

The commission adopts the repeal of §122.316, concerning Hearing and Comment Procedures for Operating Permits. The repeal is adopted without changes to the proposed text as published in the April 4, 1997, issue of the *Texas Register* (22 Tex Reg 3281).

The commission also adopts new §122.340, concerning Notice and Comment Hearing, in a new undesignated head entitled “Notice and Comment Hearing,” and new §122.345, concerning Notice of Proposed Final Action, in a new undesignated head entitled “Notice of Proposed Final Action.” The new sections are adopted with changes to the proposed text as published in the April 4, 1997, issue of the *Texas Register* (22 TexReg 3281).

The purpose of the repeal of §122.316 is to allow the adoption of new §122.340, concerning Notice and Comment Hearing, and §122.345, concerning Notice of Proposed Final Action. The repeal of §122.316 was originally scheduled to be included in the proposed major revisions to 30 TAC Chapter 122, concerning Federal Operating Permits (the proposed revisions to Chapter 122 were proposed in the May 13, 1997, issue of the *Texas Register* (22 TexReg 4140)). This proposed major revision to Chapter 122 enables the commission to submit a revised program to the United States Environmental Protection Agency (EPA) to obtain full program approval of the Texas Title V Operating Permits Program. The EPA's rule implementing the operating permits program, 40 Code of Federal Regulations (CFR) Part 70, requires states to provide public notice and it allows for options in how that notice can be provided. This reorganization of the existing rules and selection of a different option for providing notice is intended to meet the requirements of 40 CFR Part 70. Although the elimination of the requirement to publish notice of hearings in the *Texas Register*, and the proposal to allow for a

combined public notice could have been done as a part of the major revisions to Chapter 122, the commission wanted to have the option to combine the notices in order to meet the statutory deadline for the issuance of permits subject to Title IV of the Federal Clean Air Act concerning Acid Deposition Control.

#### EXPLANATION OF ADOPTED RULES

Section 122.316 outlined the hearing and comment procedures, and these requirements are incorporated into the new §122.340 and §122.345. Texas Health and Safety Code, §382.0561(a), provides that hearings regarding federal operating permits are not subject to the requirements of the Government Code, Administrative Procedure Act, Chapter 2001 or 2002. Because hearings for federal operating permits are not contested case hearings, they are not subject to the procedures in 30 TAC Chapter 55, concerning Request for Contested Case Hearings. The commission intends that the processing of hearing requests will be done under Chapter 122 and not under Chapter 55.

The applicant for a federal operating permit is required to publish two types of public notices: a notice of a draft federal operating permit; and a notice of a hearing on the draft permit, if a hearing is requested during the public comment period.

Texas Health and Safety Code, §382.031(a), requires notice of a hearing to be published in a newspaper of general circulation in the municipality in which the site is located or is proposed to be located or in the municipality nearest to the location or the proposed location of the site. This notice must be published at least 30 days prior to the date set for the hearing.

In addition to the notice required by §382.031(a), §122.316 requires notice of a hearing on a draft federal operating permit to also be published in the *Texas Register*. As a part of the ongoing efforts by the commission to provide for public notice and easy access to information about permits, the commission is adopting procedures that will simplify the public notice requirements for both applicants and the public by requiring the notice of a hearing to be published in a newspaper of general circulation, and eliminating the notice of hearing that would have been published in the *Texas Register*. The publication of notice of a hearing in a newspaper of general circulation is intended to meet the requirements of §382.031(a) to provide at least 30 days' notice of a hearing. The commission is also adopting new procedures that allow for the combination of the notice of a draft permit with the notice of hearing. The elimination of the *Texas Register* notice of hearing and the ability to combine notices of draft permits and hearings will enable the commission to provide for an efficient and user-friendly public notice process and it will allow the commission to meet deadlines required by the Federal Clean Air Act, §503(c), 40 CFR Part 70, Operating Permit Program, §70.4(b)(11), and Texas Health and Safety Code, §382.0542(b).

