

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§39.1, 39.101, 39.151, 39.201, 39.251, and 39.253; new §§39.302, 39.351, 39.401, 39.403, 39.405, 39.407, 39.409, 39.411, 39.413, 39.418-39.421, 39.423, 39.425, 39.501, 39.503, 39.509, 39.551, 39.553, 39.601-39.606, 39.651, 39.653, 39.701-39.703, 39.705, 39.707, 39.709, 39.711, and 39.713; and the repeal of §39.401, concerning public notice. Sections 39.1, 39.101, 39.151, 39.201, 39.251, 39.302, 39.351, 39.403, 39.405, 39.407, 39.409, 39.411, 39.413, 39.418, 39.419, 39.420, 39.425, 39.501, 39.503, 39.509, 39.551, 39.553, 39.601, 39.602, 39.603, 39.604, 39.605, 39.606, 39.651, 39.653, 39.701, 39.705, 39.709, and 39.711 are adopted with changes to the proposed text as published in the July 16, 1999 issue of the *Texas Register* (24 TexReg 5303). Sections 39.253, 39.401, 39.421, 39.423, 39.702, 39.703, 39.707, and 39.713 are adopted without changes to the proposed text and will not be republished. Certain provisions of the rules will constitute a revision to the state implementation plan (SIP). Specifically, §§39.201; 39.401; 39.403(a) and (b)(8)-(10); 39.405(f)(1) and (g); 39.409; 39.411(a), (b)(1)-(6) and (8)-(10) and (c)(1)-(6) and (d); 39.413(9), (11), (12), and (14); 39.418(a) and (b)(3) and (4); 39.419(a), (b), (d), and (e); 39.420(a), (b), and (c)(3) and (4); 39.423(a) and (b); 39.601; 39.602; 39.603; 39.604; and 39.605.

The provisions of former §39.401 are now set forth as new §39.351. Corrections to the proposed rules for Chapter 39 were published in the *Texas Register* on August 20, 1999 (24 TexReg 6573). The corrections were primarily of typographical errors and incorrect cross-references. The corrections are in the adopted rule text. Concurrently with this rulemaking, the commission is also adopting the rules review of and readopting the existing rules in Chapter 39, concerning Public Notice, in accordance with

the rule review requirements of the General Appropriations Act, Article IX, §167, 75th Legislature, 1997.

## BACKGROUND

The primary purpose of the adopted amendments and new sections is to implement House Bill (HB) 801, and portions of Senate Bill (SB) 7, SB 211, SB 766, SB 1308, and HB 1479, 76th Legislature (1999). HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing for certain actions. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305; changes for all of these chapters are published in this issue of the *Texas Register*. Changes to Chapters 55 and 321 were also proposed on July 16, 1999, but are not adopted at this time. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

## OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M;

revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising Texas Clean Air Act (TCAA), THSC, §382.056; and revising Texas Government Code, §2003.047. The changes in law made by HB 801 apply to certain permit applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit 30 days after declaration of administrative completeness. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county, and, in most cases, to publish newspaper notice of the executive director's preliminary decision of the application. In addition, the bill requires the commission to establish by rule the form and content of the notices and to mail notice to certain persons. It also authorizes the executive director to hold public meetings regarding applications which are required, if requested by a legislator, or if the executive director determines there is substantial public interest in the proposed activity. The executive director is also required to prepare responses to relevant and material public comment received in response to the notices or at public meetings, and file the responses with the chief clerk. It requires the commission to prescribe alternative cost-effective procedures for newspaper publication for small business stationary sources seeking air emissions authorization that will not have a significant effect on air quality. This legislation

also allows the commission by rule to provide any additional notice, opportunity for public comment or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted to Chapters 106, 116, and 122. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this issue of the *Texas Register*. Changes to Chapter 321 were also proposed on July 16, 1999, but are not adopted at this time.

#### OVERVIEW OF SB 7 AND IMPLEMENTATION

SB 7, also enacted by the 76th Legislature, restructures electric utility service in Texas. Owners of grandfathered facilities that generate electric energy for compensation are required to apply for an electric generating facility (EGF) permit from the commission by September 1, 2000. These permits are subject to notice under §382.056 of the Texas Health and Safety Code. SB 7 provides that initial issuance of these permits require notice and comment proceedings. However, amendment and renewal of these permits requires notice, comment, and opportunity for contested case hearing.

The notice provisions and public participation procedures for electric generating facility permits are implemented through changes to Chapters 39 and, to a limited extent, to Chapter 50. Renewals are

subject to Chapters 39, 50, and 80 as amended. Additional implementation of the requirements of SB 7 is expected in future rulemaking by the commission.

#### OVERVIEW OF SB 766 AND IMPLEMENTATION

SB 766, enacted by the 76th Legislature, also amends TCAA, Chapter 382 by, among other things: (1) requiring the commission to establish procedures to authorize standard permits and permits by rule; (2) dividing the current category of exemptions from permitting into two categories: permits by rule for construction of facilities with insignificant air emissions, and exemptions from permitting for changes to existing facilities with insignificant air emissions; and (3) creating a voluntary emission reduction permit (VERP) for grandfathered facilities that must be applied for by September 1, 2001. Notice requirements for these changes are implemented in the changes to Chapter 39 because of the critical nature of the timing of the permit program. Public participation requirements applicable to VERPs under SB 766 are included in these chapters, specifically §§39.403(b)(11), 39.403(d), and 39.606. Additional implementation of the requirements of SB 766 is expected to occur in future rulemaking proposals by the commission.

#### OVERVIEW OF SB 1308 AND IMPLEMENTATION

SB 1308 allows the executive director to approve water quality management plans (WQMP) and revisions, so long as an opportunity for public participation has been provided. This bill, which amends Texas Water Code, §26.037, also requires rules to provide for commission review of the executive director's decision on a plan approval or revision. This adoption incorporates these requirements through §§39.401, 39.403, and 39.553.

#### OVERVIEW OF HB 1479 AND IMPLEMENTATION

HB 1479 amended §26.028 of the Texas Water Code and allows the commission to approve an application to renew or amend a permit without the necessity of a public hearing if: 1) the applicant is not applying to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge; 2) the activities to be authorized will maintain or improve the quality of waste; 3) the applicant's compliance history raises no issues regarding the applicant's ability to comply with a material term of its permit; and 4) for Texas Pollutant Discharge Elimination System (TPDES) permits, notice and opportunity to comment is provided in accordance with federal program requirements. This adoption implements these provisions.

#### OVERVIEW OF SB 211 AND IMPLEMENTATION

SB 211 amends §2001.142(c) of the Texas Government Code, relating to notice of decision in an administrative hearing, and provides that a party is presumed to have been notified on the third day after notice has been mailed. This requirement has been implemented and has guided rule drafting in Chapters 39, 50, and 80.

In addition to the changes required by legislation, the TNRCC is making several other changes to the public notice rules in Chapter 39.

#### OVERVIEW OF CHANGES NOT RELATED TO HB 801

For air permits, there are several changes regarding notice. Specifically, all air permit amendment applications for construction of new facilities must comply with the notice requirements in Chapter 39.

In addition, changes to existing facilities must comply with the notice requirements in Chapter 39 when there are significant emission increases or in other specific circumstances. The rules also clarify when alternative language publication for an air application is required and the appropriate locations of notice signs. The requirement that notice for certain air applications be published in two consecutive issues of a newspaper has been changed to publication in one issue of a newspaper. Other changes made in this rulemaking adoption which are not related to HB 801 include those revisions necessary to incorporate by rule those changes made by SB 766 to the TCAA regarding exemptions from permitting and permits by rule and public notification and comment procedures for voluntary emission reduction permits. This adoption also incorporates public notification and current procedures required under SB 7 for electric generating facility permits.

The notice text for air applications has also been changed to make clear which air contaminants should be included in the text of the notice. Bilingual notice requirements related to air permit actions have also been clarified.

Chapter 39 also incorporates a procedure that allows the agency to suspend review of and return an application if the applicant does not publish notice. A second application fee will not be required if the applicant wishes to resubmit the application within six months. This change in procedure is not required by HB 801. However, it is consistent with the goal of ensuring the most effective use of agency resources, avoiding unwarranted delay in permit processing, and encouraging early public participation in the permit process.

The rules have been revised to reflect that there is no right to a contested case hearing on weather modification permits or licenses under Chapter 18, Texas Water Code, reflecting the interpretation of law given in commission orders which have addressed hearing requests on these applications.

#### ORGANIZATION OF CHAPTER

HB 801 applies only to certain applications that are administratively complete on or after September 1, 1999. Thus, in the adopted rules, Subchapters A-F are amended to apply only to applications that were administratively complete *before* September 1, 1999. At the same time, new Subchapters H-M apply only to applications that are administratively complete *on or after* September 1, 1999. Generally, Subchapters H-M are duplicated versions of the existing rules in Subchapters A-F, modified to incorporate substantive changes either related to HB 801 implementation, implementation of other bills, or other changes under this chapter. To facilitate this reorganization, §39.401 (related to Public Notice for Applications for Consolidated Permits) is repealed and renumbered as §39.351. Section 39.351 applies to all permit applications, regardless of when they become administratively complete. While HB 801 continues former law in effect for applications administratively complete before September 1, 1999, the commission recognizes that it may be a year or more before all of those applications have been acted on, especially those that go to contested case hearing. Therefore, the commission has chosen this parallel subchapter structure because the commission believes it is useful for the public to have easy access to rules for older applications as well as for new ones. Once all applications that were administratively complete before September 1, 1999 have been processed, the commission can delete the subchapters that apply to those applications.

In this adoption publication, only the applicability sections of Subchapters A-F are reproduced. For Subchapters H-M, the entire new subchapters are printed. Many of the sections of Subchapters H-M are the same or very similar to sections in Subchapters A-F. Where possible, section numbers are parallel; for example, §39.5 (General Notice Provisions) is similar to §39.405 (General Provisions). Generally, Chapter 39 is changed to incorporate certain statutory requirements of HB 801, to clarify and modify certain requirements for public notification and public participation, and to modify the processing of applications for air quality permits.

The revisions to Chapter 39 contain general provisions that apply to all affected programs and program-specific requirements. The latter are largely derived from statutory differences related to various programs included in HB 801 and applicable statutes. For applications administratively complete on or after September 1, 1999, Subchapter H contains general provisions and Subchapters I - M contain provisions applicable to specific types of applications.

Portions of Chapter 39 are changed to incorporate some aspects of SB 766 and SB 7. For example, the adoption includes reference to permits and public notification requirements for VERPs under THSC, §382.0519, permits for electric generating facilities subject to §39.264 of the Utilities Code, and the use of exemptions from permitting and permits by rule for construction of facilities and modification of existing facilities under TCAA, §§382.057 and 382.058. Portions of Chapter 39 implement SB 1308 relating to water quality management plan approval. The rules also incorporate requirements necessary to satisfy federal program approvals, requirements, and additional notice provisions set forth in various provisions of the Texas Water Code and the Texas Health and Safety Code.

To facilitate review, the agency will make copies of the rule available which show the differences between old and new subchapters. Copies may be obtained by calling Casey Vise, in the Office of Environmental Policy, Analysis and Assessment, at (512) 239-1932 and on the commission's website at: <http://www.tnrcc.state.tx.us/oprd/forum.html#hb801>.

#### FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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 the act.

Furthermore, 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing as well as consolidate existing notice procedures for some air permitting programs, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the adopted rule is a major environmental rule, a regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopts a rule solely under

the general powers of the agency. This adoption is expressly authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and Texas Water Code, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the Statutory Authority section of this preamble. This adoption does not 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 because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with Texas Water Code, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This action does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., Texas Water Code, Chapter 5, Subchapter M and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the amendments and new sections is to revise the TNRCC rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting contested case hearings as well as specific procedures for hearings. The rule would also consolidate already existing notice procedures for some of the air quality permitting programs, correct, clarify, and/or update the air quality permit amendment process,

requirements relating to sign posting for concrete batch plants, and clarification of requirements relating to bilingual education notices; and consolidate commission procedural rules. The adopted rules will substantially advance these stated purposes by 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 language consists of amendments and new sections relating to the commission's procedural rules rather than substantive requirements.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505, 30 TAC §§281.40, et seq.).

#### HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. Oral comments were provided by an individual and Locke, Liddell and Sapp, L.L.P.. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P., on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce (TABCC), and Texas Oil and Gas Association;

Brown, Potts & Reilly, L.L.P., on behalf of Merco Joint Venture, L.L.C.; City Public Service (CPS) of San Antonio, Texas; Dow Chemical Company (Dow); Eastman Chemical Company, Texas Eastman Division (Eastman); Exxon Chemical Company's Baytown Chemical Plant, Baytown Olefins Plant and Mont Belvieu Plastics Plant (Exxon Chemical); Exxon Company, U.S.A., Baytown Refinery (Exxon); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center for Policy Studies, and Texas Committee on Natural Resources; Jackson Walker L.L.P.; Jenkins & Gilchrist, P.C.; Public Interest Counsel, Texas Natural Resource Conservation Commission (PIC); Roller and Allensworth, L.L.P., on behalf of the Greenbelt Municipal and Industrial Water Authority; Small Business Compliance Advisory Panel (CAP); Texas Association of Business & Chambers of Commerce (TABCC); Texas Cattle Feeders Association (TCFA); Texas Cotton Ginners' Association; Texas Instruments Incorporated (TI); Thompson & Knight, L.L.P.; and the United States Environmental Protection Agency Region 6 Office (EPA).

#### COMMENTS REQUESTED

The commission solicited, in particular, comments regarding the requirements in §39.101(e)(2) and §39.501(d)(2) (Municipal Solid Waste applications); §39.503(d)(2)(B) (Industrial or Hazardous Waste applications); §39.651(d)(2) and §39.651(e)(2)(B) (Injection Well applications); and §39.603(a)(2) (Air Quality Permit applications) on the size of newspaper notice. The commission recognizes that the measurements in the rules did not necessarily reflect the measurements that newspapers use for advertisements.

During the comment period, the Texas Press Association forwarded information to the TNRCC on how most advertising space is sold. The notice size was adjusted only for air applications to match the size of Standard Advertising Units and still provide an effective notice to interested persons of the general public. This change will hopefully reduce the occurrence of errors and republication time and money. Requirements for solid waste and injection well applications were not changed. Rather, the information about Standard Advertising Units will be included in the Instructions for Publications sent to applicants along with the text of notice.

#### ANALYSIS OF COMMENTS AND ADOPTED RULES

##### *Public Hearing*

An individual expressed concern that commission public participation rules do not comply with EPA public participation requirements, particularly with regard to the permitting of municipal solid waste landfills. The commenter submitted a letter from EPA dated March 11, 1999, which summarizes EPA's policy on public participation in landfill permitting. The commenter made specific reference to the "RCRA Manual" and requirements therein for a public hearing within two weeks before or two weeks after the original filing of an application for a new permit or for a substantial Class C (It is possible the commenter said "3" rather than "C," but it was transcribed as "C"). The commenter also raised the questions of whether the commission considers air quality impacts in its consideration of landfill permit applications. The commenter did not identify a specific rule in regard to either of her comments.

**The commission has made no change in response to these comments. The state of Texas administered a landfill permitting program before the enactment of federal law governing these facilities. Texas sought EPA approval for authorization to implement the Subtitle D requirements, and that request identified public participation procedures that would apply to applications for municipal solid waste permits. At the time of the request in 1993, EPA had only promulgated a draft State Implementation Rule (SIR), but Texas, as well as other states, were allowed to submit their proposals in accordance with the draft SIR. The request submitted by Texas was approved shortly thereafter. Although the SIR was only put into final form in 1998, the approval granted Texas the authority to implement the federal requirements for municipal solid waste landfills is not affected. In response to the comment regarding consideration of air quality impacts, the commission responds that air quality impacts are considered in the review of landfill permit applications and commission rules describe the timing and extent of air quality reviews.**

**Section 361.0791 of the Texas Health and Safety Code, and §39.101(d) of the commission's rules require the commission to hold a public meeting on an application for a new municipal solid waste (MSW) facility. However, some applicants do hold public meetings on applications for existing sites that are being amended. There are currently no statutory or regulatory requirements for a public meeting on an application for a Class 1 MSW permit modification.**

Brown McCarroll observed that the commission has undertaken a quadrennial review of the commission's procedural rules in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, while simultaneously adopting new rules to implement HB 801. The commenter stated that the quadrennial review should not be a bar to future consideration of necessary changes to the new rules following adoption. The commenter recommended that the commission clearly indicate that the rules will be revisited after their implementation to address any problems resulting from the "fast track" time line for this rulemaking.

**The commission agrees with the commenter that the new procedural rules being adopted should be subject to review to correct any deficiencies which may become apparent following adoption. The quadrennial review applied only to the existing Chapters 39, 50, and 80 of the commission's rules. The fact that the existing procedural rules have undergone the statutorily required quadrennial review, and the commission has determined that those rules continue to be necessary, will not prevent the commission from revisiting the procedural rules following implementation of HB 801.**

Thompson & Knight, Exxon, and Baker & Botts, TI and Brown McCarroll submitted comments about Chapter 39 in general and suggested that the TNRCC take this opportunity to clarify notice requirements, eliminate inconsistencies, and reorganized the chapter.

