

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts an amendment to §55.152.

The amendment to §55.152 is adopted *without change* to the proposed text as published in the December 1, 2017, issue of the *Texas Register* (42 TexReg 6685) and, therefore, will not be republished.

The amendment to §55.152(a)(3), (4), (7), and (8) will be submitted to the United States Environmental Protection Agency as revisions to the State Implementation Plan.

### **Background and Summary of the Factual Basis for the Adopted Rule**

This rulemaking is adopted to implement Senate Bill (SB) 1045 (85th Texas Legislature, 2017). Adopted §55.152(a)(3) provides for a 30-day notice period during which comments and requests for a public meeting or contested case hearing (CCH) can be submitted in response to the consolidated Notice of Receipt of Application and Intent to Obtain Permit (NORI) and Notice of Receipt of Application and Preliminary Decision (NAPD). The 30-day period begins on the last date of newspaper publication, and the public comment period is automatically extended to the close of any public meeting, as required by §55.152(b). As provided for in §55.201(c), which implements SB 709 (84th Texas Legislature, 2015), hearing requests must be based on the requestor's timely submitted comments. If a request for CCH is received within the single 30-day comment period, the opportunity for additional CCH requests will extend to 30 days after the executive director files the Response to Comments (RTC). Depending upon the date it is held, a public meeting may extend the deadline for

submitting comments; however, the deadline for submitting a CCH request is not extended beyond the 30-day period after last publication of the consolidated notice unless a request for CCH is received within the 30-day period.

Applications for New Source Review (NSR) case-by-case air quality permits are subject to the public participation requirements in 30 TAC Chapters 39 and 55. The rules in these chapters implement House Bill (HB) 801 (76th Texas Legislature, 1999), which made changes to notice requirements for initial applications that were administratively complete on or after September 1, 1999. Since the rulemaking to implement HB 801 in 1999, and amendments adopted in 2010, have been in effect, the commission has required applicants to publish a NORI which solicits comments for a 30-day period; CCH and public meeting requests are also solicited. At the same time that the NORI is published in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located, or in the nearest municipality, applicants are required to place a copy of the permit application in a public place in the county and to post signs at the proposed facility location. Alternative language publication and signs may also be required.

After TCEQ staff complete the technical review, and after the TCEQ provides notice to state senators and representatives for the district in which the proposed facility will be located, applicants are required to publish NAPD, which solicits comments and public meeting requests for a 30-day period; hearing requests are also solicited but only if at least one such request was timely made in response to the NORI.

At the close of the comment period, the executive director prepares a written response to all timely-filed comments and files the response with the TCEQ's Office of the Chief Clerk, which, where applicable, will include information regarding changes to the draft permit based on the timely comments.

No changes to other aspects of notice and public participation are included in this rulemaking. In addition to publishing newspaper notices, permit applicants will also continue to be required to post signs and, if applicable, publish notice and post signs in alternative language(s). The executive director will notify area legislators 30 days prior to issuance of a draft permit and will prepare an RTC if timely comments are received. If a request for CCH is received within the single 30-day comment period, the opportunity for additional CCH requests will extend to 30 days after the executive director files the RTC. Depending upon the date it is held, a public meeting may extend the deadline for submitting comments; however, the deadline for submitting a CCH request is not extended beyond the 30-day period after last publication of the consolidated notice unless a request for CCH is received within the 30-day period.

The consolidation of the timeframes for NORI and NAPD could apply to new permit or permit amendment applications that are solely for the addition or modification of facilities that are commonly authorized and for which the TCEQ's Air Permits Division (APD) staff has extensive experience in reviewing. However, this consolidation is available only when an

application can be declared administratively and technically complete and a draft permit prepared by the executive director within 15 days. Eligible applications would be those where, within the 15-day period following TCEQ's receipt of the application, the review would consist of checking emission calculations and control technology requirements, selecting draft permit conditions that are well-established, and determining that the off-property impacts of the proposed emissions are not expected to adversely affect human health and the environment. The number of applications and the types of facilities that would be authorized by applications that would be eligible to publish consolidated notice is dependent upon the complexity of the project for which authorization is sought and the quality of the application, both of which affect APD's ability to prepare the draft permit within 15 days of receipt of the application.