#### EXPLANATION OF COMBINED HEARING NOTICE

The adopted rules provide the executive director the discretion to allow the notice of hearing to be combined with the notice of a draft permit. When the notices are combined, the notice of the draft permit will include information regarding the date, time, and location for a hearing. If no hearing requests are received during the public comment period from a person who may be affected by emissions from the site, then the pre-scheduled hearing will not be held. If a hearing is requested during the public comment period by a person who may be affected by emissions from the site, and the

hearing request is reasonable, the executive director will hold the hearing. If it is not possible to combine the notice of the draft permit with the notice of the hearing, the executive director will require the publication of separate notices. Since the public notice requirements currently in §122.316 have not been implemented at this point in time, the agency is merely changing its option of the method to publish hearing notices as 40 CFR 70 allows.

The publication of the combined notice in the newspaper is beneficial to the general public in that it gives better hearing notice to the public and allows the public better opportunity to comment on the draft permit(s). Since the combined notice will contain the information relevant to the scheduling of hearings, the public will have immediate knowledge of the details regarding the hearing and will be better able to plan in order to attend a hearing, if one is held. A combined notice allows for the presentation of information related to the draft permit to be done at one time in a newspaper of general circulation in the area near the site.

If the requirement to publish notice in the *Texas Register* was retained, it is likely that the commission would not be able to allow a combined notice. This is because of the strict requirements of the *Texas Register* for the submission of items to be published and the timing of those submissions. In order for the commission to successfully implement the combined notice concept in conjunction with the requirement to publish notice in the *Texas Register*, the commission would have to coordinate the publication by applicants of the notice of the draft permit in a newspaper and the dates for *Texas Register* submission and publication. This is a complex undertaking, because not all newspapers are published daily (some are weekly and bi-weekly). The *Texas Register* is currently published at least

100 times a year. However, during the 1997 Texas legislative session, Senate Bill 1177 was passed (effective September 1, 1997) which amended Government Code, §2002.013, to require that the *Texas Register* be published at least 52 times a year. This reduction in the availability of the *Texas Register* will further complicate the ability to coordinate notices with newspaper publication schedules. Since notice of hearings must be provided at least 30 days prior to the date of the hearing, it is possible that the newspaper notice or the *Texas Register* notice might not be published in time to meet the 30-day requirement, thus forcing a costly republication of the newspaper notice or a delay while waiting for the next *Texas Register* publication.

Federal Clean Air Act, §503(c), and 40 CFR Part 70, §70.4(b)(11) are the federal requirements that dictate the permit issuance schedule for the federal operating permit program. Health and Safety Code, §382.0542(b), provides the schedule for taking final action on applications submitted pursuant to the requirements of the federal operating permit program. The commission is required to take final action on at least one-third of those applications every year of the first five years of the operating permit program. In addition, the commission is also required to review and take final action on the applications subject to Title IV of the Federal Clean Air Act concerning Acid Deposition Control. Title IV requires sources subject to that program to obtain permits that address issues related to acid rain. The commission must issue the acid rain permits by December 31, 1997. The ability to use the combined notice and the elimination of the *Texas Register* notice will greatly increase the commission's ability to meet this deadline along with the one-third requirements of §382.0542(b). If not removed, the requirement to publish a hearing notice in the *Texas Register* will adversely affect the agency's

ability to issue Title V federal operating permits in an efficient and streamlined manner, because of the additional processing time that it will take to coordinate two separate notices.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for the rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of this rulemaking is to eliminate the requirement to publish notice of hearings in the *Texas Register* and to allow for the combination of the public notice of the draft permit and the hearing notice into one notice, and this combined notice shall be published in a newspaper of general circulation. These rules will substantially advance this specific purpose since they require the applicant to publish the hearing notice in a newspaper of general circulation and provide the option of allowing the combination of the two notices into one notice. The promulgation and enforcement of these rules will not burden private real property because the adopted rules will enable the commission to meet the statutory deadlines for taking final action on applications for federal operating permits and the reorganization of the existing rules and selection of a different option for providing notice is intended to meet the requirements of 40 CFR Part 70.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this rulemaking action is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et. seq.), the rules of the Coastal Coordination Council (31 TAC Chapters 501-506), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency

with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2), §505.22(a), and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this rulemaking action, including comments received, if any, for consistency, and has determined that this rulemaking action is consistent with the applicable CMP goals and policies. The permits issued under Chapter 122, concerning Federal Operating Permits, do not authorize the increase in air emissions nor do these permits authorize new air emissions. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rule is consistent with CMP goals and policies.