**The commission agrees and has made several clarifying and reformatting changes to Chapter 39 as discussed below to make this chapter easier to read and understand.**

*Subchapter A, §39.1. Applicability*

The commission adopts amendments to §39.1 (Applicability) to provide that permit applications covered by Chapter 39 declared administratively complete before September 1, 1999 are subject to Subchapters A-F of Chapter 39 and that Subchapters H-M apply to permit applications declared administratively complete on or after September 1, 1999. This amendment also provides that consolidated permit applications regardless of when declared administratively complete are subject to Subchapter G. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provides that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll commented that, as written, §39.1 as proposed was overly broad and that, the rule might have the unintended result of making provisions applicable to solid waste applications applicable to, for example, the provisions applicable to water quality applications.

**The commission has made changes in response to this comment to more clearly reflect that only Subchapter A and H are of general applicability in Chapter 39. The commenter also correctly identified the inadvertent deletion in the proposal of the phrase “This chapter applies to:” This phrase has been included in the adopted §39.1 to eliminate any ambiguity as to the reason for the applications listed in the subsections of §39.1. Subchapters B - F and Subchapter I - M contain the requirements applicable to specific types of applications.**

*Subchapter B, §39.101. Application for Municipal Solid Waste Permit.*

Amended §39.101 (Application for Municipal Solid Waste Permit) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. New Subchapters H-M apply to applications administratively complete on or after that date. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provides that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that, although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggested that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

**The commission has made changes in response to this comment. While the commission, to avoid redundancy, has not adopted the exact language as proposed by the commenter, the rule as adopted does include clarifying changes to include a specific reference in the body of the rule to the specific type of permits governed by the rule as requested by the commenter.**

Baker & Botts, in response to TNRCC's request for comments on the size of newspaper notices specified by §39.101(e)(2), 39.501(d)(2), 39.503(d)(2)(B), 39.651(d)(2), 39.651(e)(2)(B), and

39.603(a)(2), stated that they have not experienced difficulty in working with local newspapers to meet the intent of the referenced sizing requirements. The commenter recommended that the best course of action would be for the TNRCC to promulgate a rule that specifies that substantial compliance with the TNRCC's public notice rules satisfies applicable regulatory notice requirements.

**The commission has made no change in response to this comment. The commission did not include such a rule in the notice of the proposed rule and does not believe that including a rule allowing substantial compliance with notice requirements should be included in the adoption without providing an opportunity for comment on such a provision. In addition, such a change is not required for implementation of HB 801, which is the primary purpose for this rulemaking.**

*Subchapter C, §39.151. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.*

Amended §39.151 (Application for Wastewater Discharge Permit) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. These changes are intended to incorporate the effective date and savings clause of HB 801. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

**The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter.**

*Subchapter D, §39.201. Application for a Preconstruction Permit.*

Amended §39.201 (Application for a Preconstruction Permit) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. These changes are intended to incorporate the effective date and savings clause of HB 801. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

**The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter as requested by the commenter.**

*Subchapter E, §39.251. Application for Injection Well Permit.*

Amended §39.251 (Application for Injection Well Permit) is adopted to reflect that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. These changes are intended to incorporate the effective date and savings clause of HB 801. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

**The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter.**

*§39.253. Application for Production Area Authorization.*

Amended §39.253 (Application for Production Area Authorization) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provides that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the

type of permit is not specifically referenced in the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

**The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter.**

*Subchapter F, §39.301. Notice of Declaration of Administrative Completeness, and §39.302.*

*Applicability.*

The commission withdraws the proposed amendment to §39.301 (Notice of Declaration of Administrative Completeness). New §39.302 (Applicability) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provides that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

To avoid the duplication in §39.301 and §39.302, improve clarity and make the organization of this subchapter consistent with that of other subchapters, the commission has changed the title of §39.301

from Notice of Declaration of Administrative Completeness to Applicability and the title of §39.302 from Applicability to Notice of Declaration of Administrative Completeness and correspondingly reorganized, with some minor wording changes, the substantive provisions of these sections

Brown McCarroll suggested that although the headings for the introductory rules found in Subchapters B through F of Chapter 39 reference the types of permits that are governed by each of the rules, the type of permit is not specifically referenced in the body of the rule and suggests that this rulemaking is an opportune time to clean up the Chapter 39 rules by adding a reference to the specific permit which is governed by each rule in the text of the rule.

**The commission has made changes in response to this comment. While the commission has not adopted the language exactly as proposed by the commenter to avoid redundancy, the commission has made clarifying changes to the rule to specifically reference the types of permits governed by this subchapter as suggested by the commenter.**

*Subchapter G, §39.351. Public Notice for Applications for Consolidated Permits.*

New §39.351 (Public Notice for Applications for Consolidated Permits) reflects the information previously set forth in existing §39.401 which is being concurrently repealed with this adoption.

In addition, to make §39.351 consistent with the new organizational structure of Subchapters B through F of Chapter 39, the commission has amended §39.351 as proposed to add a subsection relating to

Applicability that provides that this section is applicable to applications for consolidated permits which combine authorizations under two or more program areas.

It should be noted that the statutory authority for this subchapter was incorrectly referenced in the proposal published in the July 16, 1999 issue of the *Texas Register* (24 Tex. Reg 5303). The correct statutory authority is TWC, Chapter 5, Subchapter J, which establishes the commission's authority concerning consolidated permitting procedures.

*Subchapter H, §39.401. Purpose.*

New §39.401 (Purpose), states that the purpose of Chapter 39 is to specify notice requirements for certain applications, including notices for public meetings, contested case hearings, notice and comment hearings, and WQMPs. This provision is very similar to existing §39.3 except that it updates this provision to reflect the applicability to comment hearings for certain permit applications (notice of which is currently covered by Chapter 39) and WQMPs (incorporating changes made by SB 1308 which modified the procedures for notice and public participation for these actions). Minor clarifications were also made to the rule as proposed.

EPA commented that the lack of evenly numbered sections in Chapter 39 is confusing and difficult for a casual reader.

**The commission has made no changes in response to this comment. This section numbering allows for expansion of these rules without requiring major reorganization of the subchapters.**

Brown McCarroll commented that there is no need to introduce Subchapter H-M in §39.401 because each of the rules in those new subchapters clearly indicates to which applications or permits it applies. The commenter suggested this section should be stricken, the text of §39.403 should become the first rule in the subchapter, and the remaining rules in Subchapter H are be renumbered accordingly.

**The commission has made no changes in response to this comment. The commission believes it is necessary to restate these subchapters for introduction, and to guide applicants and interested persons to the other subchapters and public notice requirements, as appropriate.**

*§39.403 Applicability , §39.403(a) and (b)(1)-(5), (13)*

New §39.403(a) (Applicability) reflects that rules in effect before September 1, 1999 continue to apply to applications declared administratively complete before that date. These amendments also provide that Subchapters H-M apply to applications administratively complete on or after that date. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999. Section 39.403(a)(1)-(3) explains the organization of Chapter 39, Subchapters H - M and has been added to facilitate use of this chapter for applicants and the general public.

Section 39.403(b)(5) has been changed from the rule as proposed. The commission has added clarification to note that these requirements apply to contested case and enforcement hearings which are

covered by 30 TAC Chapter 80. In addition, §39.403(b)(6) has been revised from the rule as proposed to make clear that certain sections of Chapter 39 do not apply for radioactive material license applications. Section 39.403(b)(13) was added to implement SB 1308 which amends TWC §26.037 to allow the executive director to approve water quality management plans as long as there is an opportunity for public participation.

Brown McCarroll commented that subsections (a) and (b) of proposed §39.403 have the same deficiencies as existing §39.1. They proposed a revision which would strike subsection (a) and (b) of the rule as proposed and substitute with the following language: (a) This subchapter applies to any of the following types of permit applications that are declared administratively complete on or after September 1, 1999.

**The commission has made some changes in response to this comment. However, the commission did not incorporate the commenter's recommended language. The commission believes the change would be inappropriate since there are additional notice requirements in each subchapter as well as in H. The commission believes the rule should inform applicants which sets of subchapters apply depending on the timing of their application. However, §39.403(a) (1) - (3) has been added to clarify the applicability of Subchapters H - M and to make the subchapters easier to understand and use.**

Brown McCarroll commented that §39.403(b)(5) relating to the applicability of Subchapter H-M to contested case hearings is overly broad and that no statute mandates that the general provisions found in

subchapter H of Chapter 39 be applicable to all contested case hearings, which is what would result from the rule as written. It was also noted that comparable provisions for applications that are declared administratively complete before September 1, 1999 cover hearings under Chapter 80 concerning applications for air quality permits under Chapter 116 and hearings on contested enforcement cases under Chapter 80. The commenter recommended deletion of the section.

**The commission has made changes in response to this comment. The rule has been modified to limit the applicability of §39.403(b) to those requirements listed in the appropriate subchapters. All of the subchapters have these requirements listed, if applicable. Chapter 39 includes both notices of applications and notices of hearings. Section 39.403(b)(5) is necessary to implement the statutory requirements for applicable actions on the procedures for contested case hearings.**

Brown McCarroll commented that §39.403(b)(6) relating to the applicability of Subchapters H - M to radioactive materials licences should be modified in order to make it clear that there are some sections in Subchapters H - M that do not apply to radioactive materials licences.

**The commission has made revisions in response to this comment and has modified §39.403(b)(6) as recommended.**

TCFA commented on §39.403(b) and (c) relating to applications that are or are not subject to Subchapters H - M of Chapter 39 and expressed support for a streamlined public notice procedure for CAFOs filing applications for authorizations under Chapter 321, Subchapter B.

**The commission acknowledges this statement of support.**

*§39.403(b)(8)-(12)*

New requirements listed under §39.403(b)(8)-(12) reflects that notice requirements for air applications are now contained in Chapter 39 rather than Chapter 116 and to incorporate some of the changes resulting from SB 7 and SB 766. Those types of applications which would be newly subject to the provisions of Chapter 39 include: (1) applications for air quality permits under §382.0518 and §382.055 of the Texas Health and Safety Code, unless otherwise specified in this section; (2) applications subject to the requirements of Chapter 116, Subchapter G of this title (relating to Flexible Permits); (3) permit amendments under §116.116(b) and §116.710(a)(2) and (3) when an action involves: (A) construction of any new facility, (B) changes to an existing facility which results in a significant increase in allowable emissions of any air contaminant, or (C) other changes when determined by the executive director to enhance public participation; (4) 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 CFR Part 63)), whether for construction or reconstruction; (5) concrete batch plants (CBP) registered under 30 TAC Chapter 106 (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; (6) applications for voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code; and (7) applications for permits for electric generating facilities under §39.264 of the Utilities Code.

These actions are required to undergo notice in accordance with Chapter 39 and include public participation under Chapter 55 as required by TCAA, §382.056.

Specifically, §39.403(b)(8)(A) and (B) is to clarify that applications to amend existing permits for the purpose of authorizing new construction must comply with the notice requirements in 30 TAC Chapter 39, Subchapters H and K. This is required by the TCAA, §382.056(a), but was not codified in existing notice rules in 30 TAC Chapter 116. This subsection is consistent with the requirement that all applications for new permits which would authorize new construction must comply with the notice requirements, and clarifies that there is no basis for different notice requirements for applicants who are choosing to amend an existing permit versus obtaining a new permit. §39.403(b)(8)(B) clarifies which applications for changes of existing facilities must comply with the notice requirements of Subchapters H and K of Chapter 39. This is required by the Texas Clean Air Act, Texas Health Safety Code, §382.056(a), but was not codified in existing notice rules in Chapter 116 which are being concurrently repealed. This clarifies that changes to existing facilities for insignificant increases are not required to comply with notice requirements. The reference of insignificant emissions is an existing determination criteria of the commission which establishes sources that are exempt from permitting requirements. Permit amendments which do not meet the statutory definition of modification, as changed by SB 1126, 74th Legislature, 1995, retain that exempt status.

EPA commented that only those portions of §39.403(b) applicable to air quality permits should be submitted as SIP revisions which appear to be subparts (8) - (14). Concrete batch plants registered under Chapter 106 are exempt from permitting, hence construction or modification would not require

public notice. EPA asked for verification where the TCAA was amended in 1985 to provide for a hearing on these sorts of facilities.

**The commission has included only those sections which are applicable as revisions to the SIP. The TCAA was amended September 1, 1989 by the 71st Legislature to include §382.058 which requires notice for concrete batch plants which are not located contiguous or adjacent to the right-of-way of a public works project.**

EPA commented that the term “modification of” contained in §39.403(14)(B) should be changed to “changes to” such that the term tracks the language used in the SIP.

**There is no definition of “change” in the TCAA or 30 TAC Chapter 116. “Modification” is the appropriate term because it is defined in the TCAA, §382.0512 and Chapter §116.110(9). This term covers all physical or operational changes to a facility for which notice would be required under §39.403(b)(8)(B).**

Baker & Botts commented that proposed §39.403(b)(13) changes current agency practice in requiring notice of all initial flexible permit applications, especially for those actions which would result in a reduction in emissions or no significant increases in emissions.

**The commission has made revisions in response to this comment and has deleted §39.403(b)(13) and instead combined the flexible permit notice requirements with §39.403(b)(8) resulting in the**

**notice requirements for flexible permits (new and amended) to be the same as §116.116 amendment criteria. This is because, as pointed out by the commenter, a flexible permit may be initially issued on an existing facility with no new facility construction or significant increase in allowable emission rates. This is consistent with §382.056(g) which does not require public notice if there are no new contaminants or increase in allowables emission rates. Notice requirements are focused on important actions which need public input and more accurately reflect statutory requirements.**

Brown McCarroll commented that §39.403(b)(14) is redundant and confusing, noting that the applications for permit amendments covered under this section are required under §382.0518 of the Texas Health and Safety Code which is already referenced in proposed §39.403(b)(8). The comments recommended deleting subsection (b)(14) and renumbering the remaining paragraphs accordingly.

**The commission agrees and has combined §39.403(b)(8) and (14) based on this comment and renumbered subsequent subsections accordingly.**

CPS-San Antonio, Thompson & Knight, TCGA, and TABCC commented that the requirements proposed under §39.403(b)(14)(A) and (B) are a change in practice. The commenters believe the change would result in a significant increase in the number of amendments with insignificant emissions increases going to notice, which would be a burden to applicants and potentially lengthen the amendment process for very small projects. CPS recommended that these subsections should be changed such that only permit amendments that result in an increase in significant emissions, i.e.

emissions of any air contaminant and emitted equal to or greater than the emission quantities defined in §106.4(a)(1), be subject to public notice.

**For clarity, §39.403(b)(14)(A) and (B) have been moved to §39.403(b)(8) (A) and (B) . The commission is adopting new §39.403(b)(8)(A) without changes. This subsection clarifies that applications to amend existing permits for the purpose of authorizing new construction must comply with the notice requirements in 30 TAC Chapter 39, Subchapters H and K. This is required by the TCAA, §382.056(a), but was not codified in existing notice rules in 30 TAC Chapter 116 which are concurrently being repealed. This subsection is consistent with the requirement that all applications for new permits which would authorize new construction must comply with the notice requirements, and clarifies that there is no basis for different notice requirements for applicants who are choosing to amend an existing permit versus obtaining a new permit. It also clarifies that applications for construction of new facilities with emissions of less than or equal to 25 tons per year must comply with notice requirements.**

**Section 39.403(b)(8)(B) clarifies which applications for changes of existing facilities must comply with the notice requirements of Subchapters H and K of Chapter 39. This is required by the Texas Clean Air Act, Texas Health Safety Code §382.056(a), but was not codified in existing notice rules in Chapter 116 which are being concurrently repealed. This subsection clarifies that which applications for changes to existing facilities must comply with notice requirements. This clarifies that changes to existing facilities for insignificant increases are not required to comply with notice requirements. The reference of insignificant emissions is an existing determination**

**criteria of the commission which establishes sources that are exempt from permitting requirements. Permit amendments which do not meet the statutory definition of modification, as changed by SB 1126, 74th Legislature, 1995, retain that exempt status.**

Brown McCarroll commented that proposed §39.403(b)(14)(C), which provided that the executive director can require certain air amendments to provide public notice, is an illegal delegation of authority to the commission and the executive director. The commenter also noted that the proposed rule preamble provided no explanation why this provision is necessary or even authorized under the multitude of statutory provisions. Further, Baker and Botts and Brown McCarroll commented that this subsection is vague, does not provide clear standards describing the circumstances under which additional notice would be required and, therefore, does not fairly apprise an applicant of the requirements for obtaining authorizations from the commission. They recommended deleting this provision.

