0512, 382.0515, 382.0518, 382.055, and 382.056, and FCAA, 42 USC, §§7401 *et seq.*

§116.194. Public Notice and Comment.

(a) Applications for establishment or renewal of, or an increase in, a plant-wide applicability limit permit under this division are subject to the notice and comment requirements in Chapter 39 of this title (relating to Public Notice).

(b) Nothing in this section exempts an applicant for a new source review permit from the requirements of Subchapter B of this chapter (relating to New Source Review Permits).