

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §39.105, Application for a Class 1 Modification of an Industrial Solid Waste, Hazardous Waste, or Municipal Solid Waste Permit and §39.403, Applicability. The commission also adopts new §39.106, Application for Modification of a Municipal Solid Waste Permit or Registration. Sections 39.105, 39.106, and 39.403 are adopted *with changes* to the proposed text as published in the June 8, 2001 issue of the *Texas Register* (26 TexReg 4019). The effective date of the proposed changes in these rules is delayed to effect an orderly transition and implementation of these new requirements.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

In 1993, the commission adopted 30 TAC §305.70 concerning Municipal Solid Waste Class I Modifications, which established a process to allow administrative approval of certain changes to municipal solid waste (MSW) permits. The section identified the changes to an MSW facility or operation that qualified for this administrative approval and defined eligible changes as those that are minor, routine in nature, do not substantially alter permit conditions, and maintain or improve environmental protection standards. In addition, the new section was considered a mechanism whereby many facilities would be able to begin compliance with the recently promulgated federal regulations (40 Code of Federal Regulations Part 258 concerning Criteria for Municipal Solid Waste Landfills), commonly referred to as “Subtitle D upgrades,” which called for stricter operation, design, and management standards for all MSW landfill facilities. Until the modification rule was adopted, changes to permits to incorporate the new standards could only have been made through the more formal and lengthy amendment process. Under the modification rule, the stricter federal standards were able to be implemented more expeditiously.

The rule required mailed notice in accordance with then-existing §305.103(b) concerning Notice by Mail to certain persons if the permit modification sought was one that was marked with a superscript "1." Although the superscript notation was discussed in the preambles to the proposed and adopted versions of the rule, the superscript did not appear in the published adopted version of the rule.

Therefore, an applicant could not be required to provide the mailed notice described in the rule, and the mailed notice provisions once found in §305.103(b) had been relocated to other commission rules.

Since the urgency of implementing Subtitle D upgrades has long since subsided, the commission on May 19, 2000 decided that the use of the §305.70 permit modification process for Subtitle D upgrades would not continue beyond May 19, 2003, and that such a change to a permit can only be accomplished through a major amendment. The commission proposed the repeal of the existing §305.70 and its replacement with a new and expanded §305.70 to implement the May 19 decision and other changes considered necessary. In this rulemaking, the commission has replaced previously-existing §305.70 with a new §305.70 that rectifies the superscript defect, excludes references to obsolete sections, establishes a clearer set of mailed notice requirements, identifies more specifically the changes which can be made to permits through the modification process, expands the modification process to include changes to MSW facility registrations, and reflects the recent commission and legislative decisions regarding Subtitle D upgrades. As part of this rulemaking, §39.105 is amended by transferring and expanding the public notice procedures pertaining to MSW permits into new §39.106, to supplement the public notice requirements of new §305.70. Concurrently, §39.403 is being amended to reflect the change in the title of §39.105 and to reflect the relocation of notice requirements pertaining to MSW facility modifications to the new §39.106.

SECTION BY SECTION DISCUSSION

Section 39.105 has been amended by removing all references to modifications of MSW permits, leaving this section to apply only to Class 1 modifications of an industrial solid waste or hazardous waste permits. Language has been added in new subsection (d) to address the delayed implementation of the section.

New §39.106 will apply only to applications for modification of an MSW permit or registration. Subsection (a) specifies what information shall be included in the text of a modification notice, and states that the mailed notice shall be provided by the person holding the permit or registration. Subsection (b) specifies that when a mailed notice is required by §305.70, such notice shall be mailed to the persons listed in §39.413 concerning Mailed Notice. Subsection (c) had been proposed to specify that notice by publication was required to be provided by a permittee applying for a modification under §305.70(k)(8) (now renumbered as §305.70 (k)(4) concerning Subtitle D upgrades for landfills). However, the requirement to provide published notice for that modification was deleted, so the need for subsection (c) no longer exists and the subsection has been deleted. A new subsection (c) has been added to address the delayed implementation of the section.

Section 39.403(c)(9) has been amended to reflect the change in title of §39.105 which will indicate that notice requirements for applications for modification of MSW permits will no longer be covered under §39.105.