**For clarity, the commission has not deleted this provision in response to the comment, however, §39.403(b)(14)(C) has been renumbered as §39.403(b)(8)(C) and some changes have been made to this rule. The commission adopts this subsection with revisions. The TCAA, §382.056(a) states “the commission may require publication of additional notice” which is implemented by this rule. The commission believes that the general public should have the opportunity to comment on actions which are likely to affect ambient air quality, public health and welfare, or actions where it would be in the public interest to provide notice. This requirement addresses the concerns of the TCAA as noted in §§382.056(a) and 382.002. In response to comment this rule has been**

**clarified to establish guidance on the foreseeable circumstances when notice would be required to ensure meaningful public participation in the circumstances which have been used in practice.**

The commission has updated §39.403(b)(8) to correctly reference that renewals for flexible permits must comply with notice requirements of Chapter 39 in accordance with TCAA, §382.055. This requirement was inadvertently left out of the proposed rule.

Section 39.403(b)(14) has been moved to §39.403(b)(8). In corrections published in the *Texas Register* at 24 Tex Reg 6572 on August 20, 1999, a correction to §39.403(b)(14)(B) replaced the phrase “modification of” with the phrase “changes to.” The commission has made revisions to §39.403(b)(8)(B) to accurately reflect the definition of modification in 30 TAC §116.110.

#### §39.403(c)

Section 39.403(c) lists those types of applications that are not subject to Chapter 39, including the following: 1) applications for authorizations under Chapter 321, except for applications for individual permits under Subchapter B; 2) applications for registrations and notifications under Chapter 312 for Sludge Use, Disposal, and Transportation; 3) applications under Chapter 332 for Composting; 4) applications under Chapter 122, relating to Federal Operating Permits; 5) standard permits under Chapter 116, Subchapter F; 6) exemptions from permitting and permits by rule under Chapter 106, with the exception of concrete batch plants, as described in §39.403(b)(10); 7) applications under §39.15; 8) applications for minor amendments under §305.62 (c)(2); 9) applications for Class 1 modifications of industrial or hazardous waste permits under §305.69(b); 10) applications for Class I modifications of

municipal solid waste permits under §305.70 (relating to Municipal Solid Waste Class I Modifications; 11) applications for Class 2 modifications of industrial or hazardous waste permits under §305.69(c); 12) applications for minor modifications of underground injection control permits under §305.72 for Underground Injection Control (UIC) Permit Modifications; 13) applications for minor modifications of Texas Pollutant Discharge Elimination System (TPDES) permits under §305.62(c)(3); and 14) applications for registration or notification of sludge disposal under §312.13.

Some of these subsections are recodifying the existing requirements of §39.15, including those actions under 30 TAC Chapters 312, 321, and 332. Other subsections, except for air applications, are adopted to mirror the regulatory requirements in §§305.62(c)(2), 305.69(b), 305.70, 305.69(c), 305.72, 305.62(c)(3) and §312.13 relating to sludge disposal. In addition, §39.15 has been incorporated into this subsection by reference to eliminate the duplication of creating a new §39.415 to mirror the existing requirements of §39.15. For air applications, Chapter 122 federal operating permits are required to publish notice to meet federal requirements and TCAA, §392.056. However, due to the unique nature of these applications, notice and opportunity for notice and comment hearing are required in 30 TAC Chapter 122, §122.320. Air standard permits are not required to publish notice as these actions are authorized under TCAA, §382.051(a)(5) and are not applicable under TCAA, §382.056. TCAA, §382.057 authorizes changes to existing facilities under exemption and does not require notice and opportunity for hearing, except for concrete batch plants as required by TCAA, §382.058. SB 766 authorizes construction of facilities under permits by rule and does not require notice and opportunity for hearing except for concrete batch plants as required by TCAA, §382.058.

Baker & Botts, Eastman, and TI commented that the proposed language concerning applicability in Section 39.403(b) and exclusions in §39.403(c) is unclear with respect to such activities and that this could be interpreted as expanding the types of action for which public notice is required under current law. In addition, Baker & Botts commented that §39.403 should clarify that registration of storage tanks under 30 TAC §334.7 and §334.127 and registrations of certain solid waste activities under 30 TAC §330.4 and §335.2 and other routine registrations and certifications are not subject to public notice. Eastman recommended that language be added to clarify that 39 Subchapters H-M do not apply to commission authorized permit exempt activities in 30 TAC 335.

**Section 39.403 (relating to Applicability) is intended only to incorporate the chapters and sections to which public notification applies. If any action is incorporated because of a reference in subsection (b), subsection (c) excludes them, if appropriate. If an application is not covered by subsection (b), there is no reason to exclude it in (c). If an action is exempt from a permit requirement in subsection (b), it is not applicable to notice requirements for permit applications. Section 39.403(c) has been revised to list some additional types of permits for which the notice requirements of Subchapters H-M do not apply. This rule is not meant to be all inclusive and actions for which there is no statutory or regulatory requirement for notice are not subject to this chapter.**

TI and Baker & Botts commented that the proposed rules also require a more comprehensive treatment of the more limited public notice requirements for corrections of permits, voluntary transfers of permits, minor permit amendments and permit modifications, including Class 3 modifications, in order

to conform with existing law and the unique requirements of Chapter 305, Subchapter D. Existing sections 39.15, 39.17, 39.105, 39.107, and 39.109, which will not be effective to applications that are administratively complete on or after September 1, 1999, should be re-adopted in the new notice rules.

**The commission has made revisions in response to this comment. Section 39.403(b) and (c) have been revised to specifically exclude additional actions which otherwise may be inadvertently included and to address existing §§39.15, 39.17, 39.105, 39.107, and 39.109. The commission has expanded §39.403(c) to be more explicit on those actions which are inadvertently included by (b) and provide generic wording if the list is incomplete so that actions should not be considered applicable if not required by statute or other regulation. Further, the commission has clarified §39.403(c)(2) for proper title reference.**

Merco commented that this subsection combines references to Chapter 312 and to the control of certain activities by rule and those authorization are excluded from the new public notice provisions under proposed §39.403(c)(2). Chapter 312 concerns sludge use, disposal, and transportation. The commenter suggested that the proposed rule be changed to read “applications for registrations and notification under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation).”

**The commission has made revisions in response to this comment and has used the suggested language.**

Brown McCarroll commented that §39.403(c)(5) is erroneous because neither air quality standard permits nor standard exemptions require an application. The commenter recommended that the term be replaced with "registration" in the case of standard exemptions, and the word "claim" in the case of standard permits.

**The commission does not agree with this comment. “Application” is defined in Chapter 3.**

**Therefore, no changes have been made in response to this comment.**

Baker & Botts commented that in §39.403(c)(6) the reference to §39.403(b)(11) should be to §39.403(b)(10).

**The commission has made the proposed revisions in response to this comment.**

*§39.403(d)*

§39.403(d) states that applications for initial issuance of voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code and initial issuance of permits for electric generating facilities under §39.264 of the Utilities Code are subject only to §§39.405, 39.409, 39.411, 39.418, 39.602, 39.603, 39.604, and 39.605 of Subchapter K. This is consistent with TCAA, §382.0519 and §382.05191 and the provisions of SB 7 (§39.264 of the Utilities Code). These permit applications are subject to notice, public comment, and public meetings, but not contested case hearings or requests for reconsideration of the executive director’s decision.

Brown McCarroll commented that §39.403(d) contains cross-references with erroneous titles. The commenter stated that exceptions in this subsection should also except any reference to requests for a contested case hearing, and add other cross-references to those sections of the rule where such requests are found.

**The commission has made revisions in response to this comment and have made the changes as suggested. Section 39.403(d) was revised by deleting requirements for Notice of Application and Preliminary Decision in §39.419. After further review of new Texas Health and Safety Code, §382.0519, as added by SB 766; and Texas Utilities Code, §39.264, as added by SB 7, it was determined that notice under §39.419 would never be required for VERPs and EGFs.**

Eastman and Brown McCarroll recommended that §39.403(d) be revised to include the exclusions noted in the “Section by Section Analysis” for Chapter 39; and to provide that applications for initial issuance of voluntary emission reduction permits and initial issuance of permits for electric generating facilities are subject to notice, public comment, and public meeting, but not contested case hearings or requests for consideration of ED’s decision.

**The commission has made revisions in response to this comment and has made the changes as suggested.**

Baker & Botts recommended that §39.403(d) be amended to reference §39.606 which is also applicable to the issuance of a voluntary emission reduction permit.

**The commission has made revisions in response to this comment and has made the changes as suggested.**

CPS commented, with reference to §39.403(d), that §§39.603 and 39.604 should not apply to EGFs but should only follow the notice requirements of 30 TAC Chapter 122.

**The commission does not agree with this comment. Chapter 122 is a separate authority for facility operation. Notice requirements are similar (i.e., Notice and Comment Hearing), but the mechanism for authorization is not identical for federal operating permits under Chapter 122 and other permit authorizations under Chapter 116. The commission believes the rules implement statutory requirements for the different types of actions and where possible, has strived for consistency and elimination of duplicative notice requirements. Therefore, no changes have been made in response to this comment.**

The commission has also revised §39.403(d) by deleting requirements for Notice of Application and Preliminary Decision under §39.419. After further review of new TCAA, §382.0519, as added by SB 766, and Texas Utilities Code §39.264 as added by SB 7, it was determined that second notice would never be required for VERP and EGFs.

*§39.403(e)*

§39.403(e) includes in one provision all of those sections in Chapter 39 that do not apply to radioactive materials licenses, and reflects the somewhat unique notice requirements for these applications. This

section states that radioactive material licenses under Chapter 336 of this title are not subject to the public notice requirements in §§39.405(c), 39.405(e), 39.413, 39.418, 39.419, and 39.420.

Radioactive material licenses are generally subject to applicable public notice requirements in Subchapter A, and specific public notice requirements under new Subchapter M. Subchapter M contains equivalent requirements for §39.405(c) and (f) in §39.705 and §39.711 respectively.

Requirements in §39.405(h) for broadcast notice of applications do not apply to applications for radioactive material licenses under Chapter 336. Additionally, as radioactive materials licenses are not affected by the changes in law made by HB 801, proposed requirements implementing HB 801 in new §39.420, relating to Transmittal of Executive Director's Response to Comments and Preliminary Decision, do not apply to Chapter 336 applications for radioactive material licenses. The changes made related to notice for radioactive materials licenses are primarily organizational in nature and are made to improve readability.

*§39.405. General Notice Provisions.*

Section 39.405 contains general notice provisions that apply to more than one program area. The commission has added short phrases to the beginning of each subsection for better organization and to clarify requirements. Section 39.405(a) includes the HB 801 requirement under Texas Water Code, §5.552 that Notice of Receipt of Application and Intent to Obtain Permit must be published within 30 days after the executive director declares the application administratively complete.

§39.405(a) allows the chief clerk to publish the notice and be reimbursed by the applicant if notice is not timely published by the applicant. The current rules contain this requirement. The commission

intends for the chief clerk to exercise this authority only when necessary to protect the public interest by ensuring that an application is timely processed, such as the case of a permit renewal when the renewed permit would contain more protective provisions.

To avoid undue delay in permit processing, §39.405(a) includes a provision that the executive director may suspend further processing or return the application for failure to publish notice in a timely manner or failure to submit copies of the notice and publisher's affidavit as required under §39.405(e). This procedure is already available for air quality permits. If an application is returned, a new permit application fee will not be required if the applicant resubmits the application within 6 months of its being returned. The provision for suspension or return of the application allows the executive director to prevent from further processing without an opportunity for early public involvement if the applicant fails to provide timely proof of notice.

Section 39.405(b) provides that the chief clerk may require the applicant to provide necessary mailing lists in electronic form.

Section 39.405(c) states when notice by mail is completed..

Section 39.405(d) allows a combination of notices to satisfy more than one section of this chapter as long as all applicable notice requirements are satisfied. This section maximizes the flexibility allowed for issuing notice while ensuring compliance with applicable requirements.

Section 39.405(e) requires an applicant to file proof of notice in the form of a copy of the published notice and a publisher's affidavit. The section imposes a 10 business day deadline for submitting a copy of the required published notice and a 30 calendar day deadline for submitting a publisher's affidavit with the chief clerk as proof of publication. The rule has been revised from the proposed rule to allow 30 calendar days after the last date of publication for the applicant to file the affidavit, rather than 10 business days. This revision was made to ensure that applicants have sufficient time to comply with the affidavit filing requirement. It is important to get verification of notice as soon as possible to ensure proper notification and protect the public interest by ensuring that an application is timely processed. The timely filing of this information is important so that the agency can determine whether there is a notice defect requiring republication. Furthermore, the timely receipt of this information is important so that the commission may determine the applicable comment period and be capable of relaying this information to the public when requested. While it may be difficult to file a publisher's affidavit within 10 business days following the publication of notice, it is within the applicant's control and ability to obtain and file with the chief clerk a copy of the notice as published in the newspaper. The commission believes that allowing 10 business days for this filing is reasonable.

Section 39.405(f) contains general publication provisions. Under HB 801, Texas Water Code, §5.552(d) mandates that applicants satisfy existing statutory notice requirements, in addition to HB 801 requirements for notices of applications. Section 39.405(f)(1) satisfies HB 801's requirement that the Notice of Receipt of Application and Intent to Obtain Permit be published in a newspaper of largest circulation in the county. Additionally, §39.405(f)(2) is necessary to ensure that solid waste

applications and injection well applications comply with the notice requirements of HB 801 and other applicable notice statutes, including Texas Health and Safety Code, §361.0791 and §361.0665.

In §39.405(f)(2), the commission has made a revision from the proposed rules to state that injection well applications, as well as solid waste applications, are subject to the publication requirements of §39.405(f)(2). Texas Water Code, §27.018(b) authorizes the commission to promulgate rules for the noticing of injection well applications. Injection well applications have been included and made subject to §39.405(f)(2) requirements in order to maintain consistency with current agency practice. Under current agency rules, injection wells disposing of solid waste are subject to hazardous waste notice requirements. Current agency rules for other injection wells track Texas Health and Safety Code Chapter 361 notice requirements applicable to industrial solid waste. By including injection wells in §39.405(f)(2), the rule achieves consistency in having injection well notices continue to track the solid waste notice requirements.

In §39.405(g), the commission has established the criteria for when a copy of an application must be placed in a public place in the county where the facility is or will be located. Section 39.405(g)(1) details when an administrative complete application must be in place for public review and how long it must remain available. Section 39.405(g)(2) details when a technically complete application and the executive director's preliminary decision must be in place for public review and that it must remain available until the commission takes action or refers the application to SOAH. This is required HB 801, TWC, §5.552(c)(2) and (e) and §5.553(c)(3) and (e); and TCAA, §382.056(b)(2), (d), (i)(3), and (j).

Brown & Potts recommended that staff review §39.405 to determine if certain references to Subchapters H-L inadvertently omit including Subchapter M relating to Public Notice for Radioactive Material Licenses.

**The commission has reviewed §39.405 and determined no revisions are necessary in response to this comment. The omission of references to Subchapter M was intentional in §39.405(c), regarding the general requirements for mailing and hand delivery of notice, and §39.405(e), regarding the general requirements for proof of publication of notice. These requirements do not apply to radioactive material licensing applications. Subchapter M contains other requirements regarding mailing or hand delivery of notice (§39.705) and proof of publication of notice (§39.711) for radioactive materials licensing applications.**

Henry, Lowerre proposed a revision to §39.405(a) to limit the circumstances when the chief clerk may cause notice to be published if the applicant fails to publish notice within the prescribed time period. Under the proposed revision, the chief clerk would have authority to publish the notice only in cases of revocation or suspension of permits. The commenter noted that the rules are intended to provide the public a full period of review. With respect to a Notice of Application and Intent to Obtain a Permit, HB 801 requires publication of notice within 30 days of an application being declared administratively complete. The comment included a recommended revision to the rule which would provide that an application would not be processed until Notice of Receipt of Application and Intent to Obtain Permit was published and that failure to publish the notice within the time required would subject the applicant

to an enforcement action for violation of Texas law. The commenter further recommended revising the rule to include a procedure for requesting an extension of the time period for publishing notice.

**The commission has not made any changes in response to this comment. Section 39.405(a) allows the chief clerk to publish the notice and be reimbursed by the applicant if notice is not timely published by the applicant. The current rules contain this requirement. The commission intends for the chief clerk to exercise this authority only when necessary to protect the public interest by ensuring that an application is timely processed, such as the case of a permit renewal when the renewed permit would contain more protective provisions. Section 39.405(a) includes authorization for the executive director to suspend further processing of an application and also to return an application if an applicant does not publish notice as required. The rule prevents prejudice to the public by authorizing the executive director to cease processing the application, and possibly to return the application, for an applicant's failure to timely publish notice. Accordingly, applicants reap no benefit from failure to publish notice in the time required. No additional punitive measures are necessary because there is no direct environmental harm. The commission further disagrees with the comment recommending procedures for seeking an extension of the publication time requirements because HB 801 does not provide for an extension of the 30 day publication deadline for notice of Receipt of Application and Intent to Obtain Permit.**

Brown McCarroll proposed that the heading of §39.405 should be revised to include the word "Notice" in the title of this section.

