

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§39.405, 39.419, and 39.602.

The amendments to §39.405(g)(3) and §39.419(e)(1) are proposed as revisions to the State Implementation Plan.

Background and Summary of the Factual Basis for the Proposed Rules

Senate Bill (SB) 709

SB 709 was passed by the 84th Texas Legislature (2015), with an effective date of September 1, 2015. SB 709 makes several changes to the current contested case hearing (CCH) process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a CCH. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications filed on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their CCH request has timely and specifically identified, by name and physical address, a member who would be affected in the member's own right. The issues submitted by the commission to the State Office of Administrative Hearings (SOAH) for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment and physical property. The prima facie case may be rebutted

by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. The bill allows for extensions beyond 180 days based upon agreement of the parties with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to implement both SB 709 and SB 1267, also

passed by the 84th Texas Legislature. The amendments are proposed rules in 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings. SB 709 is implemented by rules proposed in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9 (84th Texas Legislature, 2015), are implemented by rules proposed in Chapters 1, 50, 55, 70, and 80.

Section by Section Discussion

In addition to the amendments associated with this rulemaking, the proposed rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§39.405, Applicability and General Provisions

Subsection (k) is proposed to implement amended Texas Water Code (TWC), §5.115(d) in SB 709, Section 2 and Section 5(a)(1), which requires the commission to adopt rules to provide for notice of administratively complete applications to be posted on the commission's webpage. In addition, the prior applicability text that referenced the

effective date of the section in subsection (g)(3) is updated to provide the precise date of June 24, 2010.

§39.419, Notice of Application and Preliminary Decision

Proposed amendment to subsection (a) implements new TWC, §5.5553 in SB 709, Section 4 and Section 5(a)(1). For applications filed on or after September 1, 2015, that are subject to a CCH under TWC, §5.556 or §5.557, written notification of the draft permit must be provided to the state senator and state representative of the area where the facility is or will be located at least 30 days prior to the chief clerk's mailing of the executive director's preliminary decision and Notice of Application and Preliminary Decision. In addition, the prior applicability text that referenced the effective date of the section in subsection (e)(1) is updated to provide the precise date of June 24, 2010.

§39.602, Mailed Notice

Subsection (c) is proposed to implement new TWC, §5.5553 in SB 709, Section 4 and Section 5(a)(1) for air quality permit applications. For applications filed on or after September 1, 2015, that are subject to a CCH under TWC, §5.556 or §5.557, written notification of the draft permit must be provided to the state senator and state representative of the area where the facility is or will be located at least 30 days prior to the chief clerk's mailing of the executive director's preliminary decision and Notice of Application and Preliminary Decision.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government. The proposed rules are procedural in nature and do not directly impact the cost of CCHs.

This rulemaking is proposed to implement SB 709, passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current CCH process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a hearing. A group or association seeking to be considered as an affected person must specifically identify in its comments a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications received on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their comments have timely and specifically identified a member who would be affected in the member's own right. The issues submitted by the commission to the SOAH for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and the permit, if issued, would protect human health and safety, the environment and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit

violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the ALJ's proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by the date specified by the commission. SB 709 allows for continuances based upon agreement of the parties (with the ALJ's approval), or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit

establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Local governments that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant. The number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

The number of units of local governments is a small percentage of the number of applicants for and who comment on air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications. While it is possible that a unit of state government can be a permit applicant, it is rare. If one is, it would be affected in the same way as other governmental entities who are applicants. State agencies are generally prohibited from contesting TCEQ permit applications, so they would not be affected the same as other governmental entities who protest applications and participate in CCHs.

There are fiscal implications for the agency due to the need to revise the Commissioners' Integrated Database to adequately implement SB 709. However, costs to upgrade the database are not expected to be significant and would be absorbed using current

resources.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and greater clarity for the public and also for applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications.

No significant fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to a CCH request will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them

to furnish a copy of their application, though these costs are not expected to be significant.

The rules will apply to applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications. The number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rulemaking would have the same effect on a small business as it does on a large business. The proposed amendments are procedural in nature and do not directly impact the cost of CCHs. It is not known how many applicants would be small or micro-businesses, but for those that are, there may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is

subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant. In addition, the number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking is necessary to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rulemaking is in effect.