Section 39.403(c)(10) has been amended to indicate that notice requirements for applications for modification of MSW permits and registrations will now be covered under new §39.106.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute and it does not meet any of the four applicability requirements listed in §2001.0225(a). Major environmental rule means 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. As for the four applicability requirements, the adoption does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of any delegation agreement or contract between the state, the commission, and an agency or representative of the federal government, nor is the rulemaking performed solely under the general powers of the agency. Additionally, the rulemaking is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the purpose of the adopted rules is to clarify the requirements for providing notice when making changes to permits and registrations for MSW facilities. Comments on the draft regulatory impact analysis were solicited, and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for the rulemaking under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to revise the commission rules to clarify procedures for public participation in the processing of

applications for modifications of MSW permits and registrations. The rules relate to procedures for providing public notice and providing opportunity for public comment. The rules will substantially advance these stated purposes by clarifying and providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the rulemaking consists of amendments and a new section relating to the commission's procedural rules.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

HEARING AND COMMENTERS

The commission held a public hearing on the proposal in Austin on August 17, 2001. The original comment period did not provide for a public hearing; however, Clean Water Action requested that a public hearing be held on the proposal. Therefore, a public hearing was scheduled and the close of the comment period was extended to August 17, 2001.

Clean Water Action and Henry, Lowerre and Frederick (CWAT/HLF) submitted joint comments. Other commenters were the Texas Chapter of the National Solid Wastes Management Association (NSWMA);

Republic Services, Inc. (RSI); Waste Management of Texas, Inc. (WMT); and TNRCC Public Interest Counsel (PIC). Comments provided by NSWMA also were endorsed by El Paso Disposal (EPD); G. O. Weiss, Inc. (GOW); Olympic Waste Services (OWS); Texas Disposal Systems Landfill, Inc. (TDSL); and Trinity Waste Services (TWS). NSWMA, RSI, and WMT recommended withdrawal of the proposed rules which included changes to Chapter 39 and Chapter 305. Texas Department of Transportation conducted a review of the proposed changes to Chapter 39 as they relate to the CMP but offered no comment or suggestion. The Municipal Solid Waste Management and Resource Recovery Advisory Council (Council) recommended withdrawal of the proposed rules but subsequently indicated its support of the rule proposal in general as further described herein.

The Council discussed these rules at meetings conducted by the Council on June 8, 2001, September 7, 2001, and November 19, 2001. At these meetings, the Council elaborated on and modified its written comments submitted during the formal comment period. Although the Council had originally recommended to withdraw the proposed rules, it later indicated that it supported the majority of the proposed rules as modified in response to comments.

RESPONSE TO COMMENTS

NSWMA, RSI, and WMT commented that the proposed rules should be withdrawn, due to the negative impact on the waste industry.

Although only WMT specifically addressed the proposed changes to Chapter 39, they are part of the overall proposed rulemaking which the other commenters recommended for withdrawal. The

commission considers that the changes to Chapter 39 are an integral part of the modification process and are necessary to bring the public notification procedures for MSW modifications in line with the procedures in use by other agency programs. Therefore, the commission does not agree that the rules should be withdrawn, and has adopted the rule amendments with only a minor change.

HLF/CWAT and PIC commented that public notice text requirements in §39.106(a) should include a description of the public comment procedures, the location where the public may obtain access to the application, and the procedures on how to be placed on a mailing list. PIC commented that the rules should include a 30-day period for the public to submit written comments prior to TNRCC approval of the application, and provide for a TNRCC response to those comments. PIC also commented that the text of the notice should provide information on the right to file a Motion to Overturn the Executive Director's Action, and that notice should be delivered by certified mail.