**The commission has made revisions in response to this comment and has made the change to the proposal as suggested.**

Jenkins & Gilchrist suggested that the agency include as part of the preamble to the proposed rules an explanation clarifying that proposed §39.405 and §39.418 do not prevent an applicant from publishing its Notice of Receipt of Application and Intent to Obtain permit *before* the administrative completeness review is complete. The commenter observed that there is no express requirement that the notices cannot be published *before* the application is deemed administratively complete. The commenter noted that including language in the preamble to clarify that an applicant is not required to wait until after the application is deemed administratively complete to publish its notice would allow notice to satisfy the requirements of both 30 TAC Chapters 39 and 305.

**The commission has made no changes in response to this comment. Publishing the notice required under §39.418 before an application is deemed administratively complete would not further the goal of meaningful early public participation. Before being declared administratively complete, an application may lack sufficient information to allow for a meaningful review by the public. If the application lacks sufficient information necessary for the public to formulate substantive comments and identify relevant and material issues, the Notice of Receipt of Application and Intent to Obtain Permit would not serve HB 801's objectives of enhanced early public participation.**

Brown McCarroll commented that §39.405(a) should be clarified as to the options available upon an applicant's failure to timely publish notice. The commenter questioned whether the rule as proposed could be interpreted to allow the chief clerk to publish the notice, while simultaneously, the executive director suspended processing. The commenter further stated that in those cases where the chief clerk causes the notice to be published, it is unclear if the applicant can be held responsible for filing the affidavit, as required by subsection (f). Assuming the options under the rule are mutually exclusive, the commenter requested clarification as to whether it is the executive director who has the discretion to determine whether to pursue one of the options.

**The commission has made revisions in response to the comment and has made revisions to the rule. Section 39.405(a) has been revised to clearly provide that the options available upon an applicant's failure to timely publish notice are mutually exclusive. The executive director may either (1) request that the chief clerk publish notice or (2) suspend processing of the application. The revisions to subsection (a) further clarify that the executive director exercises discretion as to which course of action may be followed. The revisions further clarify that the executive director is authorized to pursue these options for either a failure to publish or a failure to submit the required affidavits of publication.**

Merco, TI and Baker & Botts each commented that proposed §39.405(d), regarding applicability requirements should be deleted. The commenters noted that this provision was confusing and unnecessary because it addresses applicability after this subject has also been addressed in §39.403.

**The commission has made revisions in response to this comment and has deleted proposed §39.405(d) from the adopted rules and added its language to the applicability provisions of §39.403. Additionally, the commission has revised §39.403 to more comprehensively address applicability.**

Brown McCarroll commented that §39.405(f) is ambiguous as to the affiant required for an affidavit of publication. The commenter stated that if a publisher's affidavit is required, the commission should be aware that in some instances newspapers will not provide a publisher's affidavit within 10 business days as required by the rule. If an affidavit from the applicant is acceptable, the commenter believes the time line is reasonable; however, the commenter further states that applicant affiants will not be able to attest to the circulation patterns of the paper in which the notice was published. Because the executive director may suspend the processing of the application under §39.405(a) for failure to file the affidavit within the time required, the commenter requested that the commission ensure that it is within an applicant's power to comply with the time period established by the rule. Dow also commented that the proposed 10 business days time frame for filing the affidavit is not workable because of circumstances beyond the control of the applicant. Dow observed that 15-20 days typically pass before the publisher mails the signed affidavit. The commenter stated that an additional 5-10 days transpire before the applicant receives the signed affidavit because of the mailing process and any delays. The commenter further observed that holidays may cause delays in the filing of the affidavit. Accordingly, the commenter believed that 30 calendar days from the date of notice should be the required deadline for the filing of the affidavit.

**Because of organizational changes, proposed §39.405(f) is adopted as §39.405(e). The commission has made revisions in response to Brown McCarroll's comment regarding ambiguity in the proposed rule as to the required affiant. The rule has been revised to specify that an affidavit from the publisher is required. The rule has been clarified further to provide that the chief clerk shall file the affidavit in instances where the chief clerk causes notice to be published under §39.405(a)(1). The commission further agrees with the comments of Brown McCarroll and Dow to the extent they recommend revising the time period required for the filing of the publisher's affidavit to allow an applicant more time. The rule has been revised to require the filing of the publisher's affidavit within 30 calendar days after the last date of publication. However, because of the need for timely information concerning publication, the commission has revised the rule further to include a requirement that the applicant file a copy of the published notice (tear sheet) showing the date of publication and name of newspaper within 10 business days after the last date of publication. The timely filing of this information is important so that the agency can determine whether there is a notice defect requiring republication. Furthermore, the timely receipt of this information is important so that the commission may determine the applicable comment period and be capable of relaying this information to the public when requested. While it may be difficult to file a publisher's affidavit within 10 business days following the publication of notice, it is within the applicant's control and ability to obtain and file with the chief clerk a copy of the notice as published in the newspaper. The commission believes that allowing 10 business days for this filing is reasonable.**

Brown McCarroll commented that §39.405(g) inadvertently states public notice for air permit applications must be published in a newspaper of largest circulation. The commenter noted that Texas Health and Safety Code, §382.056(a) provides that notice for air permit applications shall be published in a newspaper of general circulation in the municipality nearest to the proposed location of the facility, and that §39.603 correctly sets forth this requirement.

**Because of organizational changes and renumbering, proposed §39.405(g) is now §39.405(f). The commission has made revisions in response to this comment and has revised adopted §39.405(f)(1) to clarify that newspaper criteria for air applications is listed in subchapter K.**

Baker & Botts commented that determination of which newspaper has the largest circulation in a given county, as required by proposed §39.405(g), has sometimes proven difficult based on the various circulation figures that are available for a newspaper. The commenter suggested modifying this phrase to refer to paid subscriptions within the county for weekday, as opposed to weekend, newspaper delivery.

**The commission has made no changes in response to this comment. The commission believes that largest circulation is commonly understood to mean total number of subscriptions and that such information is easily accessible.**

Baker & Botts further commented that with respect to solid waste applications, HB 801 notice requirements and existing law are satisfied by publication in the newspaper of largest general circulation

that is published in the county, or, in the absence of such a newspaper, the newspaper of largest general circulation in the county. The commenter stated that there is no need for solid waste applicants to be subject to two separate notice requirements under proposed §39.405(g)(1) and (2). The commenter states that there is no express will of the Legislature to require multiple publication in both and in county and out of county published newspaper with largest circulation in the county. The commenter further stated that this comment applies to the notices required under §§39.418, 39.501(b), 39.501(c), 39.501(g)(2), 39.503(b), 39.503(c), 39.503(e), 39.503(f); 39.651(c), 39.651(d), 39.651(e) and 39.653(d). TI also commented that §39.405(g) potentially requires applicants to publish various notices in multiple newspapers and suggests that HB 801 publication requirements be harmonized with the more precise notice requirements of Texas Health and Safety Code, Chapter 361.

**The commission has made no changes in response to these comments. If one newspaper is *published in the county*, yet a second paper that is not published in the county is the newspaper of *largest circulation in that county*, an applicant would be required to publish the Notice of Receipt of Application and Intent to Obtain Permit under §39.418 in the first paper to satisfy Texas Health and Safety Code, Chapter 361 requirements and publish in the second paper to satisfy HB 801 requirements under Texas Water Code, §5.552(b)(1). While the commission has attempted to harmonize statutory notice requirements when possible, the express provisions of Texas Water Code, §5.552(b)(1) prevent the commission from being able to provide absolute assurance that an applicant will never be required to publish notice under §39.418 in more than one paper. In addition, under HB 801, Texas Water Code, §5.552(d) requires applicants to satisfy existing statutory notice requirements, in addition to HB 801 notice requirements for notices of**

**applications. The implementation of HB 801 increases the chances of an applicant being required to publish notice in more than one paper only with respect to the §39.418 Notice of Receipt of Application and Intent to Obtain Permit for solid waste and injection well applications. With respect to subsequent notices which may be required for these applications, HB 801 does not impose specific requirements regarding the newspaper that must be used for publication. For these subsequent notices, the sections of Subchapters I and L cited by the commenter incorporates the requirements of §39.405(f)(2); therefore, publication under these sections is only required to satisfy the existing requirements of Texas Health and Safety Code Chapter 361, including §§361.003(24), 361.079, 361.0791(e), 361.080(b), and 361.081(c).**

Eastman commented that §39.405(g) should be revised to allow an applicant whose facility includes contiguous property in two counties to publish notice only in the newspaper with the largest circulation in one of the counties and in the vicinity of the facility.

**The commission has made no changes in response to this comment and has no statutory basis for making the requested change. The notice requirements in question are derived from Texas Water Code, §5.552(b)(1) (39.405(f)(1)); and Texas Health and Safety Code, §§361.0665, 361.0791(e), 361.080(b), and 361.081(e) (39.405(f)(2)). None of these statutes grant the commission authority to waive notice requirements in each affected county when a facility is located in contiguous counties. Furthermore, under Texas Water Code, §5.551(2)(d), applicants must satisfy all existing statutory notice requirements under Chapter 361 in addition to the notice of application requirements under HB 801.**

Eastman commented that §39.418 does not contain a requirement to make a copy of the application available to the public. Eastman recommended revising the rule to incorporate this requirement.

**To implement Texas Water Code, §5.552(e) and Texas Health and Safety Code, §382.056(d) requirements that a copy of the application be available to the public in the affected county, the commission has added a new §39.405(g)(1). The commission included the requirement in the General Notice Requirement section as the applicant's obligation to maintain a copy of the application in a public space is a continuing obligation during the permitting process. This new subsection also addresses the time period that the copy of the application must be made available to make it clear to applicants and interested persons the time during which the permit application should be available. Although HB 801 does not address the time period during which the application should be available to the public, the commission believes that to facilitate more informed public comments and more refined requests for reconsideration and contested case hearing, the application should be available until the commission has taken action on the application or participants in the process can avail themselves of discovery in the contested case hearing process. Procedures related to designating application information confidential are also included. The commission recognizes that there are circumstances where portions of the application are confidential and subject to an Attorney General opinion confirming this confidential status, may be withheld from disclosure in response to a public information request under the Public Information Act. The TNRCC has procedures in place to separate confidential portions of the application from those that are available to the public. However, the TNRCC believes that the application made available to the public, while not informing the public of the**

**substance or nature of the confidential portion of the application should reflect at least the existence of the confidential portions of the application. In this way, the confidentiality needs of applicants are respected while the public's right to know is likewise is observed.**

Eastman commented that §39.419(e) is not clear as to the timing of making a copy of the permit application available for review and copying. The commenter suggested added timing requirements.

**This requirement has been moved from §39.419(e) to §39.405(g)(2). The commission has made revisions in response to this comment. Because of reorganization, the requirements that the text of notice give details of the public place location where the application will be available for review and copying are now in §§39.411(b)(8) and (c)(5). In addition, §§39.405(g) as adopted now includes specific requirements relating to the time period that the copies of the application shall be available for review.**

Eastman commented that §39.419(e), as well as §39.411(b)(14), should be clarified to state that a “public place in the county” is not limited to a publicly owned building. The commenter believes that any building reasonably accessible to the public in the vicinity of the facility should be allowed because, in some instances, the nearest publicly owned building may be distant from the facility.

**This section has been moved from §39.419(e) to §39.405(g)(2). The commission has made no changes in response to this comment. The commission believes that to ensure that a building is reasonably accessible, only publicly owned or operated places should be used for the placement of**

**applications for review and copying. In addition, the commission has no way to ensure that the public would have access to private properties.**

*§39.407. Mailing Lists.*

Section 39.407 (Mailing Lists) mirrors the language in existing §39.7 requiring the chief clerk to maintain mailing lists of persons requesting notice of an application and allowing persons who have participated in past agency permit proceedings to request to be on a mailing list. All references to “commission” have been replaced with “agency” in order to be consistent with the terms defined in 30 TAC Chapter 3. As defined in the commission’s rules, “agency” means the commission, the executive director, and their staffs. The rule has been adopted without substantive changes from §39.7 or from proposal.

TI and Baker and Botts commented, with reference to §39.407, that the names and addresses on facility mailing lists change frequently. Both of these commenters indicated that a periodic schedule should be established for confirmation of interest in remaining on the list. Alternately, the Chief Clerk should treat each permitting action separately and any person requesting to be added to facility’s mailing list should be added for the duration of a particular permitting action.

**The commission has made no change in response to this comment. The commission agrees that the names and addresses on facility mailing lists do change frequently and the suggestion to include a periodic schedule for updating the mailing list to confirm interest may merit further consideration. However, this provision was not included in the publication of the rule proposal**

**and the commission believes that inclusion of a such a requirement would best be accomplished after opportunity for comment period. The commenters' suggested alternative that the rules provide for the chief clerk to treat each permitting action separately for purposes of maintaining a mailing list would not be consistent with the requirements of §39.413(a)(8) which incorporates by reference requirements of 40 CFR §124.10(c)(1)(ix). Finally, the rules as adopted under §39.407 authorize the chief clerk to, from time to time, request confirmation that persons on a mailing list wish to remain on the list.**

Henry, Lowerre commented that §39.407 should be revised to include: enforcement actions; that the chief clerk and Office of Public Assistance shall publicize the opportunities to request to be included on such mailing lists; that mailing lists maintained by the chief clerk shall include mailing lists for individual facilities; types of facilities and types of permits; and that mailing lists shall be used to provide notice for actions under Chapters 26 and 27, Texas Water Code; and Chapters 361, 382 and 401, Texas Health and Safety Code. The commenter also stated that the TNRCC is at risk of losing authorization for its Title V Federal Operating Permit (FOP) Program under 40 CFR §71.27(d)(3)(E)(3) because of its failure to provide for these types of public outreach.

**The commission has made no change in response to this comment. New §39.413(a)(8) incorporates the mailing list requirements set forth in 40 CFR §124.10(c)(1)(ix). No further rule changes are necessary to comply with federal program approval requirements. With respect to the suggestion that §39.407 be revised to include mailing lists for enforcement actions, the commission has not amended this section. However, the commission has amended §39.425 to**

**specifically provide that persons may request to be included on mailing lists for the pleadings in the formal enforcement actions.**

*§39.409. Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing.*

Section 39.409 is similar to existing §39.9 and requires commission notices to inform the public of any applicable deadlines to submit public comment, and, if applicable, requests for reconsideration, contested case hearing, or notice and comment hearing. The new rule has been clarified slightly since proposal to reference that the deadline for comments, which must be stated in the rule, is derived from new §55.152 of this title (relating to Public Comment Period). The new rule adds deadlines for filing requests for reconsideration (a new public participation mechanism allowed under HB 801) as well as requests for notice and comment hearings because some air applications which currently fall within the scope of Chapter 39 include this requirement. The provisions are necessary to implement the requirements of HB 801 that require the commission, by rule, to establish the time period for filing hearing requests and requests for reconsideration. Under the HB 801 requirements of §5.552, Texas Water Code and §382.056, Texas Health and Safety Code, notices are required to describe the procedural rights and obligations of the public. The rule is adopted without further changes.

EPA commented that verification is needed that §39.409 applies to air quality permits. Further, EPA commented that to be approvable as a SIP revision, a minimum of 30 days public notice and opportunity for comment is required before there is final action on the application. EPA did not believe the rule so provides.

**Notice given under this chapter includes notice for air applications, as set forth in §39.403 (relating to Applicability). This section is intended to be notice to all applicants that are required to publish notice under Chapter 39, including air applications which are subject to Subchapter K. Changes have been made in Chapter 39 to clarify what is required to be in a notice (§39.411 and §39.603). The requirement that 30 days for public notice and opportunity for comment is required before final action on the application is found in new §39.603(a) and (b). In addition, clarifications have been made to §55.152 and that the public comment period shall end 30 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit, or, if Notice of Application and Preliminary Decision is required, then the comment period shall end 30 days after the last publication of this notice. Further, because the commission recognizes that public meetings may be held after the last publication, the comment period can be extended to the close of any public meeting. In addition, the complete permit application file is always available for public inspection in commission offices. The commission believes these rules meet the requirements for SIP approval.**

Henry, Lowerre commented that the deadlines for public participation need to be flexible and that the rules need to provide for extensions for the filing of public comments, hearing requests and motions for reconsideration.

**The commission has made no change in response to this comment. The commission notes that the rules as adopted provide for the commission to extend the time for a request for reconsideration and contested case hearing when there are circumstances where the requestor is seeking specific**

**relief from the commission. While the rules do not allow for extensions of time to file public comment, any person who did not file timely comments may file a motion for rehearing or motion to overturn (previously motion for reconsideration). In addition, the rules provide that the public comment period is automatically extended to the close of any public meeting. Therefore, when there is significant public interest in an application that results in the holding of a public meeting, extended time periods for public comment will be provided. HB 801 and the commission rules implementing this bill are intended to encourage early public participation and the early resolution of disputed issues between applicants and protestants. The legislation allows for ample and expanded opportunities under the HB 801 process for public notice and comment periods. The commission believes it is appropriate to balance the competing need for defined permit processing time frames and public participation in the permitting process as reflected in adopted in Chapter 39.**

*§39.411. Text of Public Notice.*

Section 39.411(a) is similar to existing §39.11. However, it adds a new requirement that applicants shall use the notice text provided and approved by the agency. The executive director may approve changes before notice is given.