Local Employment Impact Statement

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

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is

not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to Chapter 39 are procedural in nature and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they 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. Rather, the proposed amendments implement changes made to the TWC in SB 709 by revising procedural rules regarding web-based and mailed notice of permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The proposed amendments to Chapter

39 do not exceed an express requirement of state law or a requirement of a delegation agreement, and were not developed solely under the general powers of the agency, but are authorized by specific sections of the TWC that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments to Chapter 39 revise procedural rules regarding web-based and mailed notice of permit applications and are procedural in nature. Promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, the

proposed rules do partially fulfill a federal mandate under 42 United States Code, §7410. Consequently, the exemption that applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

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

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 15, 2015, at 2:00 in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written

comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-018-080-LS. The comment period closes on September 21, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, at (512) 239-0466.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§39.405, §39.419

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; TWC, §5.1733, concerning Electronic Posting of Information, which authorizes the commission to post public information on its website; and TWC, §5.5553, concerning Notice of Draft Permit, which requires the commission to provide notice of draft permit to certain state officials. The amendments are also proposed 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; 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.

In addition, the amendments to §39.405(g)(3) and §39.419(e) are also proposed under Federal Clean Air Act, 42 United States Code, §§7404, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The proposed amendments implement TWC, §§5.115, 5.1733, and 5.5553; THSC, §382.012; and Senate Bill 709 (84th Texas Legislature, 2015).

§39.405. General Notice Provisions.

(a) Failure to publish notice. If the chief clerk prepares a newspaper notice that is required by Subchapters G - J, L, and M of this chapter (relating to Public Notice for Applications for Consolidated Permits;[,] Applicability and General Provisions;[,] Public Notice of Solid Waste Applications;[,] Public Notice of Water Quality Applications and Water Quality Management Plans;[,] Public Notice of Injection Well and Other Specific Applications;[,] and Public Notice for Radioactive Material Licenses) and the applicant does not cause the notice to be published within 45 days of mailing of the notice from the chief clerk, or for Notice of Receipt of Application and Intent to Obtain Permit, within 30 days after the executive director declares the application administratively complete, or fails to submit the copies of notices or affidavit required in subsection (e) of this section, the executive director may cause one of the following actions to occur.

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

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

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

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

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

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

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

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

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

(3) air quality permit applications required by Subchapters H and K of this chapter (relating to Applicability and General Provisions and Public Notice of Air Quality

Permit Applications, respectively) to publish notice shall comply with the requirements of §39.603 of this title (relating to Newspaper Notice).

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

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

(2) A copy of the complete application (including any subsequent revisions to the application) and executive director's preliminary decision must be available for review and copying beginning on the first day of newspaper publication required by this section and remain available until the commission has taken action on the application or the commission refers issues to State Office of Administrative Hearings; and

(3) where applicable, for air quality permit applications filed on or after June 24, 2010 [the effective date of this section], the applicant shall also make available the executive director's draft permit, preliminary determination summary and air quality analysis for review and copying beginning on the first day of newspaper publication required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) and remain available until the commission has taken action on the application or the commission refers issues to State Office of Administrative Hearings.

(h) Alternative language newspaper notice.

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

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

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

(2) This subsection applies whenever notice is required to be published under §39.418 or §39.419 of this title, and either the elementary or middle school nearest to the facility or proposed facility is required to provide a bilingual education program as required by Texas Education Code, Chapter 29, Subchapter B, and 19 TAC §89.1205(a) (relating to Required Bilingual Education and English as a Second Language Programs) and one of the following conditions is met:

(A) students are enrolled in a program at that school;

(B) students from that school attend a bilingual education program at another location; or

(C) the school that otherwise would be required to provide a bilingual education program has been granted an exception from the requirements to provide the program as provided for in 19 TAC §89.1207(a) (relating to Exceptions and Waivers).

(3) Elementary or middle schools that offer English as a second language under 19 TAC §89.1205(e), and are not otherwise affected by 19 TAC §89.1205(a), will not trigger the requirements of this subsection.

(4) The notice must be published in a newspaper or publication that is published primarily in the alternative languages in which the bilingual education program is or would have been taught, and the notice must be in those languages.

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

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

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

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

(i) permit application number;

(ii) company name;

(iii) type of facility;

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

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

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

(8) The requirements of this subsection are waived for each language in which no publication exists, or if the publishers of all alternative language publications refuse to publish the notice. If the alternative language publication is published less frequently than once a month, this notice requirement may be waived by the executive director on a case-by-case basis.

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

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

(11) If a waiver is received under this subsection on an air quality permit application, the applicant shall complete a verification and submit it as required under §39.605(3) of this title (relating to Notice to Affected Agencies). If a waiver is received under this subsection on a waste or water quality application, the applicant shall complete a verification and submit it to the chief clerk and the executive director.