The commission does not agree that a requirement for TNRCC response is appropriate for the type of changes being made through the modification process, and has not revised the rule based on these comments. A response to comments, in accordance with 30 TAC §55.101, is mandatory only for applications filed under Texas Health and Safety Code (THSC), Chapter 361 and does not apply to the modification procedures. The commission agrees that procedures for being placed on a mailing list and on the availability of the application at the TNRCC regional office or other local location are appropriate and has revised §39.106(a) to include these information requirements. The commission also agrees that a public comment period should be provided and has incorporated an opportunity for comment into these rules. Information on filing a Motion to Overturn the Executive Director's

Action will be provided by the chief clerk with notice of issuance. Delivery of the notice by other than first-class mail is inconsistent with other TNRCC modification notice procedures and the commission has not revised §39.106(a) based on this comment.

NSWMA and WMT commented that expanded mail notice goes far beyond notification requirements in the former permit modification rules. NSWMA commented that changes to a facility would be of interest only to adjacent property owners, and that notification of governmental agencies and public officials as required in §39.106(b) is unnecessary, burdensome for facilities with a large number of neighboring property owners, and will discourage change and improvement. RSI commented that the notice requirements may fuel controversy or opposition, and adversely affect relations between the facility and the surrounding community. WMT commented that the rules will afford no additional environmental protection, and that compliance will be virtually impossible and inordinately costly, while creating less flexibility for efficient operation.

The commission acknowledges that the public notice requirements in §39.106 are more extensive than were intended for the former permit modification rules. However, the requirements in §39.106(b) are identical to notice requirements for other TNRCC programs and are in response to legislative direction for expanded public notice relating to permit actions. The commission believes that the large majority of permit modifications will not require public notice and that the estimated cost of notice, at \$.45 per notice, will not be overly burdensome even to sites with large numbers of property owners within 500 feet. The commission does not agree that notifying neighboring landowners and public officials of proposed permit revisions will hinder improvements, reduce flexibility or

operational efficiency, or that concern over controversy adequately justifies eliminating notice, and has not changed the rules based on these comments.

STATUTORY AUTHORITY

The amendment and new section are adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; THSC, §361.011, which provides the commission all powers necessary and convenient to carry out its responsibilities concerning the regulation and management of MSW; §361.024, which provides the commission authority to adopt and promulgate rules consistent with the general intent and purposes of THSC; §361.061, which provides the commission the authority to require and issue permits authorizing and governing the construction, operation, and maintenance of the solid waste facilities used to store, process, or dispose of solid waste under THSC, Chapter 361; and §361.064, which authorizes the commission to prescribe the form of and reasonable requirements for the permit application; and the procedures for processing the application.

SUBCHAPTER B: PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

§39.105, §39.106

§39.105. Application for a Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit.

(a) Notice requirements for Class 1 modifications are in §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee) for industrial solid waste or hazardous waste permits.

(b) The text of required notice shall follow the requirements of §39.11 of this title (relating to Text of Public Notice) and the additional requirements in §305.69 of this title.

(c) When mailed notice is required, the applicant shall mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice).

(d) The effective date of the amendment of existing §39.105 of this title (relating to Application for a Class 1 Modification of an Industrial Solid Waste, Hazardous Waste, or Municipal Solid Waste Permit) and this new §39.106 of this title (relating to Application for Modification of a Municipal Solid Waste Permit or Registration) is June 3, 2002. Applications for modifications filed before this amended section and new §39.106 of this title become effective, will be subject to this section as it existed prior to June 3, 2002.

§39.106. Application for Modification of a Municipal Solid Waste Permit or Registration.

(a) When mailed notice is required under §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications), the mailed notice shall be mailed by the permit or registration holder and the text of the notice shall comply with §39.411(b)(1) - (3), (6), (7), (9), and (12) of this title (relating to Text of Public Notice), and shall provide the location and phone number of the appropriate regional office of the commission to be contacted for information on the location where a copy of the application is available for review and copying.

(b) When mailed notice is required by §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications), notice shall be mailed by the permit or registration holder to the persons listed in §39.413 of this title (relating to Mailed Notice).