Section 39.411(b) lists the required contents for notice of application and intent to obtain a permit. Among other requirements (for example, a description of the location of the proposed activity), the rule also requires descriptions of public participation procedures. The section also provides for certain

program-specific requirements. In addition, the commission has added language pertaining to Class 3 modifications.

Section 39.411(c) lists the requirements for a notice of application and preliminary decision, including: (1) the items required in a notice of receipt and intent to obtain permit under §39.411(b); (2) a summary of executive director's preliminary decision; (3) the location in a public place in the county where the facility is located at which the application and executive director's preliminary decision are available for review and copying; and (4) the deadline to file comments or request a public meeting.

Section 39.411(d) states the required text of notice for public meetings and hearings. For notices of public meetings, the notice should include a brief description of public comment procedures, including how comments may be submitted and, if there exists an opportunity for hearing, that only relevant and material issues raised during the comment period can be considered if a hearing is granted.

These rules mirror the current requirements under §39.11; incorporate the requirements imposed under HB 801 (TWC §§5.551(c) and 5.553(c) and TCAA, §382.056(b) and (g)); and includes new requirements for notices of air applications. The new requirements adopted for notice text of air applications include which criteria pollutants will be emitted by the project and information regarding how a person might be affected by the emissions of the project. These requirements are authorized by TCAA, §382.056(b)(8) and are included to provide meaningful information to the public about the project and how to participate in the commission's decision.

Brown McCarroll noted that §39.411 lists 18 possible types of information that may be required in the text of any one of the myriad notices required under other rules found in Subchapters H-M of Chapter 39. The commenter expressed concern that none of those other rules specify which of the 18 types of information is required for the particular notice that is the subject of the rule.

**The commission has made revisions in response to the comment. To provide requested clarification, §39.411 has been reorganized to specify when notice is triggered and what information is required for each type of notice.**

Baker & Botts commented that §39.411 should encourage the timely identification of issues and concerns in response to early public notices so that such matters can be addressed in the technical review.

**The commission agrees that the rules should encourage identification of issues at an early stage of permit review. To clarify this, the commission has added language in §39.411(b)(4)(A) and (B) to be more precise regarding how the text of the Notice of Receipt of Application and Intent to Obtain Permit must describe the procedures for public comment. This change is consistent with HB 801's goal of encouraging early public participation in the environmental permitting process. For example, an applicant is required to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. The applicant must also place a copy of the application and the executive director's preliminary decision at a public place in the county and the executive director is authorized to hold public meetings. The executive**

**director is also required to prepare responses to relevant and material public comment received in response to the notices. All of the above examples describe provisions in the commission's rules implementing HB 801 which encourage earlier public participation.**

Brown McCarroll suggested that the commission adopt rules that delineate the exact information that is required for each specific type of notice.

**The commission has made revisions in response to this comment. Section 39.411 has been revised to clarify the information that must be included in each specific type of notice.**

Brown McCarroll suggested that the proposed §39.411 be replaced with a new §39.411 titled "Notice of Hearing." They suggested that the new rule list the applicable information that will be required in the text of the notice, including items listed in proposed §39.411(b)(1)-(3), (7), (8), (11), and (18) as well as the SOAH Docket Number (if known at the time notice is published, or otherwise given), and SOAH's address and phone number. The comment concluded by suggesting that the rules in Subchapters I-M also cross reference this new rule; indicating that the new rule will govern what the notice of hearing will contain. The rules affected are: §§39.501(e), 39.503(e), 39.551(e), 39.651(e), 39.652(d), and 39.709.

**The commission agrees that the information required in each type of notice for each type of permit should be clear. As a result, §39.411 has been revised to clarify the information for each specific type of notice. Section 39.411(d) has been added to specifically address the requirements**

**for notice of meetings and hearings. All subchapters of Chapter 39 cross-reference §39.411 for appropriate text of notice requirements.**

Henry, Lowerre commented that Subchapters H-M, in §39.411(b) and §39.413, must state explicitly that notice is required and identify the type of notice required.

**The commission agrees that the rules should be clear about when and what type of notice is required for each type of permit. As a result, §39.411 has been revised to clarify when notice is required and then necessary information for each notice type. All subchapters of Chapter 39 cross-reference §39.411 for appropriate text of notice requirements.**

The EPA commented that §39.411 should state that an approvable SIP must provide notice of availability of the State's analysis of the application. The commenter indicated that this requirement appeared to be missing from the proposed rule.

**The commission's analysis of applications for federal preconstruction reviews under Prevention of Significant Deterioration (PSD), Nonattainment (NA), or Hazardous Pollutant Major Sources (FCAA §112(g)) are provided by §39.419 notice requirements to meet all federal program requirements. To address 40 CFR §51.161(a) and (b) for all other construction and modification application reviews, the applications and files are available for public inspection in at least one location in the area which may be affected by the emissions from a facility. This file contains the commission's analysis of the effect of construction or modification on ambient air quality,**

**including the commission’s preliminary determination on the application. In accordance with 40 CFR §51.161(b)(2), under §39.418 notice requirements, there is a 30 day comment period on the application, which all facilities with new construction or modification must provide. The commission has also added §55.152(b), which extends the public comment period to beyond the 30 days listed in the newspaper publication to the close of any public meeting. The TCAA, §382.056(l) requires the commission to respond to relevant and material issues raised by the public during the §39.419 notice on the preliminary decision. The commission has expanded this requirement in §39.420 to require responses to comments received from either the notice under §39.418 or the notice under §39.419 to ensure that the general public has the opportunity to comment on the commission’s preliminary decision and application analysis if any interest is expressed for a project. If any member of the general public requests to be on a mailing list or comments on the application, they are mailed sent the executive director’s preliminary decision and analysis of the application and provided an additional 30 day opportunity to comment, request a reconsideration of the executive director’s decision, or request a contested case hearing.**

Jenkins & Gilchrist commented that the language in §39.411(b)(4) should be revised to clarify that the “relevant and material issues” referred to in this paragraph are those *disputed factual* issues that are “relevant and material to the Commission’s decision on the application” in accordance with TWC, §5.555(d)(1) and (3). The commenter suggested language.

**The commission has made the revisions requested by this comment and the text of notice in §39.411(b)(4)(B) has been amended to clarify that the comments which will be considered by the**

**commission in granting a hearing request must be relevant and material to the commissions' decision and disputed factual issues.**

Henry, Lowerre commented that §39.411(b)(4) or (10) should include “a description of procedures for public comment and request for reconsideration processes and procedures for submitting comments and requests and for submitting requests for extensions of time for submitting comments or requests for reconsideration...” The comment implicitly requested adding to Chapter 39 procedures for requesting extensions of time for submitting comments or requests for reconsideration.

**The commission does not agree with the comment that procedures for requesting extensions should be added to Chapter 39. Public comment periods are established in §55.152 as beginning at the first day after the Notice of Intent and continues until the end of the comment period for any Notice of Preliminary Decision or at the close of any public meeting. This is an extensive period of time for the general public to make comments on an application. The time frames provided for requesting reconsideration and hearings are under §55.201 which allows for an extension. As a result, none of these time periods need to be addressed in Chapter 39. However, §39.411(b)(4) has been revised to include a brief description of the public participation procedures and outlines the basic requirements and limitations of public comments in response to this comment.**

Henry, Lowerre recommended that §39.411(b)(5) include a description of “the procedures for requesting a public hearing, reconsideration or a notice of the specific requirements for adequate

requests, and a description of the criteria used by the commission to determine whether to grant such requests.”

**The commission agrees that the notice should clearly state the procedures for public involvement in the permitting process. In response to this comment, §39.411(b)(5) has been revised to require a brief description of the public’s opportunity for public meetings, hearings, or requests for reconsideration and outlines the basic requirements for consideration by the commission. Sections 39.411(b)(5) and (c)(6) have also been revised to describe the criteria required by HB 801 for holding a public meeting. The text of §39.411(b)(5) was changed to make it clear that notices should specifically tell people they can request a public meeting as well as a contested case hearing.**

Henry, Lowerre recommended that §39.411(b)(6) be revised to include a statement that requests must include “a specific or general description of the location and activity of the requestor at that location which is the basis of the claim of being an “affected person.”

**The commission has made revisions to the rules in response to this comment. Section 39.411(b)(10) has been clarified to describe what information a requestor should provide to establish how they might be an “affected person” for hearing requests which may be submitted for air applications in response to Notice of Receipt and Intent to Obtain Permit. The other solicited opportunity for requesting a contested case hearing occurs after the transmittal of the executive director’s response to comments, so this information has also been included in §55.156.**

Henry, Lowerre recommended that §39.411(b)(7) be revised to include “a description of the public meeting process, procedures for requesting a public meeting and the criteria that will be used by TNRCC to determine whether to hold a public meeting.”

**In response to this comment, §39.411(b)(5) and (c)(6) have been revised to describe the criteria required by HB 801 for holding a public meeting which includes any requests by a state legislature or if there is significant public interest in the application.**

Brown McCarroll recommended that §39.411(b)(10) be modified for consistency (see, e.g., subsection (9)) and clarity, to indicate that the deadline to file requests for reconsideration or hearing do not always apply. The commenter proposed the following modification: “(10) the deadline to file comments, or if applicable, requests for reconsideration or hearing;”

**The commission has made revisions in response to this comment. The rule has been changed to note that requests for hearing or reconsideration are not applicable at this point in the process and may occur only in response to the executive director’s response to comments. This is included in §39.411(c)(3).**

To further improve the clarity of the notice requirements, the commission reorganized §39.411(b). As a result of this reorganization, there were several changes. The following changes are intended to include all air application specific issues§39.411(b)(10): previous §39.411(b)(6) was moved to

§39.411(b)(10); statement about location of hearing requester relative to proposed facility was moved from §39.411(b)(6) to §39.411(b)(10)(B) because only air applications provide opportunity to request a contested case hearing with this notice; §39.411(b)(10)(B)(i)-(iv) were added to clarify the information needed from hearing requesters; and §39.411(b)(10)(C) added the words “contested case” for clarity and consistency.

Eastman recommended that §39.411(b)(14) be clarified to state that a “public place in the county” is not limited to a publicly-owned building. They suggested that any building reasonably accessible to the public in the vicinity of the facility should be allowed. This would be preferable to them since, in some counties, the nearest publicly-owned building may be distant from the facility.

**The commission does not agree with these comment. In order to ensure that a building is reasonably accessible, only publicly owned or operated places should be used for placement of the applications for review and copying. This especially important due to the applicability of Americans with Disabilities Act requirements for public buildings. In addition, the commission has no way to ensure that the public would have access to private properties. Due to reorganization, the requirements that the text of notice give details of the public place location are now in §39.411(b)(8) and (c)(5).**

Eastman commented that, in cases when the applicants have a contiguous facility which overlaps into another county, the applicant should be allowed to place one permit application in a public place in the

vicinity of the facility to satisfy this requirement. They note that it would be burdensome to require this in both counties.

**The commission does not agree with these comment. The text of HB 801 explicitly requires that the application be placed “at a public place in the county in which the facility is located or proposed to be located.” As a result, the commission has made no change in response to this comment.**

Brown McCarroll and Baker & Botts commented that §39.411(b)(16)(A) requires all public notices for air permit applications to list all criteria pollutants and pollutants regulated under various state standards. Brown McCarroll questioned if the commission intended that the list only include those air contaminants for which authorization is sought in the application. If not, the rule would require every notice for any facility to contain the same list of air contaminants. Brown McCarroll recommended that the commission require the notice to list "regulated air contaminants emitted in quantities greater than *de minimis* levels." Baker Botts suggested that only those criteria pollutants for which the permit applications seeks authorization to emit should be required to be identified.

**The commission has made revisions in response to this comment regarding which pollutants must be listed in the notice, and has changed §39.411 to reflect this comment. *De minimis* levels are not defined in these rules or the statute, therefore the commission can not make the requested change. It should be noted that, according to new §39.411(b)(10)(A) the notice need only list pollutants “for which authorization is sought in the application.”**

The commission created §39.411(c) to list all applicable text information which is needed for the Notice of Application and Preliminary Decision. During the reorganization of this section the following changes were made: (c)(2) moved from (b)(4) with clarifying revisions; (c)(3) moved from (b)(9) with revisions to note that action can occur by Executive Director if timely hearing or reconsideration requests were not received and that the time period for such requests will be after transmittal of the Executive Director's decision and response to public comments; (c)(4) moved from (b)(11) with a revision that states the information will include a summary (not just a statement) of the Executive Director's preliminary decision; (c)(5) moved from (b)(14) with clarification that the application must be updated with all additional information; (c)(6) moved from (b)(10) and revised to clarify that notice should solicit requests for public meeting, but not requests for reconsideration or hearing (except for air which is covered under (b)(16)); (c)(6) also changed to specify how the public can request a public meeting; and (c)(7) moved from (b)(13).

The commission created §39.411(d) to list all applicable text information which is needed for notice of public meetings or hearings. During the reorganization of this section the following changes were made: (d)(1) includes applicable information from (b); (d)(2) is moved from (b)(7) with revisions to eliminate redundancy; and (d)(3) based on (c)(2) with revisions to delete requirement of font size (not required by statute).

The following changes were made to clarify what information is required in the Notice of Application and Preliminary Decision, not the Notice of Receipt of Application and Intent to Obtain Permit: previous §39.411(b)(9) was moved to (c)(3); previous 39.411(b)(10) moved to (c)(6); previous

§39.411(b)(11) moved to (c)(4); and previous §39.411(b)(13) moved to (c)(7); and remaining requirements for updated and complete application and preliminary decision were moved to (c).

Previous §39.411(b)(7) was moved to (d)(2) since it is only applicable to meetings and hearings

*§39.413. Mailed Notice.*

Section 39.413 (Mailed Notice) is similar to existing §39.13, except that the reference in §39.13 provided that the section does not apply to applications for radioactive material licenses is removed since portions of §39.413 are now applicable to radioactive material licenses under §39.705. This change is necessary to clarify and maintain consistency in the interpretation and application of commission rules.

Brown McCarroll commented that §39.413 contains overlapping and confusing requirements.

**The commission has made revisions in response to this comment. As adopted, the rule recognizes that there may be applicable program-specific mailing requirements. Changes include updating §39.413(7) to include a corrected reference for a rule adopted on July 14, 1999.**

Henry, Lowerre recommended that §39.413 be revised to provide that the applicant shall notice as appropriate.

**The commission does not agree with the specific language suggested in this comment, however, §39.413 has been revised to refer to the respective subchapters for special instructions regarding these mailed notices. The circumstances when applicants are required to mail notices are very limited and instead of placing those requirements in this section, the rules in the relevant subchapters include those requirements.**

*§39.418. Notice of Receipt of Application and Intent to Obtain Permit.*

§39.418 (Notice of Receipt of Application and Intent to Obtain Permit), describes the requirements and procedures for an applicant to publish the notice of receipt of application and notice of intent to obtain a permit, a new requirement created by HB 801 in TWC, §5.552 and TCAA, §382.056(a). These rules implement this newspaper publication requirement in different ways for different programs. The applicant is required to publish the notice of intent to obtain a permit once in the newspaper of largest circulation in the county, except for air applications which publish in a paper of general circulation in the municipality nearest the facility. Slightly different newspaper publication requirements apply to solid waste permit and injection well applications to satisfy both the amendments made by HB 801 and Texas Health and Safety Code, Chapter 361 requirements, and maintain consistency between solid waste and injection well notice requirements. The chief clerk will mail this notice to those listed in §39.413, and for air applications, the chief clerk will also mail notice according to §39.602. §39.418 is consistent with the explicit requirement of HB 801 that provides that applicable public notice requirements under Chapters 26 and 27 of the TWC 361 of the Health and Safety Code.

Brown McCarroll commented that the commission should adopt rules that delineate the exact information that is required for each specific type of notice. By way of example, the commenter submitted proposed revisions to §39.418 intended to clarify the required content of that notice.

**The commission agrees that the rules as proposed needed clarification regarding the content and action requirements for specific notices. Accordingly, §§39.411, 39.418, and 39.419 have been revised to clarify text and action requirements for each type of notice. Each of Subchapters I-M has now included specific provisions requiring notice pursuant to §§39.418 and 39.419. When a specific type of notice is required in each of the Subchapters, references have also been included as to the required contents of the specific notice by reference to the pertinent subsections of §39.411. Because of these changes, §§39.411, 39.418, and 39.419 have been reorganized.**

Baker & Botts and TI commented that the failure to publish the Notice of Receipt of Application and Intent to Obtain Permit within 30 days of administrative completeness, as required under §39.418, should be excused if the chief clerk experiences backlogs which prevent the timely mailing of instructions for public notice to the applicant. Brown McCarroll also commented that the rule is confusing as to exactly when the requirement to provide notice is triggered. The commenter suggested that the 30 day time period for publication of notice begin upon an applicant's receipt of the instructions for notice from the chief clerk.