#### PUBLIC HEARING AND COMMENTERS

A public hearing was held on May 5, 1997, in Austin. The comment period closed on May 5, 1997. Written comments were received from one interested party, Texas Eastman Division, Eastman Chemical Company; there was no oral testimony given at the public hearing. The commenter strongly supported the intent of the proposed revisions, and did not suggest changes or clarifications. The commenter stated that it believes that the notice and comment type of hearing allows for more simplified and direct public participation than the contested case hearing. The commenter also supported the change that eliminates the publication of the hearing notice in the *Texas Register*, and instead, requires the publishing of the notice in a local newspaper. In addition, the commenter supported the combination of the draft permit notice and the hearing notice where possible.

Texas Health and Safety Code, §382.031(a), requires that notice of a hearing to be published in a newspaper of general circulation at least 30 days prior to the date set for the hearing. The notice required by §122.340(e) is intended to meet the requirements of §382.031(a).

Section 122.340(d) of the proposed rule requires the executive director to mail notice 30 days before the date of a hearing to the applicant, to any person who made a timely request for a hearing, and to persons who have submitted comments. The notice requirements of §382.031(c) explicitly state that if a hearing notice is required by Chapter 382 to be given to a person, the notice must be served either personally or mailed to the person at the person's most recent address that is known to the commission. There is no notice of hearing requirement in Chapter 382 regarding federal operating permits that requires a hearing notice to be served personally or mailed to a person. So, the commission has determined that the proposed requirement to mail notice in §122.340(d) is unnecessary.

Although the commission does not believe that there is a legal requirement to provide mailed notice of operating permit hearings, the commission considered whether such notice would be an effective and efficient method for informing the public about hearings for federal operating permits. One of the goals of the proposed rule was to provide the executive director the discretion to allow the notice of hearing to be combined with the notice of a draft permit. The combined notice will provide hearing scheduling information to the public at the same time that they learn about a draft permit. The hearing notice will provide the time, location, and nature of the hearing and it will also contain a brief description of the purpose of the hearing. The combined notice will also have instructions for how to request a hearing or how to obtain additional information about the draft permit. If no hearing requests are received during

the public comment period from a person who may be affected by emissions from the site, then the pre-scheduled hearing will not be held. The combined notice will also provide the name and phone number of the commission office to call to verify that a hearing will be held. The commission has determined that this kind of contemporaneous notice is actually more valuable and relevant for interested members of the public because the combined notice will provide wider dissemination of information about the draft permit. In addition, the combined notice will provide earlier notification of a hearing, if one is held. If the commission included a requirement to provide mailed notice of hearings 30 days in advance of the hearing date, the benefit of using the combined notice would be diminished. Because the commission intends to hold the hearings approximately one to two weeks after the end of the public comment period, a 30-day mailed notice requirement would significantly lengthen the dates that would be available for hearings. The commission intends to utilize this option for contemporaneous notice as often as possible for federal operating permits.

Therefore, §122.340(d) has been revised in the final rule to eliminate the requirement for 30 days' advance mailed notice of a notice and comment hearing. There were also several other minor changes made to the rule language in both sections to correct grammatical mistakes and to make stylistic changes.

#### STATUTORY AUTHORITY

The repeal is adopted under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.031, which provides for mailed notice of hearings when required by

Health and Safety Code, Chapter 382; §382.056, which provides for notice of intent to obtain permits and request hearings; §382.0561, which concerns federal operating permits and hearings for those permits; and §382.0562, concerning the notice of decision related to applications for federal operating permits.