(c) The effective date of the amendment of existing §39.105 of this title (relating to Application for a Class 1 Modification of an Industrial Solid Waste, Hazardous Waste, or Municipal Solid Waste Permit) and this new §39.106 is June 3, 2002. Applications for modifications filed before amended §39.105 of this title and this new §39.106 become effective, will be subject to §39.105 of this title as it existed prior to June 3, 2002.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§39.403

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, which provides the commission the authority to adopt and enforce rules necessary to carry out its powers and duties under the laws of this state; THSC, §361.011, which provides the commission all powers necessary and convenient to carry out its responsibilities concerning the regulation and management of MSW; and §361.024, which provides the commission authority to adopt and promulgate rules consistent with the general intent and purposes of the THSC; §361.061, which provides the commission the authority to require and issue permits authorizing and governing the construction, operation, and maintenance of the solid waste facilities used to store, process, or dispose of solid waste under THSC, Chapter 361; and §361.064 which authorizes the commission to prescribe the form of and reasonable requirements for the permit application; and the procedures for processing the application.

§39.403. Applicability.

(a) Permit applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapters H - M of this chapter (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; Public Notice of Water Quality Applications; Public Notice of Air Quality Applications; Public Notice of Injection Well and Other Specific Applications; and Public Notice for Radioactive Material Licenses). Permit applications that are declared administratively complete before September 1, 1999 are subject to Subchapters A - F of this chapter (relating to

Applicability and General Provisions; Public Notice of Solid Waste Applications; Public Notice of Water Quality Applications and Water Quality Management Plans; Public Notice of Air Quality Applications; Public Notice of Other Specific Applications; and Public Notice for Radioactive Material Licenses). All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits). The effective date of the amendment of existing §39.403, specifically with respect to subsections (c)(9) and (10), is June 3, 2002. Applications for modifications filed before this amended section becomes effective will be subject to this section as it existed prior to June 3, 2002.

(1) Explanation of applicability. Subsection (b) of this section lists all the types of applications to which Subchapters H - M of this chapter apply. Subsection (c) of this section lists certain types of applications that would be included in the applications listed in subsection (b) of this section, but that are specifically excluded. Subsections (d) and (e) of this section specify that only certain sections apply to applications for radioactive materials licenses or voluntary emission reduction permits.

(2) Explanation of organization. Subchapter H of this chapter contains general provisions that may apply to all applications under Subchapters H - M of this chapter. Additionally, in Subchapters I - M of this chapter, there is a specific subchapter for each type of application. Those subchapters contain additional requirements for each type of application, as well as indicating which parts of Subchapter H of this chapter must be followed.

(3) Types of applications. Unless otherwise provided in Subchapters H - M of this chapter or Subchapter G of this chapter, public notice requirements apply to applications for new permits, concrete batch plant air quality exemptions from permitting or permits by rule, and applications to amend, modify, or renew permits.

(b) As specified in those subchapters, Subchapters H - M of this chapter apply to notices for:

(1) applications for municipal solid waste, industrial solid waste, or hazardous waste permits under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361;

(2) applications for wastewater discharge permits under Texas Water Code, Chapter 26, including:

(A) applications for the disposal of sewage sludge or water treatment sludge under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation); and

(B) applications for individual permits under Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations).

(3) applications for underground injection well permits under Texas Water Code, Chapter 27, or under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361;

(4) applications for production area authorizations under Chapter 331 of this title (relating to Underground Injection Control);

(5) contested case hearings for permit applications or contested enforcement case hearings under Chapter 80 of this title (relating to Contested Case Hearings);

(6) applications for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), except as provided in subsection (e) of this section;

(7) applications for consolidated permit processing and consolidated permits processed under Texas Water Code, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing);

(8) applications for air quality permits under Texas Health and Safety Code, §382.0518 and §382.055. In addition, applications for permit amendments under §116.116(b) of this title (relating to Changes to Facilities), initial issuance of flexible permits under Chapter 116, Subchapter G of this title (relating to Flexible Permits), amendments to flexible permits under §116.710(a)(2) and (3) of this title (relating to Applicability) when an action involves:

(A) construction of any new facility as defined in §116.10(4) and (10) of this title (relating to General Definitions);

(B) modification of an existing facility as defined in §116.10(9) of this title which result in an increase in allowable emissions of any air contaminant emitted equal to or greater than the emission quantities defined in §106.4(a)(1) of this title (relating to Requirements for Exemptions from Permitting) and of sources defined in §106.4(a)(2) and (3) of this title; or