**The commission agrees with the comment in general and believes that applicants should not be penalized because of any delays in the mailing of the text of notice from the chief clerk's office. In**

**response to this comment, the commission will implement operational changes to ensure that the determination of administrative completeness and the notice for publication is forwarded to applicants as soon as possible. The rule has been revised in subsection (a) to clarify that the determination of administrative completeness and the notice to be published will be sent to the applicant concurrently.**

EPA commented that §39.418(b)(3) provides that subdivisions (1) and (2) do not apply to air applications, but rather notice is to be given as provided in Subchapter K. The commenter noted, however that Subchapter K references §39.418 which, again, excepts air applications from the notice requirements which are stated in that section. Because of these circular provisions, it appears to the commenter that the rules contain no requirements providing for the Notice of Receipt of Application and Intent to Obtain Permit on an air application. Baker & Botts & TI commented that the reference to mailed notice for air applications in §39.418(b)(3) was redundant and confusing because of its reference to the mailed notice requirement of Subchapter K. Baker & Botts and TI recommended that the subsection be deleted.

**The commission has made revisions in response to the comment. Section 39.418(b)(3) has been revised to specify and clarify that air permit applicants must comply with each of the specific Subchapter K notice requirements listed when giving notice under §39.418. Specifically, applicants for air permits are required to publish newspaper notices under §39.603 and §39.604 and the chief clerk mails notice under §39.602. The commission believes the rule has been appropriately clarified and does not need to be deleted.**

Baker & Botts and TI commented that §§39.418, 39.419, and 39.420 should be prefaced with the phrase “when required by and subject to Subchapters I through M.” The commenters stated that the agency should only include the general requirements applicable to public notices in Subchapter H. The commenters believe that specific requirements to give notice should be set forth separately for each media and should be contained only in Subchapters I - M.

**The commission has made no changes in response to these comments. Each of Subchapters I-M has now included specific provisions requiring notice pursuant to §§39.418 and 39.419. When a specific type of notice is required in each of the Subchapters, references have also been included as to the required contents of the specific notice by reference to the pertinent subsections of §39.411. Because of these clarifications, the additional suggested revisions are not necessary.**

In §39.418(b)(4), the commission has revised the reference to §39.411 to now reference §39.411(b) in order to achieve more specificity and clarity.

In §39.418(b)(1), the commission has revised the rule to reference that injection well applications are subject to §39.405(f)(2).

*§39.419. Notice of Application and Preliminary Decision.*

Section 39.419 (Notice of Application and Preliminary Decision) follows the requirements in Texas Water Code, §5.553 and Texas Health and Safety Code, §382.056(g), as added by HB 801. It requires

that, after technical review is complete, the executive director files the preliminary decision and the draft permit with the chief clerk, except for certain air applications that follow different procedures specified in §39.419(e). It requires that an applicant publish notice of the preliminary decision in a newspaper at least once in the same paper as the notice of intent unless otherwise required in Chapter 39. The requirement that an applicant publish in the same newspaper as that used for the notice of intent is established as a matter of convenience and consistency. Section 39.419 also includes a list of those circumstances where an applicant for an air quality permit is not required to publish notice of the preliminary decision consistent with the language in TCAA, §382.056(g), as amended by HB 801. Applicants would not have to publish this notice if the following occurs: (1) as a result of publication of Notice of Receipt of Application and Intent to Obtain a Permit, no hearing requests have been received or all hearing requests have been withdrawn by the time the executive director has made a preliminary determination; or (2) the application is for any amendment, modification, or renewal application which does not result in an increase in allowable emissions nor the emission of a new air contaminant unless the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations; or the application is for initial issuance of a voluntary emission reduction permit or an electric generating facility permit. In accordance with Texas Health and Safety Code, §382.056(p), §39.419(e)(3) has been added to require Notice of Preliminary Decision (for air quality permit applications) to meet federal program requirements. This includes NA permits, PSD permits, and actions relating to Hazardous Air Pollutants for Major Sources. The

commission notes that the executive director's Notice of Preliminary Decision is the notice of draft permit for those programs for which the commission has federal program approval.

As previously noted, the requirement of proposed §39.419(e) was moved to §39.405(g)(2) for clarification. Consequently, proposed §39.419(f) has been redesignated as §39.419(e) in this adoption. This change is reflected in the commission's responses to testimony received on the proposed subsection (f).

Henry, Lowerre commented that §39.419(f)(1)(C) should be revised to provide that Notice of Application and Preliminary Decision is not required for an application for any amendment, modification, or renewal application that would not result in allowable emissions and would not result in the emission of an air contaminant not previously emitted "unless a public comment has raised the issue of the compliance history of the applicant in a fashion that could lead the commission to determine that the applicant has unresolved violations which constitute a recurring pattern of egregious conduct or that demonstrate a consistent disregard for the regulatory process." The commenter stated that this revision is necessary to give notice to the public and the applicant of the exception to the general rule that these applications are not subject to hearing or to this notice.

**The commission has made no changes in response to this comment. TCAA, §382.056(o) requires the commission to evaluate the compliance history of the applicant and the facilities in question as a part of the application review process. The statute requires an evaluation of violations contained in the applicant's compliance history. A complaint received from the public can result**

**in an inspection and any appropriate enforcement action documenting violations. However, in order for any violation to be documented in the applicant's compliance history, the complaint must be received by the TNRCC, investigated, and confirmed before a violation is issued. If complaints are received for the first time during the public comment period, the applicant's compliance history will contain no violations which could provide a basis for the commission to hold a hearing under TCAA, §382.056(o). Since the statute requires evaluation of violations, the air permitting program contacts the appropriate regional office and local air pollution control programs throughout the review process to ensure the latest compliance information is evaluated prior to issuance of a permit.**

EPA commented that, unless a hearing is requested, no notice or public comment period will be provided. Section 39.419(f) provides that for air applications, no notice of application and preliminary decision is required if no hearing request is submitted. Although §55.152 provides for a public comment period, that provision is dependent upon either publication of Notice of Application under §39.419 which may not occur, or Notice of Receipt of Application, which may not occur.

**The commission is adopting §55.152(a)(1), which provides for a 30 day comment period for air applications after notice is provided under §39.418. Notice under §39.418 always occurs for any construction of a facility or modification of facilities which may affect ambient air quality. The commission is also adopting §55.152(a) which provides for a 30 day comment period for air applications if notice is provided under §39.419.**

EPA commented that §39.419(f)(1)(C) provides that no Notice of Application and Preliminary Decision is required for amendments, modifications, or renewals which would not result in an increase in allowable emissions and does not result in emissions of an air contaminant not previously emitted. The commenter was concerned that the public has no opportunity to determine for itself if it agrees that no increase in allowable emissions occurs or if the proposed change will not result in the emissions of an air contaminant not previously emitted. Finally, the commenter stated that the provision may not satisfy the provisions of 40 CFR §51.161, and that the TNRCC should explain how this section satisfies revisions of CFR §51.161

**The commission's analysis of applications for federal preconstruction reviews under PSD, NA, or Hazardous Pollutant Major Sources (FCAA §112(g)) is provided by §39.419 notice requirements to meet all federal program requirements. To address 40 CFR §51.161(a) and (b) for all other construction and modification application reviews, the applications and files are available for public inspection in at least one location in the area which may be affected by the emissions from a facility. This file contains the commission's analysis of the effect of construction or modification on ambient air quality, including the commission's preliminary determination on the application. In accordance with 40 CFR §51.161(b)(2), under §39.418 notice requirements, there is a 30 day comment period on the application, which all facilities with new construction or modification must provide. The commission has also added §55.152(b), which extends the public comment period to beyond the 30 days listed in the newspaper publication to the close of any public meeting. The TCAA, §382.056(l) requires the commission to respond to relevant and material issues raised by the public during the §39.419 notice on the preliminary decision. The commission has expanded**

**this requirement in §39.420 to require responses to comments received from either the notice under §39.418 or the notice under §39.419 to ensure that the general public has the opportunity to comment on the commission's preliminary decision and application analysis if any interest is expressed for a project. If any member of the general public requests to be on a mailing list or comments on the application, they are mailed the executive director's preliminary decision and analysis of the application and provided an additional 30 day opportunity to comment, request a reconsideration of the executive director's decision, or request a contested case hearing.**

CPS commented that §39.419(f)(1)(c) should be revised so that all permit amendments and modifications that do not result in a significant increase in allowable emissions or significant increase in emissions of pollutants not previously emitted be allowed to forego the public notice all together. Otherwise, CPS suggested that permit amendments, modifications, or renewals that do not result in significant increases in emissions of existing or future new contaminants be allowed to forego the second Notice.

**The commission has not made changes in response to these comments. Applications to amend existing permits for the purpose of authorizing new construction must comply with the notice requirements in §39.418 and §39.419. This is required by the TCAA, §382.056(a). This requirement is consistent with the requirement that all applications for new permits which would authorize new construction must comply with the notice requirements, and clarifies that there is no basis for different notice requirements for applicants who are choosing to amend an existing permit versus obtaining a new permit. These requirements also clarify that applications for**

**construction of new facilities with insignificant emissions must comply with notice requirements in accordance with the statute. However, applications for changes to existing facilities with insignificant emissions increases do not have to comply with the notice requirements of Chapter 39 as detailed in §39.403(8). In addition, adopted §39.419(e)(1)(C) specifies that, unless there is a pattern of noncompliance as specified by TCAA, §382.056(o), if an application is for an amendment or renewal with no increase in allowable emissions, Notice of Application and Preliminary Decision is not required in accordance with TCAA, §382.056(g). This statute does not make a distinction for “significant” or “insignificant” emissions increases, and only states “an increase.”**

Baker & Botts commented that §39.419(f)(2) should be clarified to provide that mailed notice under §39.419(c) is not required for air applications and the mailing of notice under §39.419(f)(2) is not required if the conditions set forth in §39.419(f)(1)(A)-(C) are met.

**The commission has made changes in response to this comment to clarify the rule. The commission has revised §39.419(c) to provide that the chief clerk mail notice under §39.413, unless otherwise required in §39.419. Because mailed notice for air applications is given under §39.419(f)(2), the rule as changed for adoption clarifies that §39.419(c) does not apply to air applications. Section 39.419(e)(2) has been revised such that if notice is required under §39.419 for an air application, it is given under §39.419(f)(2).**

TI commented that §39.419(f)(2) should be eliminated because it is redundant and confusing as the issue of mailed notice for air applications is addressed by §39.602.

**The commission has not made changes in response to this comment. The commission believes that the subsection's reference to §39.602 is helpful in referring the reader to the mailed notice provisions applicable to air applications.**

EPA commented that §39.419(f)(3) is subject to the problems of §§39.418 and 39.419(f)(2) by virtue of its references to Subchapter K and that Subchapter's reference to §39.418, which excludes the air program.

**The commission has revised §39.603(b) to address this problem and the adopted rule should clarify the circumstances for notice requirements and ensure public participation in the air permitting process.**

EPA commented that it is unclear whether §39.419(f)(3) applies to modifications or changes which may be applicable to federal preconstruction approvals.

**The commission has not made any changes in response to this comment. Adopted §39.419(e)(3) refers to "applications" which includes, by definitions in 30 TAC Chapter 3, any new permit or major modification under federal preconstruction permit review requirements. Therefore, all new permits or major modifications of existing permits for federal preconstruction reviews PSD,**

**NA, or Hazardous Air Pollutant Major Sources under FCAA §112(g)) are required to publish Notice of Application and Preliminary Decision.**

CPS recommended that §39.419(f)(3) be clarified to read that the Notice of Application and Preliminary Decision shall be published for permits that “are for the following federal preconstruction approval for new sources” in order to distinguish the publication requirements for renewals or other minor permit actions on existing, previously permitted NA, PSD or Hazardous Air Pollutant Major Sources sites.

**The commission has not changed this section in response to this comment. Section 39.419(f)(3) states that Notice of Application and Preliminary Decision is required for “federal preconstruction approvals” as listed. In accordance with federal statutes and regulations, a major modification may be required to meet these federal preconstruction requirements even when there is no new facility construction (for example, change in method of operation or after shutdown), and it is necessary that these authorizations undergo notice to assure compliance with federal program mandates.**

In §39.419(d), the commission revised the rule to more specifically identify that the text of notice of requirements for Notice of Application and Preliminary Decision are those in §39.411(c)

Section 39.419(e)(1)(D) was added by the commission because Texas Utilities Code, §39.264, as added by SB 7, and TCAA, §382.0519, as added by SB 766, do not require notice of preliminary decision for VERPs and EGFs.

*§39.420. Transmittal of the Executive Director's Response to Comments and Decision.*

Section 39.420 relates to transmittal of the executive director's response to comments and opportunity to request reconsideration or hearing, and mirrors the requirements in TWC, §5.553 and TCAA, §382.056(m) as added by HB 801. This section establishes the duties of the chief clerk to transmit the executive director's decision, responses to comments, and instructions for requesting that the commission reconsider the executive director's decision and instructions for requesting a contested case hearing. TCAA, §382.056(l) requires the commission to respond to relevant and material issues raised by the public during the §39.419 notice on the preliminary decision. The commission has expanded this requirement in §39.420 to require responses to comments received from either the notice under §39.418 or the notice under §39.419 to ensure that the general public has the opportunity to comment on the commission's preliminary decision and application analysis if any interest is expressed for a project. The revised ensures that the public will receive a response if relevant, material, or otherwise comments are submitted at any point during the processing of the application period. This expansion is essential to meet at least the air permit requirements under 40 CFR §51.161 and SIP requirements. If any member of the general public requests to be on a mailing list or comments on an application, they are mailed sent the executive director's preliminary decision and analysis of the application and provided an additional 30 day opportunity to comment, request a reconsideration of the executive director's decision, or request a contested case hearing. No opportunity for requesting reconsideration or

contested case hearing is provided for those air permit applications which do not allow for these actions under law, such as VERP, EGF, standard permits, exemptions from permitting, etc. (TCAA, §382.056 SB 766, SB 7). However, the commission responds to comments on these actions.

Responses to comments for VERP and EGF applications are treated in the same way as Title V FOP applications which are replied to under 30 TAC §122.345, which are subject to notice and comment hearings.

Baker & Botts and TI recommended that restructuring §39.420 would simplify application of public notice requirements and recommended prefacing §39.420 with the phrase “when required by and subject to Subchapters I through M” to eliminate potential ambiguities in the rules.

**The commission has made changes to the rule to eliminate ambiguity, by structuring the HB 801 requirements in a list form. However, the change recommended by the commenters has not been adopted because Subchapters I through M do not include requirements relating to the duties of the chief clerk to transmit the executive director’s decision, responses to comments, and instructions for requesting that the commission reconsider the executive director’s decision and instructions for requesting a contested case hearing. These requirements are contained in §55.156 (Public Comment Processing). Therefore, the commission has added an introductory phrase to the rule as follows: “when required by and subject to §55.156.”**

Jenkins & Gilchrist commented that the rule as proposed contains a probable error. The commenter indicated that the cross-reference to §39.419(f)(1)(C) relating to items that do not need to be included in

the transmittal of the executive director's decision and response to comment for air applications should instead cross-reference §39.419(f)(1)(A)-(C).

**The rule as adopted has been changed to explicitly identify those circumstances where no opportunity to request reconsideration or contested case hearing is allowed. These include VERP, EGF, and circumstances when a hearing request has been withdrawn, or when the commission is prohibited from seeking further public comment under TCAA, §382.056(g).**

This subsection as adopted describes under what circumstances transmittal of the executive director's decision, response to public comments, instructions for requesting reconsideration of the executive director's decision or contested case hearing is not applicable. The commission has made changes from the rule as proposed and the rule as adopted clarifies that the transmittal of certain documents is not required for voluntary emission reduction permits and electric generating facilities consistent with the requirements of SB 7 and SB 766 as enacted during the 76th Legislative Session.

*§39.421. Notice of Commission Meeting to Evaluate a Request for Reconsideration or Hearing on an Application.*

§39.421 (Notice of Commission Meeting to Evaluate a Request for Reconsideration or Hearing on an Application) mirrors existing §39.21 (Notice of Commission Meeting to Evaluate a Hearing Request on an Application). However, §39.421 adds a requirement to notify all persons who commented (or a representative of a group or association) to the list of persons who receive notice of a commission

agenda when a hearing request will be considered. The title of the section is modified to indicate that it applies to requests for reconsideration provided for under HB 801, as well as to hearing requests.

*§39.423. Notice of Contested Case Hearing.*

§39.423 (Notice of Contested Case Hearing) mirrors existing §39.23, but is changed to clarify the requirements for the notice of a contested case hearing on a commission referral to the State Office of Administrative Hearings on the sole question of whether a hearing requestor is an affected person. Section 39.423 was changed to incorporate the requirement of SB 211, that when a notice is mailed, a party is presumed to receive notice 3 days after mailing. Thus, instead of requiring the chief clerk to mail notice 10 days before a hearing, the rule requires notice to be mailed 13 days before the hearing.