(i) Failure to publish notice of air quality permit applications. If the chief clerk prepares a newspaper notice that is required by Subchapters H and K of this chapter for air quality permit applications and the applicant does not cause the notice to be

published within 45 days of mailing of the notice from the chief clerk, or, for Notice of Receipt of Application and Intent to Obtain Permit, within 30 days after the executive director declares the application administratively complete, or fails to submit the copies of notices or affidavit required in subsection (j) of this section, the executive director may cause one of the following actions to occur.

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

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

(j) Notice and affidavit for air quality permit applications. When Subchapters H and K of this chapter require an applicant for an air quality permit action to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice which shows the date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice

requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (i) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

(k) For applications filed on or after September 1, 2015, and subject to providing notice as prescribed by Texas Water Code, §5.115, the commission shall make available on the commission's website notice of administratively complete applications for a permit or license authorized under the Texas Water Code and the Texas Health and Safety Code.

§39.419. Notice of Application and Preliminary Decision.

(a) After technical review is complete, the executive director shall file the preliminary decision and the draft permit with the chief clerk, except for air applications under subsection (e) of this section. The chief clerk shall mail the preliminary decision concurrently with the Notice of Application and Preliminary Decision. For applications filed on or after September 1, 2015, this mailing will occur no earlier than 30 days after written notification of the draft permit is provided to the state senator and state representative of the area in which the facility which is the subject of the application is located. Then, when this chapter requires notice under this section, notice must be given as required by subsections (b) - (e) of this section.

(b) The applicant shall publish Notice of Application and Preliminary Decision at least once in the same newspaper as the Notice of Receipt of Application and Intent to Obtain Permit, unless there are different requirements in this section or a specific subchapter in this chapter for a particular type of permit. The applicant shall also publish the notice under §39.405(h) of this title (relating to General Notice Provisions), if applicable.

(c) Unless mailed notice is otherwise provided under this section, the chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.413 of this title (relating to Mailed Notice).

(d) The notice must include the information required by §39.411(c) of this title (relating to Text of Public Notice).

(e) For air applications the following apply.

(1) Air quality permit applications that are filed on or after June 24, 2010 [the effective date of this section], are subject to this paragraph. Applications filed before June 24, 2010 [the effective date of this section] are governed by the rules as they existed immediately before June 24, 2010 [the effective date of this section], and those rules are

continued in effect for that purpose. After technical review is complete for applications subject to the [requirements of] requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title (relating to New Source Review Permits), the executive director shall file the executive director's draft permit and preliminary decision, the preliminary determination summary and air quality analysis, as applicable, with the chief clerk and the chief clerk shall post these on the commission's website [Web site]. Notice of Application and Preliminary Decision must be published as specified in Subchapter K of this chapter (relating to Public Notice of Air Quality Permit Applications) and, as applicable, under §39.405(h) of this title, unless the application is for any renewal application of an air quality permit that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted and the application does not involve a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History).

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

(3) If the applicant is seeking authorization by permit, registration, license, or other type of authorization required to construct, operate, or authorize a component

of the FutureGen project as defined in §91.30 of this title (relating to Definitions), any application submitted on or before January 1, 2018, shall be subject to the public notice and participation requirements in Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities).

**SUBCHAPTER K: PUBLIC NOTICE OF AIR QUALITY PERMIT
APPLICATIONS
§39.602**

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; and TWC, §5.5553, concerning Notice of Draft Permit, which requires the commission to provide notice of draft permit to certain state officials. The amendment is also proposed 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; 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. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The proposed amendment implements TWC, §5.5553, THSC, §382.012, and Senate Bill 709 (84th Texas Legislature, 2015).

§39.602. Mailed Notice.

(a) When this chapter requires notice for air quality permit applications, the chief clerk shall mail notice to:

(1) the applicant;

(2) persons on a relevant mailing list kept under §39.407 of this title (relating to Mailing Lists);

(3) persons who filed public comment or hearing requests on or before the deadline for filing public comment or hearing requests; and

(4) any other person the executive director or chief clerk may elect to include.

(b) When Notice of Receipt of Application and Intent to Obtain Permit is required, mailed notice shall be sent to the state senator and representative who represent the area in which the facility is or will be located.

(c) For applications received on or after September 1, 2015, written notification of the draft permit shall be sent to the state senator and representative who represent the area where the facility is or will be located at least 30 days prior to the chief clerk's mailing of the executive director's preliminary decision and Notice of Application and Preliminary Decision.