(C) other changes when the executive director determines that:

(i) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor;

(ii) there is a reasonable likelihood of high nuisance potential from the operation of the facilities;

(iii) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process;

(iv) there is a reasonable likelihood of significant public interest in a proposed activity; or

(9) applications subject to the requirements of Chapter 116, Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major

Sources (FCAA, §112(g), 40 Code of Federal Regulations Part 63)), whether for construction or reconstruction;

(10) concrete batch plants registered under Chapter 106 of this title (relating to Exemptions from Permitting) unless the facility is to be temporarily located in or contiguous to the right-of-way of a public works project;

(11) applications for voluntary emission reduction permits under Texas Health and Safety Code, §382.0519;

(12) applications for permits for electric generating facilities under Utilities Code, §39.264;

(13) Water Quality Management Plan (WQMP) updates processed under Texas Water Code, Chapter 26, Subchapter B.

(c) Notwithstanding subsection (b) of this section, Subchapters H - M of this chapter do not apply to the following actions and other applications where notice or opportunity for contested case hearings are otherwise not required by law:

(1) applications for authorizations under Chapter 321 of this title (relating to Control of Certain Activities by Rule), except for applications for individual permits under Subchapter B of that chapter;

(2) applications for registrations and notifications under Chapter 312 of this title;

(3) applications under Chapter 332 of this title (relating to Composting);

(4) applications under Chapter 122 of this title (relating to Federal Operating Permits);

(5) applications under Chapter 116, Subchapter F of this title (relating to Standard Permits);

(6) applications under Chapter 106 of this title, except for concrete batch plants specified in subsection (b)(10) of this section.

(7) applications under §39.15 of this title (relating to Public Notice Not Required for Certain Types of Applications) without regard to the date of administrative completeness;

(8) applications for minor amendments under §305.62(c)(2) of this title (relating to Amendment). Notice for minor amendments shall comply with the requirements of §39.17 of this title (relating to Notice of Minor Amendment) without regard to the date of administrative completeness;

(9) applications for Class 1 modifications of industrial or hazardous waste permits under §305.69(b) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice for Class 1 modifications shall comply with the requirements of §39.105 of this title (relating to Application for a Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 of this title (relating to Text of Public Notice) and §305.69(b) of this title;

(10) applications for modifications of municipal solid waste permits and registrations under §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications). Notice for modifications shall comply with the requirements of §39.106 of this title (relating to Application for Modification of a Municipal Solid Waste Permit or Registration), without regard to the date of administrative completeness;

(11) applications for Class 2 modifications of industrial or hazardous waste permits under §305.69(c) of this title. Notice for Class 2 modifications shall comply with the requirements of §39.107 of this title (relating to Application for a Class 2 Modification of an Industrial or Hazardous Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 of this title and §305.69(c) of this title;

(12) applications for minor modifications of underground injection control permits under §305.72 of this title (relating to Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee);

(13) applications for minor modifications of Texas Pollutant Discharge Elimination System (TPDES) permits under §305.62(c)(3) of this title; or

(14) applications for registration and notification of sludge disposal under §312.13 of this title (relating to Actions and Notice).

(d) Applications for initial issuance of voluntary emission reduction permits under Texas Health and Safety Code, §382.0519 and initial issuance of electric generating facility permits under Texas Utilities Code, §39.264 are subject only to §39.405 of this title (relating to General Notice Provisions), §39.409 of this title (relating to Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing), §39.411 of this title, §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), §39.602 of this title (relating to Mailed Notice), §39.603 of this title (relating to Newspaper Notice), §39.604 of this title (relating to Sign-Posting), §39.605 of this title (relating to Notice to Affected Agencies), and §39.606 of this title (relating to Alternative Means of Notice for Voluntary Emission Reduction Permits), except that any reference to requests for reconsideration or contested case hearings in §39.409 of this title or §39.411 of this title shall not apply.

(e) Applications for Radioactive Materials Licenses under Chapter 336 of this title are not subject to §§39.405(c) and (e), 39.418, 39.419, 39.420, and certain portions of §39.413 of this title (relating to Mailed Notice).