

The commission proposes 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.” In concurrent rulemaking, the commission is proposing the repeal of §122.316, concerning Hearing and Comment Procedures for Operating Permits. Section 122.316 outlines the hearing and comment procedures, and these requirements will be 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 30 TAC Chapter 122 and not under 30 TAC Chapter 55.

EXPLANATION OF PROPOSED RULES. 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 local newspaper. 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*. The commission proposes to streamline the permitting process by simply requiring the notice of a hearing to be published in the local

newspaper, and eliminating the *Texas Register* notice. The publication of notice of a hearing in a local newspaper is intended to meet the requirements of §382.031(a) to provide at least 30 days notice of a hearing.

The proposed rules will also 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. The executive director will mail notice of the hearing to the applicant, to any person who requested a hearing, and to persons who have submitted comments. If it is not possible to combine the notice of the draft permit with the notice of the hearing, then the executive director will require the publication of separate notices.

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 permit(s). 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. The proposed rules do not alter the current public notice requirements that exist in §122.316, except for the deletion of the *Texas Register* publication requirement of the hearing notice.

The proposed rules reformat the remainder of the requirements into two new sections.

A major revision to Chapter 122 is planned to be proposed in May 1997. The revision will enable the agency to submit a revised program to the United States Environmental Protection Agency (EPA) to obtain delegation of the Texas Title V Operating Permits Full Program. The revisions will, consistent with previous commission directives, include additional changes to the public notice requirements of Chapter 122. This major rulemaking will not be completed before owners and operators of sites affected by the interim program will be required to publish notice of hearings under the current rules.

The rules regarding notice and comment hearings are proposed for the entire State of Texas.

The proposed new §122.340 would establish public notice procedures for owners or operators of sites affected by the Texas Title V Operating Permits Program. These public notice procedures include notice and comment hearing requirements for various types of draft permits and hearing procedures for permit applicants and the executive director.

The proposed new §122.345 would establish procedures for notice of any proposed final action by the executive director and the contents of the notice.

FISCAL NOTE. Stephen Minick, Strategic Planning and Appropriations Division, has determined that for each year of the first five-year period the proposed sections are in effect, there will be no significant costs to state government or units of local government as a result of administration or enforcement of

the sections. The commission may realize some reduced demand on agency resources and a related cost savings as a result of deleting the requirement to publish hearing notice(s) in the *Texas Register*. The actual fiscal implications to the commission are not anticipated to be significant. Units of local government operating major sources subject to the proposed rules will realize a cost savings equivalent to that for any similar private facility authorized to consolidate public notice requirements under these sections.

PUBLIC BENEFIT. Mr. Minick has also determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be more cost-effective regulation of sources of air emissions. The effect on owners or operators of major sources of air emissions subject to these sections will be a small reduction in cost as a result of the option to combine notices. These cost savings are not anticipated to represent a significant savings for any person affected by the proposed rules or a significant part of the costs of any project for which notice is required. The potential cost savings will affect small businesses on the same basis as any larger business. There are no economic costs anticipated for any owners or operators required to comply with these sections as proposed.

TAKINGS IMPACT ASSESSMENT. The commission has prepared a Takings Impact Assessment for this rule proposal pursuant to 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 proposed rules will substantially advance this specific purpose since they will propose the option of allowing the combination of the two notices into one notice, which will be published in a newspaper of general circulation. The promulgation and enforcement of these rules will not burden private real property because the proposed rules do not alter the current agency procedures, 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 public notices and hearing notices as 40 CFR 70 allows.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW. The commission has determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et. seq.), 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) 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 proposed action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the proposed action is consistent with the applicable CMP goals and policies. The permits issued pursuant to Chapter 122, concerning Federal Operating Permits, do not authorize the increase in air emissions nor do these permits authorize new air emissions. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

PUBLIC HEARING. A public hearing on this proposal will be held May 5, 1997, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, located at 12100 Park 35 Circle, Austin. 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 within the audience will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to each hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS. Written comments regarding this proposal and request for alternatives may be mailed to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97120-122-AI. Comments must be received by 5:00 p.m., May 5, 1997. For further information or questions concerning this proposal, contact Kevin Bloomer of the Operating Permits Division, Office of Air Quality, (512) 239-5730.

STATUTORY AUTHORITY. The new sections are proposed under the Texas Health and Safety Code, the TCAA, §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed new sections implement Health and Safety Code, §382.017.