For example, applications that may be processed within 15 days are those for a new permit where an applicant failed to timely renew their permit and no changes have been made to the facilities which were previously authorized. In addition, an application for a facility that was previously authorized but was not timely constructed for which the control technology and projected off-property impacts review have recently been conducted may be a candidate for the 15-day processing time. An application to add an additional similar facility at the same location for which the control technology and projected off-property impacts review has recently been conducted will not be a candidate for the 15-day processing time in cases where additional modeling is required.

This public notice alternative would allow for a more efficient air permit application

process. APD may be able to streamline applications that meet specific criteria, thereby increasing the number of permit applications that could potentially utilize the consolidated notice. An example of recent APD permit streamlining efficiencies is the development of Readily Available Permits (RAP), which are NSR permits tailored to an individual facility type based on emissions calculations, equipment variables, and site-specific parameters. More information on RAPs is available here:

<https://www.tceq.texas.gov/permitting/air/guidance/newsourcereview/ra-permitting.html>.

Concurrent with this adoption, and published in this issue of the *Texas Register*, the commission is adopting amendments to Chapter 39, Public Notice, to provide for a consolidated NORI and NAPD.

The public participation requirements for renewals of case-by-case permits are not affected by the adopted amendments in Chapters 39 and 55. Therefore, a consolidated notice is not available or required for NSR case-by-case air quality permit renewal applications.

### **Section Discussion**

#### *§55.152, Public Comment Period*

Adopted §55.152(a)(3) provides that the close of the public comment period is 30 days after the last publication of the consolidated notice concurrently adopted in §39.603(d) for new permit or permit amendment applications issued under 30 TAC Chapter 116, Subchapters B and G, which are declared administratively and technically complete and for which a draft

permit is prepared by the executive director within 15 days of receipt of the application.

Existing §55.152(a)(3) - (7) are re-numbered as paragraphs (4) - (8).

### **Final Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to 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 adopted amendment to Chapter 55 is not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants, but instead amends the notice requirements for certain case-by-case air quality permit applications, which are procedural in nature.

Texas Government Code, §2001.0225, applies only 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 amendment to Chapter 55 amends the notice requirements for certain case-by-case air quality permit applications, which are procedural in nature. 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 developed to meet the requirements for public participation in the Texas Clean Air Act as identified in the Statutory Authority section of this preamble.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

### **Takings Impact Assessment**

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendment to Chapter 55 amends the notice requirements for certain case-by-case air quality permit applications, which are procedural in nature. Promulgation and enforcement of the adopted rulemaking will not burden private real property. The adopted amendment does 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). 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 adopted rule and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendment affect any action or authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted amendment is not subject to the Texas Coastal Management Program (CMP).

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

### **Effect on Sites Subject to the Federal Operating Permits Program**

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

### **Public Comment**

The commission held a public hearing on January 3, 2018. The comment period closed on January 3, 2018. The commission received comments from Broadwind Energy and the Lone Star Chapter of the Sierra Club (Sierra Club).

### **Response to Comments**

*Comment*



Broadwind Energy commented that requiring only one notice would be a huge benefit to small businesses, stating that the \$3,000 cost for two notices for its recent application was a huge hit to its budget for the project.

*Response*

**The commission acknowledges that excluding the cost of one newspaper publication may be significant for some small businesses.**

*Comment*

Sierra Club commented that while the Background and Summary of Factual Basis for the Proposed Rule in the proposed preamble (Background discussion) makes it clear that consolidated notice is largely intended for applications with modest impacts that are not complex, or applications that meet the guidelines for a RAP, the Background discussion should also include a statement regarding the process for adding additional types of facilities eligible for a RAP to ensure that both industry and the public are aware of what types of facilities may qualify for the RAP or a permit with consolidated notice.

*Response*

**The existing description of a RAP within the Background discussion serves as an example of a streamlined permit application that could potentially meet the criteria that would allow the consolidated notice option. At this time, APD has developed a simple cycle turbine RAP. When any additional types of applications are identified as those that**

**can be processed as a RAP, the information may be made available on the commission's website. As demonstrated by the other examples of applications potentially eligible for consolidated notice that are listed within the Background discussion, an eligible application does not necessarily have to be for a RAP. For additional information on RAPs, a link is provided within the Background discussion.**

*Comment*

Sierra Club commented that the Background discussion should include discussion regarding applications eligible for consolidated notice cannot involve an applicant negotiating the proposed draft permit by continually sitting down with, nor presenting a draft permit to, permitting staff.