**FEDERAL OPERATING PERMITS**

**§122.316. Hearing and Comment Procedures for Operating Permits.**

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on July 9, 1997.

## NOTICE AND COMMENT HEARING

### §122.340

The new section is adopted under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.031, which provides for mailed notice of hearings when required by Health and Safety Code, Chapter 382; §382.056, which provides for notice of intent to obtain permits and request hearings; §382.0561, which concerns federal operating permits and hearings for those permits; and §382.0562, concerning the notice of decision related to applications for federal operating permits.

#### **§122.340. Notice And Comment Hearing.**

(a) Notice and comment hearing requirements apply to initial issuances, significant permit revisions, reopenings, and renewals.

(b) Any hearing regarding a permit will be conducted under the procedures in this section, and not under the APA.

(c) Any person who may be affected by emissions from a site regulated under this chapter may request the executive director to hold a hearing on the draft permit. The request must be made during the 30-day public comment period.

(d) The executive director shall decide whether to hold a hearing. The executive director is not required to hold a hearing if the basis of the request by a person who may be affected by emissions from a site is determined to be unreasonable. If a hearing is requested by a person who may be affected by emissions from a site regulated under this chapter, and that request is reasonable, the executive director shall hold a hearing.

(e) At the applicant's expense, notice of a hearing on a draft permit must be published in the public notice section of one issue of a newspaper of general circulation in the municipality in which the site or proposed site is located, or in the municipality nearest to the location of the site or proposed site. The notice must be published at least 30 days before the date set for the hearing. The notice must include the following:

(1) the time, place, and nature of the hearing;

(2) a brief description of the purpose of the hearing; and

(3) the name and phone number of the commission office to be contacted to verify that a hearing will be held.

(f) At the executive director's discretion, the hearing notice may be combined with the notice of the draft permit required by this chapter.

(g) Any person, including the applicant, may submit oral or written statements and data concerning the draft permit.

(1) Reasonable time limits may be set for oral statements, and the submission of statements in writing may be required.

(2) The period for submitting written comments is automatically extended to the close of any hearing.

(3) At the hearing, the period for submitting written comments may be extended beyond the close of the hearing.

(h) A tape recording or written transcript of the hearing must be made available to the public.

(i) Any person, including the applicant, who believes that any condition of the draft permit is inappropriate or that the preliminary decision to issue or deny the permit is inappropriate, shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting that position by the end of the public comment period.

(j) Any supporting materials for comments submitted under subsection (i) of this section must be included in full and may not be incorporated by reference, unless the materials are one of the following:

- (1) already part of the administrative record in the same proceedings;
- (2) state or federal statutes and regulations;
- (3) EPA documents of general applicability; or
- (4) other generally available reference materials.

(k) The executive director shall keep a record of all comments received and issues raised in the hearing. This record is available to the public.

(l) The draft permit may be changed based on comments pertaining to whether the permit provides for compliance with the requirements of this chapter.

(m) The executive director shall respond to comments consistent with §122.345 of this title (relating to Notice of Proposed Final Action).

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on July 9, 1997.

## NOTICE OF PROPOSED FINAL ACTION

### §122.345

The new section is adopted under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.031, which provides for mailed notice of hearings when required by Health and Safety Code, Chapter 382; §382.056, which provides for notice of intent to obtain permits and request hearings; §382.0561, which concerns federal operating permits and hearings for those permits; and §382.0562, concerning the notice of decision related to applications for federal operating permits.

#### **§122.345. Notice of Proposed Final Action.**

(a) After the public comment period or the conclusion of any notice and comment hearing, the executive director shall send notice by first-class mail of the proposed final action on the application to any person who commented during the public comment period or at the hearing, and to the applicant.

(b) The notice must include the following:

(1) the response to any comments submitted during the public comment period;

(2) identification of any change in the conditions of the draft permit and the reasons for the change;

(3) a description and explanation of the process for public petitions to the EPA;

(4) the date by which the petition must be filed; and

(5) a statement that any person affected by the decision of the executive director may petition the Administrator.

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on July 9, 1997.