NOTICE AND COMMENT HEARING

§122.340, §122.345

§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 according to the following procedures and not under the Government Code, Administrative Procedure Act, Chapter 2001 or 2002.

(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 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 will hold a hearing. The executive director will send 30 days advance notice of the hearing to all persons who have made timely written requests for a hearing, to the applicant, and to any person who submitted comments during the 30-day public comment period.

(e) At the applicant's expense, notice of a hearing on a draft permit shall 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 shall be published not less than 30 days before the date set for the hearing. The notice shall include the following:

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

(2) a brief description of the purpose of the hearing.

(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 limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required.

(2) The period for submitting written comments shall be 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 shall 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, must 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 shall 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 in the hearing and also of the issues raised. This record shall be 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).

NOTICE OF PROPOSED FINAL ACTION

§122.345

§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 shall 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 proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on March 19, 1997.

The commission proposes the repeal of §122.316, concerning Hearing and Comment Procedures for Operating Permits.

EXPLANATION OF PROPOSED REPEAL. The purpose of the repeal is to allow the adoption of new §122.340, concerning Notice and Comment Hearing, and §122.345, concerning Notice of Proposed Final Action in concurrent rulemaking. The repeal of §122.316 was scheduled to be proposed in the May 1997 time frame. This major revision in May 1997 to 30 TAC Chapter 122 enables the agency to submit a revised program to the United States Environmental Protection Agency to obtain delegation of the Texas Title V Operating Permits Full Program. This major rulemaking would not be completed in time, however, to replace the agency's requirement of publishing hearing notice in the *Texas Register* with the newspaper publication option as allowed by 40 CFR 70.

FISCAL NOTE. Stephen Minick, Strategic Planning and Appropriations Division, has determined that for each year of the first five-year period the repeal as proposed is in effect, there will be no significant costs to state government or units of local government as a result of administration or enforcement of the repeal. The commission may realize some reduced demand on agency resources and a related cost savings as a result of replacing the requirement to publish hearing notices in the *Texas Register*. The actual fiscal implications to the commission are not anticipated to be significant. Units of local government operating major sources subject to the proposed rules will realize a cost saving equivalent to that for any similar private facility authorized to consolidate public notice requirements under these sections.

PUBLIC BENEFIT. Mr. Minick has also determined that for each year of the first five years the repeal as proposed is in effect, the public benefit anticipated as a result of the repeal will be more cost-effective regulation of sources of air emissions. There are no anticipated effects on small businesses. There is no anticipated economic cost for persons who are required to comply with the repeal as proposed.

TAKINGS IMPACT ASSESSMENT. The commission has prepared a Takings Impact Assessment for this proposal pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The purpose of this repeal is to eliminate the requirement to publish notice of hearings in the *Texas Register* and to propose two new sections which will allow the combination of the public notice and the hearing notice into one notice, and this combined notice shall be published in a newspaper of general circulation. This repeal as proposed will substantially advance this specific purpose, since it will propose the option of allowing the combination of the two notices into one notice, which will be published in a newspaper of general circulation. The promulgation and enforcement of this rule will not burden private real property because the proposed repeal does not alter the current agency procedures, 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 in the method to publish public notices and hearing notices as 40 CFR 70 allows.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW. The commission has determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended

(Texas Natural Resource Code, §§33.201 et. seq.), 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) 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 proposed action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and has determined that the proposed action is consistent with the applicable CMP goals and policies. The permits issued pursuant to Chapter 122, concerning Federal Operating Permits, do not authorize the increase in air emissions nor do these permits authorize new air emissions. Interested persons may submit comments on the consistency of the proposed rule with the CMP during the public comment period.

PUBLIC HEARING. A public hearing on this proposal will be held May 5, 1997, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, located at 12100 Park 35 Circle, Austin. 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 within the audience will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to each hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS. Written comments may be mailed to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97120-122-AI. Comments must be

received by 5:00 p.m., May 5, 1997. For further information, please contact Kevin Bloomer, Operating Permits Division, Office of Air Quality, (512) 239-5730.

STATUTORY AUTHORITY. The repeal is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed repeal implements Health and Safety Code, §382.017.

FEDERAL OPERATING PERMITS

§122.316

§122.316. Hearing and Comment Procedures for Operating Permits.

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

Issued in Austin, Texas, on March 19, 1997.