*Response*

**If a request to discuss a prospective project or application is made by an applicant, APD's practice is to meet with applicants as requested. Although it is not standard practice for meetings to occur prior to application submittal on a continual basis, there is no rule or policy that prohibits an applicant from requesting multiple meetings with APD. If an applicant requests a meeting with APD, it is generally to discuss the permit application at a high-level and identify any potential issues that may arise. Pre-application meetings are not used to negotiate draft permit conditions.**

**As eligibility to publish consolidated notice is dependent upon the application being determined administratively and technically complete and having a draft permit**

**prepared within 15 days of receipt of the application, in conjunction with the complexity of the project and quality of the application, it is unlikely that an applicant would have the ability to continually meet with permitting staff to negotiate a proposed draft permit while still meeting all eligibility requirements. As stated earlier, consolidated notice is available only when an application can be declared administratively and technically complete and a draft permit is prepared by the executive director within 15 days, and the rule text specifically provides that the draft permit is prepared by the executive director.**

*Comment*

Sierra Club commented that the time available to request a CCH should be extended in cases where no hearing requests are submitted within the 30-day period following publication of the notice but the comment period is extended due to the commission holding a public meeting on the application.

*Response*

**Requests for CCH must be received within 30 days of the publication of the consolidated notice. All timely hearing requests are considered by the commissioners in their open meeting, unless the application is directly referred to the State Office of Administrative Hearings for a CCH prior to a scheduled commission meeting. Within the 30-day period, citizens should have adequate time to become aware of the notice, review the application and draft permit, prepare and submit comments, and request a public meeting or a CCH. The commission's rules regarding the NORI for applications for minor**

**NSR applications and consolidated notice of applications submitted for a Standard Permit for Concrete Batch Plants also require that a hearing request be submitted within the 30-day public comment period, and therefore this consolidated notice is consistent with those similar types of applications. In addition, the amount of time for and thoroughness of review of a draft permit is the same whether there is a consolidated notice or both NORI and NAPD. For these reasons, the commission has determined that a 30-day comment period is reasonable. No change to the rule was made in response to this comment.**

## **SUBCHAPTER E: PUBLIC COMMENT AND PUBLIC MEETINGS**

### **§55.152**

#### **Statutory Authority**

The amendment is adopted 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 or other laws; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC or other laws; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and 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. The amendment is also adopted under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which

prescribes the public participation requirements for certain applications filed with the commission. In addition, the amendment is also adopted under Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; and the Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit state implementation plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements THSC, §382.056 and Senate Bill 1045 (85th Texas Legislature, 2017).

**§55.152. Public Comment Period.**

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

(1) 30 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), or 30 days after Notice of Application and Preliminary Decision if a second notice is required under §39.419 of this title (relating to

Notice of Application and Preliminary Decision), for an air quality permit application not otherwise specified in this section;

(2) 30 days after the last publication of the consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision under §39.603 of this title (relating to Newspaper Notice) for a registration for a concrete batch plant under the Air Quality Standard Permit for Concrete Batch Plants adopted by the commission under Chapter 116, Subchapter F of this title (relating to Standard Permits), unless the plant is to be temporarily located in or contiguous to the right-of-way of a public works project;

(3) 30 days after the last publication of the consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision under §39.603 of this title for an application for a new permit or permit amendment under Chapter 116, Subchapters B and G of this title (relating to New Source Review Permits and Flexible Permits);

(4) 15 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title, or 30 days after Notice of Application and Preliminary Decision if a second notice is required under §39.419 of this title, for a permit renewal under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(5) 45 days after the last publication of the notice of Application and Preliminary Decision for an application for a hazardous waste facility permit, or to amend, extend, or renew or to obtain a Class 3 Modification of such a permit, or 30 days after the publication of Notice of Application and Preliminary Decision for Class 3 modifications of non-hazardous industrial solid waste permits;

(6) 30 days after the mailing of the notice of draft production area authorization under Chapter 331 of this title (relating to Underground Injection Control);

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

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

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