*§39.425. Notice of Contested Enforcement Case Hearing.*

Section 39.425 (Notice of Contested Enforcement Case Hearing) is similar to current §39.25. However, while §39.25 states that the chief clerk shall give notice to the parties, as required under §2001.052 of the APA; §39.425 requires notice to the statutory parties and persons who have requested to be on the mailing list. The new rule further incorporates both the 10 days notice required under the APA, §2001.051(1), and the additional 3 days for mailed notice, to harmonize with SB 211. This section as adopted sets forth the notice requirements for contested enforcement hearings. It reflects both the 10 days notice required under the Administrative Procedure Act and adds 3 days for mailed notice to harmonize with the provisions of SB 211.

Henry, Lowerre commented that the rule as proposed should be changed since at the time this section is effective, there are no parties. The commenter further stated that since TNRCC rules now provide for intervention in some enforcement hearings, the notice needs to be provided to the executive director, Office of Public Interest Counsel, “respondent,” anyone who files a complaint that resulted in the enforcement action, and anyone, who requests such notice or to be on the mailing list for that facility.

**The commission has made changes, in part, in response to this comment. The rule has been revised to change “parties” to “statutory parties, respondents and persons who have requested to be on the mailing list for the pleadings in the formal enforcement action.” The commission has not included the requested provision that would include complainants on the chief clerk’s mailing list because it is important to protect the identity of complainants and respect the desire of such individuals to remain anonymous. In those circumstances where the complainant is not concerned with disclosure of his identity, the complainant may request to be included on the mailing list and thus receive notice of the enforcement hearing.**

*Subchapter I, §39.501. Application for Municipal Solid Waste Permit.*

The commission adopts new §39.501 (Application for Municipal Solid Waste Permit). This section establishes the notice requirements for municipal solid waste permits to satisfy the statutory requirements of TWC, §5.552 and §5.553. Since publication, this section has been revised to include new §39.501(a) stating that the section applies to applications declared administratively complete on or after September 1, 1999. This new section is similar to existing §39.101, but replaces the current requirement for Notice of Intent to Obtain a Permit with the new HB 801 requirement for Notice of

Receipt of Application and Notice of Intent to Obtain a Permit under §39.501(c). Since publication, §39.501(c) has been revised to specifically reference the publication requirements Notice of Receipt of Application and Notice of Intent to Obtain a Permit under §39.418, as well as the requirements for text of notice under §39.411.

The requirements in §39.501(c) will satisfy the statutory requirements of §361.0665, Health and Safety Code (relating to Notice of Intent to Obtain Municipal Solid Waste Permit). However, in order to satisfy THSC, §361.067, §39.501(c) requires that the agency also mail a copy of the application or a summary of its contents to the mayor, county judge, and health authority. This requirement has been retained in §39.501(c) because under HB 801, TWC §5.552(d), applicants must satisfy existing statutory requirements in addition to the requirements of HB 801.

Adopted §39.501 does not include subsection (c) from current §39.101, because requirements for the notice of draft permit are replaced by the new HB 801 requirements for Notice of Application and Preliminary Decision in new §39.419 (Notice of Application and Preliminary Decision).

The commission has revised §39.501(d) to clarify that the Notice of Application and Preliminary Decision shall be published after the chief clerk mails the notice to the applicant. The language in existing §39.101(d), relating to notice of public meeting, is included in new §39.501(e), and has a grammatical change from §39.101(d). Section 39.501(f)(3)(B) contains grammatical changes from its counterpart in existing §39.101(e)(3)(B).

Since proposal, §39.501(f)(3)(A) and §39.503(f)(3)(A) have been revised to mirror the requirements in existing §39.101(f)(3)(A) and §39.103(f)(3)(A) that the applicant must file an affidavit certifying compliance with its obligation to mail notice of hearing. This requirements is not included in §39.405(e), which only requires an affidavit of newspaper publication, and must be included in the rules to satisfy THSC, §361.081(b).

Brown McCarroll suggested that §§39.501(a), 39.503(a), and 39.651(a) be revised to indicate that Subchapters I and L apply to applications declared administratively complete on or after September 1, 1999.

**The commission has made revisions in response to this comment and has added new §39.501(a), 39.503(a) and 39.651(a). Subsequent subsections in these rules have been renumbered accordingly.**

Brown McCarroll suggested that §39.501(a) and §39.503(a) be revised to specifically reference the type of permit governed by these provisions.

**The commission has made revisions in response to this comment and has renumbered §39.501(b) and §39.503(b) accordingly.**

Baker & Botts commented that the language in §39.501(b)(2)(A) regarding newspaper publication requirements should be stricken because of its redundancy, as publication requirements for solid waste applications are set forth at §39.405(g), which is referenced by §39.418.

**Because of organizational changes, §39.501(b) is now §39.501(c). Also because of organizational changes, §39.405(g) is now §39.405(f). The commission agrees that part of §39.501(c)(2)(A) is redundant and has deleted §39.501(c)(2)(A)(i). However, the provisions regarding publication in a newspaper in the immediate vicinity in which the facility is located or proposed to be located are not in §39.405(f) and therefore, have been retained because of the specific requirements of THSC, §361.0665(c).**

Jenkins and Gilchrist suggested that §39.501(b)(2) be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish the Notice of Receipt of Application and Intent to Obtain Permit.

**The commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues. Therefore, the commission has not made any changes in response to this comment.**

Baker & Botts suggested that §39.501 should clarify that public notice requirements for MSW permit modifications are limited to those set forth in §305.70.

**The commission has made revisions in response to this comment and has added §39.403(c)(10) to clarify this.**

Changes were made to §§39.501(d) and 39.503(d) (§§39.501(c) and 39.503(c) in proposed rule) to clarify that the references to §39.405 are references to the notice language in §39.405, and not to a notice required by §39.405. The commission also revised §39.503(d) (1) to clarify the requirements of combined notices and §39.501(d) to clarify the required timing for publication of the Notice of Application and Preliminary Decision.

*§39.503. Application for Industrial or Hazardous Waste Facility Permit.*

This section establishes the notice requirements for industrial and hazardous waste facility permits to satisfy the statutory requirements of TWC §5.552 and §5.553. Since proposal, the commission has added an applicability provision in §39.503(a) stating which industrial and hazardous waste applications must comply with the section, based on the application's date of administrative completeness. New §39.503 (Application for Industrial or Hazardous Waste Facility Permit) parallels current §39.103, except that §39.503 has been modified to satisfy the statutory provisions of HB 801. As required under HB 801, §5.553, Texas Water Code, §39.503(c)(2)(A) requires Notice of Receipt of Application and Intent to Obtain Permit under new §39.418. The new Notice of Receipt of Application and Intent to Obtain Permit satisfies the current requirement in §281.17(d) of this title for Notice of Receipt of

Application. Furthermore, notice under the new rule satisfies TWC §5.552 and THSC §361.079 notice requirements. Adopted §39.503 does not include subsection (d) from current §39.103 because requirements for the notice of draft permit are replaced by the new HB 801 requirements for Notice of Application and Preliminary Decision in new §39.419.

New §39.503(c)(2)(B) also retains the requirement that the agency mail a copy of the application or a summary of its contents to the mayor, county judge, and health authority. Although under HB 801 those persons also receive the concurrent Notice of Receipt of Application and Intent to Obtain Permit, the requirement to mail a copy or summary of the application, from §361.067, Texas Health and Safety Code, is retained in §39.503(c)(2)(B). Under HB 801, §5.552(d), applicants must comply with all existing statutory notice requirements in addition to HB 801 requirements.

The language in existing §39.103(e), related to notice of public meeting, is included in new §39.503(e), and has a grammatical change from §39.503(e). The commission has revised §39.503(d)(1) to clarify the requirements of combined notice. The commission has also revised §39.503 (f)(2) to clarify that the publication requirements of §39.503(f)(2)(A) apply to all industrial or hazardous waste notices of hearing, whereas §39.503(f)(2)(B) applies additionally only to hazardous waste notices of hearing. This change harmonizes THSC, §361.003(24) and §361.080 (b).

The commission revised §39.503(b), (b)(1), (c), (d)(1), and (h) to incorporate the changes made in rules adopted by the commission on July 14, 1999.

Jenkins and Gilchrist suggested that §39.503(b)(2) be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish the Notice of Receipt of Application and Intent to Obtain Permit. The proposed rules require that these notices be provided after the executive director determines the application is administratively complete, making it impossible to combine the notice required by §39.418 with the notice required under §305.69(c) and §305.69(d).

**The commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues. Therefore, the commission has not made any changes in response to this comment. The Notice of Receipt of Application and Intent to Obtain Permit required under §39.18 is not required for Class 2 modifications, and the commission has added new §39.403(c)(11) to clarify this. Additionally, the commission has determined that the Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title is equal to or more stringent than the current notice provisions for Class 3 modifications under §305.69(d)(2). Therefore, the commission is substituting the more stringent Notice of Receipt of Application and Intent to Obtain Permit for the existing notice of modification in §305.69(d)(2). A change has been made to adopted §39.509 to reflect this determination. Thus, there will be no conflict between §39.418 and §305.69(d)(2) because the requirements of §39.418 supercede §305.69(d)(2).**

TI, Baker & Botts, and Eastman commented that the requirements in §39.503(c)(1) and §39.651(c)(1) to publish notice in a newspaper circulated in each county that is adjacent and contiguous to the county in which the facility is to be located is burdensome and is not required by HB 801 or existing statutes. Eastman commented that the requirement is burdensome in requiring the applicant to publish multiple notices covering far more geographic area than reasonably required and suggested that this section be clarified so that it does not apply to existing facilities.

**Under THSC §361.003(24), the definition of “affected person” includes persons who may reside in the county where the facility is located, or in counties adjacent or contiguous to the county where the facility is located. Accordingly, the commission requires notice to be given to residents of these counties. The commission does not agree that this requirement should not apply to existing facilities since there is no statutory exemption for existing facilities if permit actions requested trigger public notice. Therefore, no changes have been made in response to this comment.**

The commission has revised §39.503(f)(2) and §39.651(f)(2) to clarify that the publication requirements of §39.503(f)(2)(A) and §39.651(f)(2)(A) apply to all industrial or hazardous waste notices of hearing, whereas §39.503(f)(2)(B) and §39.651(f)(2)(B) apply additionally only to hazardous waste notices of hearing. This change harmonizes THSC §361.003(24) and §361.080(b).

*§39.509. Application for a Class 3 Modification of an Industrial or Hazardous Waste Permit.*

The commission adopts new §39.509 to establish the notice requirements for Class 3 modifications to satisfy the statutory requirements of TWC, §5.552 and §5.553. This section also establishes which

applications for Class 3 modifications must comply with the section, based on the application's administrative completeness date. New §39.509 parallels current §39.109, except that §39.509 has been modified to require Class 3 modifications to meet the notice requirements in §39.418 and §39.419, instead of complying with the notice requirements in §305.69. In addition, the commission has provided for notice of public meetings.

Currently, pursuant to federal regulations, applicants for Class 3 modifications must publish notice of receipt of application no later than 7 days after the commission receives the application. Now, HB 801 requires applicants for Class 3 modifications to publish Notice of Receipt of Application and Intent to Obtain Permit, as well as the Notice of Application and Preliminary Decision. The Notice of Receipt of Application and Intent to Obtain Permit must be published within 30 days after the application is declared administratively complete.

**The commission has determined that the Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title is equal to or more stringent than the current notice provisions for Class 3 modifications under §305.69(d)(2). Therefore, to avoid requiring applicants to publish notice three times, the commission is substituting the more stringent Notice of Receipt of Application and Intent to Obtain Permit for the existing notice of modification in §305.69(d)(2). Adopted §39.509 has been amended to reflect this determination. Applicants for Class 3 modifications will also be required to publish Notice of Application and Preliminary Decision. Therefore, there will be no conflict with §305.69(d)(2) because this change supercedes the requirement in §305.69(d)(2).**

**Additionally, the commission has determined that the comment period for Class 3 modifications of solid waste permits now begins with the publication of the Notice of Receipt of Application and Intent to Obtain Permit, and concludes 45 days (for hazardous waste permit applications) or 30 days (for non-hazardous industrial permit applications) after the publication of the Notice of Application and Preliminary Decision. The commission has amended §55.152(a)(4) to reflect this change.”**

The following comments pertain to Class 3 modifications and the consolidated response to these comments below:

Henry, Lowerre and Jenkins and Gilchrist commented that §39.509 should be revised to allow applicants to combine the notices required under §305.69 and Chapter 39. Henry, Lowerre commented that the commission should seek a solution that retains the 7 day deadline and since HB 801 states that the notice under that law must be “not later than 30 days after administrative completeness,” the seven day deadline meets the express requirements of HB 801. If the notice (at the 7 day deadline) provides most, if not all, of the information required by HB 801, HB 801 could then be satisfied. Henry, Lowerre also suggested that a procedure would need to be added so that interested persons obtain written notice (by mail) of the determination of administrative completeness no less than 30 days after that determination. Jenkins and Gilchrist commented that §39.509 should be expanded to include applications for Class 2 modifications.

TI and Baker & Botts commented that public notice requirements should not be in addition to the existing public notice requirements of §305.69 for industrial and hazardous solid waste permit modifications, including Class 3 modifications. Public notice requirements are driven by federal law, not state law, and the existing notice requirements are better tailored for these routine requests.

Thompson & Knight commented that the commission should adopt a consistent early notice provision. Notice within 30 days following administrative completeness is both early and meaningful because the application is then complete and available for review. This approach eliminates a needless duplication of early notice. The absence of 40 CFR §270.42 from the list of required elements in 40 CFR §271.13 allows states flexibility in this aspect of the permitting process.

Eastman commented that requiring Class 3 modifications to meet §39.418 and §39.419 would result in two additional newspaper and mailed notices which would significantly increase the amount of time for processing and approval of the modification request. Eastman recommends that §39.509 be deleted and §39.403(c) be revised to state that applications for Class 3 permit modifications subject to §305.69 are not subject to the requirements of Chapter 39 Subchapters H-M and recommends that §39.403(c) also state that Class 1 and 2 permit modifications subject to §305.69 are not subject to the requirements of Chapter 39, Subchapters H-M.

**The commission agrees that consistent early notice provisions are needed and has attempted to revise the rules to achieve as much consistency as is possible under the current state statutory requirements and federal requirements. The commission also agrees that the requirement for**

**Class 3 modifications to meet §39.418 and §39.419 will result in the applicant being required to publish two notices, which may increase the amount of time for processing and approval of the modification request.**

**The Notice of Receipt of Application and Intent to Obtain Permit under §39.18 and the Notice of Application and Preliminary Decision under §39.419 are not required for Class 2 modifications, and the commission has added new §39.403(c)(9) and (11) to clarify this. In addition, the commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues.**

**Regarding Class 3 modifications, the commission has determined that the Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title is equal to or more stringent than the current notice provisions for Class 3 modifications under §305.69(d)(2). Therefore, to avoid requiring applicants to publish notice three times, the commission is substituting the more stringent Notice of Receipt of Application and Intent to Obtain Permit for the existing notice of modification in §305.69(d)(2). Adopted §39.509 has been amended to reflect this determination. Although, changes to §305.69 cannot be made as part of this rulemaking because the commission did not propose to amend that section, §39.509 specifies that an applicant for a Class 3 modification must comply with §39.418 and §39.419 instead of complying with the provisions of §305.69(d)(2). Therefore, there will be no conflict with §305.69(d)(2) because this change**

**supercedes the requirement in §305.69(d)(2). Applicants for Class 3 modifications will also be required to publish Notice of Application and Preliminary Decision.**

*Subchapter J, §39.551.Application for Wastewater Discharge Permit, including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.*

The commission adopts new §39.551 to implement the HB 801 requirements for Notice of Receipt of Application and Intent to Obtain Permit in proposed §39.418 and the Notice of Application and Preliminary Decision in proposed new §39.419. Under this proposal, the Notice of Receipt of Application and Intent to Obtain Permit replaces the notice of administrative completeness under current requirements. Also, the Notice of Receipt of Application and Intent to Obtain Permit would be required to be published by the applicant no later than the 30th day after the date the executive director determines the application to be administratively complete.

New §39.551 includes an applicability provision that was not included in the rule as proposed and the remainder of §39.551 was renumbered accordingly. This section is consistent with the provisions of HB 801 and new §39.403 reflecting that the new law is not intended.

Since proposal, the commission has deleted the statement in §39.551(c)(1), proposed as (b)(1), that this notice may be combined with the notice in §39.419. A deadline for hearing requests is not included because at the point in the process when the Notice of Application and Preliminary Decision is published, the commission is seeking only public comment, and is not seeking hearing requests. In

addition, changes are made throughout the section to reflect the new Notice of Application and Preliminary Decision required by sections in Chapter 5, Texas Water Code as amended by HB 801.

The commission made an additional change in 39.551 to clarify that the reference to the section governing the form of the School Land Board Notice is Section 5.115(c) of the Texas Water Code. Because §39.419(b) provides that the Notice of Application and Preliminary Decision is published as required in specific subchapters, the publication of notice under §39.551(c)(1) is not separate from the §39.419 notice requirement.

New §39.551(c)(1)(C) explains that the Notice of Application and Preliminary Decision must include a deadline for a person to file a public comment or to request a public meeting. Consistent with the requirements of HB 801, this notice will not include an opportunity to request a contested case hearing. Under new §39.420, persons who submit comments in response to this notice during the public comment period will be included in the transmittal of the executive director's preliminary decision and the executive director's response to comments, and will be instructed on how to request a reconsideration of the executive director's decision or request a contested case hearing.

Section 39.551(e) (§39.551(d) in the rule as proposed) sets forth the notice requirements for certain types of water quality applications. New §39.551(e) incorporates the requirements in HB 801 in the notice for a minor amendment of a water quality permit. To parallel federal program requirements, the proposed amendment further states that the executive director shall prepare a response to all relevant

and material or significant public comments received by the commission under §55.152 (Public Comment Processing).

Section 39.551(e)(4)(renumbered to §39.551(f)(4) in the adopted rule) sets forth the notice requirements for notice of contested case hearing for water quality applications.

Merco commented that the title of Subchapter J implies that all applications for the disposal of sewage sludge are subject to Subchapter J, regardless of whether the applicant applied for a permit, registration or notification and suggested that the commission include an applicability section.

**The commission has changed the rule in response to this comment and added an applicability section in 39.551 that specifically provides that Subchapter J does not apply to registrations and notifications for sludge disposal. Corresponding changes were made in 39.403(c).**

Brown McCarroll commented that to make these provisions consistent with the companion rules in Subchapters B through F, the first rule in each subchapter should indicate that the subchapter applies to the specific type of application if declared administratively complete on or after September 1, 1999.

**The commission agrees and has changed §39.551(a) accordingly.**

CPS commented that the phrase "issued September 14, 1998" be deleted from §39.551(a)(2) because this date is not relevant to the requirements of HB 801. CPS further comments that new TPDES

permit applications declared administratively complete before September 1, 1999 should be subject to the new subchapter C and those declared on or after September 1, 1999 should be subject to subchapters H and J.

**The commission agrees that the September 1, 1999 date is the relevant date for HB 801 purposes and applicability of these subchapters. However, the commission has made no change in response to this comment regarding §39.551(a)(2), renumbered in the adoption as §39.551(b)(2)..**

**Subchapter C and J provide that mailed notice to adjacent or downstream landowners is not required for applications for new TPDES permits for discharges authorized by an existing state permit issued before September 14, 1998 for which an application does not propose a major amendment. While the commission agrees that the September 14, 1998 date is not relevant to the requirements of HB 801, it is relevant as to whether adjacent or downstream landowner mailed notice is required. This exemption from landowner mailed notice requirements is independent of HB 801 requirements and is not affected by this law.**

CPS commented that including the School Land Board notice requirement in §39.551(a) of the proposed rule be included in §39.413 *Mailed Notice* as part of the required list to avoid confusion relating to the landowner notice exemption for renewals and minor amendments and the School Land Board notice requirements.

**The commission agrees that the rule as proposed may create some ambiguity and reorganized §39.551(b) (§39.551(a) in the proposal) for clarification to avoid confusing School Land Board**

**notice requirements and landowner noticed exemptions. A corresponding change clarifying these requirements has also been included in §39.651, relating to injection well permits.**

Baker & Botts commented that the reference to §39.11 in §39.551(b)(4)(A) of the proposed rule should instead refer to §39.411.

**The commission agrees that the reference to 39.11 is incorrect and has changed the rule as adopted in response to this comment. Section 39.551(c)(4)(A) (which was §39.551(b)(4)(A) in the rule as proposed but was renumbered with the addition of an applicability section) has been changed to §39.411(b)(1)-(3), (b)(5)-(7), (b)(9), (b)(12) and (c)(2)-(6) to correctly identify the items in the text of notice section applicable to applications filed on or after September 1, 1999 consistent with HB 801 requirements. The commission has changed this subsection in response to this comment.**

TI and Baker & Botts commented that with regard to §39.551(c)(1), no opportunity for a contested case hearing should be provided if an applicant has not proposed a major amendment to a state water quality permit that is to be converted to a TPDES permit.

**The commission has made no change in response to this comment. HB 801 is not intended to expand or restrict the types of actions for which notice, opportunity for public comment and opportunity for public hearing are provided. Neither HB 801 nor HB 1479 implemented by this rule adoption provide for such a limitation on contested case hearings. Further, the change**

**suggested by these commenters was not included in the rule as proposed, and the commission does not believe that it would be appropriate to make this change without providing an opportunity to comment.**

Section 39.551(c) in the proposed rule (renumbered as §39.551(d) in the rule as adopted given the addition of an applicability section) includes requirements related to notice of application and preliminary decision for certain TPDES permits. CPS commented that this subsection be deleted as unnecessary since the September 14, 1998 date is irrelevant to HB 801 provisions.

**While the commission agrees that the September 14, 1998 date is not relevant to HB 801 requirements, the September 14, 1998 date is relevant to the applicability of non HB 801 notice requirements. Therefore, the commission has made no change in response to this requirement.**

Brown McCarroll commented that the phrase "TPDES major facility permits" is used in §39.551(d)(3)(B) as proposed but is not defined in this rule and recommended that a definition should be included. Section 39.551(d)(3)(B) in the rule as proposed now appears in the rule as adopted as 39.551(e)(3)(B).

**TPDES major facility is defined in 40 CFR §122.2. Major facility permits are designated on an annual basis by EPA. When a facility is placed on the list, they are notified by the EPA or TNRCC. In response to this comment, the commission has modified the rule and added a**

**reference to this subparagraph to reflect that TPDES major facility permits are as designated on an annual basis.**

CPS requested in its comments that the commission renumber proposed subsection §39.551(c) (renumbered in the adoption as §39.551(d)) together with the recommendation that the proposed §39.551(c) be deleted, as discussed above) and rename it “Notice of Application and Preliminary Decision.

**The commission has not changed the rule as requested by the commenter. As described above, the commission has not deleted §39.551(c) in the rule as proposed (§39.551(d) in the adopted rule) because it is needed to specify the notice requirements for certain permits converted to TPDES permits. The recommended change in title of this section is not appropriate because this section encompasses subjects broader than Notice of Application and Preliminary Decision.**

Brown McCarroll commented that §39.551(f)(4) relating to notice of contested case hearings for TPDES permits should inform the reader of everything that is required to be in the notice.

**The commission agrees and has changed the rule to reflect the specific text of notice requirements of §39.411 are required.**

The commission made an additional change in 39.551 to clarify that the reference to the section governing the form of the School Land Board Notice is Section 5.115(c) of the Texas Water Code.

§39.553. *Water Quality Management Plan Updates.*

The commission adopts new §39.553, relating to Water Quality Management Plans (WQMP) updates. This new section requires that the commission's chief clerk publish public notice of the WQMP updates in the *Texas Register*. The chief clerk shall mail notice to persons known by the commission to be interested in the WQMP update or identified on mailing lists maintained by the chief clerk. The rule identifies the specific contents of the text of the public notice, provides a 30-day public comment period, and allows for a public meeting on a WQMP update, in accordance with §55.156 (Public Comment Processing). A 30-day public comment period is consistent with the public notice period for other water quality permitting matters, federal requirements for processing of TPDES permits, and federal guidelines governing the state Continuing Planning Process. This new section also identifies procedures for the executive director to respond to all significant public comments received by the commission before the end of the comment period. Finally, new §39.553 identifies that the executive director may certify the WQMP update and provides for the commission's chief clerk to mail a copy of the response to comments as well as the certified WQMP update, to all persons who submitted timely comments.

New §39.553 sets forth the notice requirements for WQMP. New adopted §39.553(b)(3) (§39.553(a)(3) in the proposed rule) sets forth the text of notice requirements for WQMP.

Brown McCarroll suggested that the Chapter 39 subchapters begin with applicability sections which explicitly state the types of applications which must meet the subchapter requirements.

**The commission agrees and modified §39.553(a) to include an applicability section and subsequent subsections have been renumbered to reflect this addition.**

Brown McCarroll commented that §39.553(a)(3) should be modified to delete the cross-reference to §39.411.

**Due to the addition of the applicability subsection, this rule has been renumbered to §39.553(b)(3).**

**The commission has made no change in response to this comment as it is helpful for the purposes of clarity to explicitly reflect that WQMP updates are not subject to the text of notice requirements in §39.411.**

*Subchapter K, §39.601 Applicability.*

The commission adopts new §39.601 (Applicability). This section states those actions which must comply with notice requirements for this chapter to satisfy the statutory requirements of TCAA, §382.056 and 382.057 which requires notice for facilities which are obtaining authorization under TCAA, §§382.0518, 382.057, and 382.055. This section also establishes which rules air applications must comply with depending on their date of administrative completeness.

Brown McCarroll comments that §39.601 should be revised to match the companion rules in Subchapters B through F, with the first rule in each subchapter should indicate that the subchapter applies to the specific type of application

**The commission has made revisions in response to this comments and has revised the rule accordingly.**

*§39.602. Mailed Notice.*

The commission adopts new §39.602 (Mailed Notice). This section establishes the circumstances and timing of mailing notices to certain persons corresponding to published notice requirements under §39.418 (Notice of Receipt of Application and Intent to Obtain Permit) and §39.419 (Notice of Application and Preliminary Decision) and the appropriate wording of these notices as listed in §39.411(b) and (c). This section satisfies the statutory requirements of TCAA, §382.056(a), (b), (g), (i), which requires certain text in the notices after administrative completeness and preliminary determination and copies to be sent to the applicant, persons on a mailing list, or commenters on the application. The statutory requirement to send mailed notice to the state senator and representative who represent the area where the facility is or will be located in required by TCAA, §382.0516.

Brown McCarroll, Baker & Botts, and TI commented that, although required to be performed by §39.602, there are no specific mailed notice requirements listed in this section. Instead, it is recommended that the commission substitute a specific cross-reference to those rule provisions which require mailed notice. Also, the commenter proposed that §39.602 refer to §39.413(a)(9), (11), (12), and (14). In addition, there is no subsection (a) in §39.413 as currently proposed. Baker & Botts and TI also state that additional requirements for mailed notice should not be imposed since the TCAA specifies the notice recipients for mailed notice of air permit applications.

**The commission has revised §39.602 to reference mailed notices and the reference to §39.414(a) to eliminate confusion. There are no additional requirements in the rule beyond current practice or required by statute. Section 39.413(9) refers to the applicant who must be notified of requirements to publish notice; §39.413(11) refers to those persons who have requested to be on a mailing list and is required by HB 801; §39.413(14) refers to those persons who have expressed an interest in the application and follows through in ensuring public participation in the permit application process; §39.413(12) is included to note that the executive director to include persons who may have an interest in the application which are not otherwise anticipated by the current rules (such as EPA or local air pollution control programs). The commission has also added new §39.603(a) and (b) to specify when notices are required for air applications.**

Henry, Lowerre requested that the agency expand the list of people who will receive mailed notice to include those in §39.413(a)(2), (3), and (7). It was suggested that if TNRCC is seeking to provide effective notice and opportunities for public comment, broad notice should be provided, especially, where the costs are minimal.

**The commission declines to make this change as there is no statutory authority to expand the list of mailed notices for air applications to those in (2), (3), or (7).**

*§39.603. Newspaper Notice, §39.603(a)-(d)*

The commission adopts new §39.603, concerning Newspaper Notice. The commission has reorganized the rule from proposal to improve clarity. The commission also made minor corrections to references

as proposed. Section 39.603(a) establishes the circumstances when notice is required to be published under §39.418 (Notice of Receipt of Application and Intent to Obtain Permit) to satisfy the statutory requirements of TCAA, §382.056(a) which requires notice to be published 30 days after the executive director has determined the application to be administratively complete. Section 39.603(b) establishes the circumstances when notice is required to be published under §39.419 (Notice of Application and Preliminary Decision) to satisfy the statutory requirements of TCAA, §382.056(g) which requires notice to be published in certain circumstances after the executive director's preliminary decision.

Section 39.603(c) lists the requirements for publication in a newspaper. Specifically, §39.603(c) sets the criteria for the newspaper to meet the statutory requirements of TCAA, §§382.056(a) in that it must be a newspaper of general circulation in the nearest municipality; §39.603(c)(1) requires a notice to be published containing information as required in §39.411 to meet the statutory requirements of TCAA, §382.056(a), (b), (g), and (i), which establish when notice must be published with certain information to inform the public on the pending application; §39.603(c)(2) establishes the criteria for additional notice in the newspaper which is authorized under TCAA, §§382.056(a) and readopts the current requirements of §116.132(b). The use of a display notice is the next best effective means of encouraging public participation in the application review process. Section 39.603(d) establishes the circumstances and methods by which applicants must publish notice in alternate languages to meet the statutory requirements of TCAA, §382.056(a).

Henry, Lowerre commented that the proposal to reduce the number of notices from two issues to one needs to be rejected as HB 801 did not require or suggest this change. Instead, HB 801 provided

cheaper and less frequent notice requirements for air permits because of existing differences in air permits (i.e., two newspaper notices and signs). Reducing notices for air permits is contrary to the goals of HB 801 to assure effective and early notice. Exxon expressed support for the amendment.

**The commission recognizes that HB 801 did not expressly provide for this change. Rather, the commission makes the change in order to continue its effort to consolidate procedural requirements and make them more consistent. The commission has determined that to be consistent with other media notice requirements, the number of issues in which notice must be published was reduced to one (no other program was/is required to publish in consecutive issues or publish notice in alternate languages). Further, this change is consistent with TCAA, §382.056(a).**

Baker & Botts, Eastman, and Exxon questioned the statutory basis for the requirement to publish notice in two separate sections of one paper. This requirement is expensive and burdensome and not required by HB 801 or any other state law. In addition, Eastman noted out that this notice does not comply with the text requirements of §39.411.

**The statutory reference for additional notice by commission is TCAA, §382.056(a) which allows additional publication of notice. This requirement is currently in Chapter 116 and is moved to Chapter 39 with no substantive changes. This notice is the most efficient and cost-effective notice is that given in the public notice section of a newspaper. The commission has also determined that this requirement is needed in order to give TCAA, §382.056(a) meaning and that for businesses**

**(other than small business stationary sources which will not have a significant effect on air quality), use of a display notice is the next best effective means of encouraging public participation in the application review process. Further, the commission believes that this additional notice compensates for not doing individual mailings which are required for the other commission programs. Finally, this is not a new requirements for air permit applicants as this notice is currently required by Chapter 116 and has not proven to be excessively burdensome to previous applicants. This notice does not need to necessarily meet the requirements of §39.411(b)(4) and (5) as the intent of this notice is to forward interested members of the public to the notice which details the information required by the statute on how to participate in the air permit application process.**

TCFA noted that notice requirements of §39.603(a)(2) is more costly to publish and is more likely to be published inaccurately by the smaller newspapers and therefore they support the proposed rule.

Baker & Botts commented that §39.603(a) requires notice when stated by this chapter, but none appears to be required in this section or the remaining parts of the chapter.

**The commission has revised this subsection by adding §39.603(a) and (b) and adding 33 days for publication for notice under §39.419, consistent with the deadlines to publish notice under §39.418. Subsequent subsections are renumbered.**

Brown McCarroll commented that §39.603(a)(1) should be modified to delineate what information should be included in the text of the notice and to delete the cross-reference to §39.411.

**The commission has revised §39.603(c)(1) to specifically detail the text of notice under §39.411(b) and (c) required for air applications for both §39.418 and §39.419.**

Eastman recommended that §39.603(b)(4) be made consistent with the language in §39.603(a); specifically: “in the municipality nearest to the location” be substituted for “county.”

**Section 39.603(b)(4) has been renumbered to §39.603(c)(4). Further, the commission did not make the recommended change because this requirement is taken directly from TCAA, §382.056(a).**

Henry, Lowerre commented that newspaper notices required under §39.603 should be of a sufficient size, but not less than 18 inches.

**During the comment period, the Texas Press Association forwarded information to the TNRCC on how most advertising space is sold. The notice size was adjusted to match the size of Standard Advertising Units, and the commission believes it will still provide an effective notice to interested persons of the general public. This change will hopefully reduce the occurrence of errors and republication time and money, as noted by comments by TCGA and TCFA. This section has been**

**revised to require this notice to be 6 column inches, or 12 square inches in size. The commission believes the size of 12 square inches should be sufficient to attract attention to the notice.**

*§39.603(e)*

Section 39.603(e) defines the criteria for small business stationary sources (§39.603(1)(A)) which will not have a significant effect on air quality (§39.603(1)(B)) and describes the alternative notice procedures which these applications may follow (§39.603(1)) to meet the statutory requirements of TCAA, §382.056(a). Section 39.603(e) was proposed as §39.603(c) and was renumbered due to the addition of §39.603(a) and (b) . The criteria used for defining a small business stationary source is directly from HB 801 which amends TCAA, §382.056(a) which states that the commission shall establish rules for alternate notice procedures “if the applicant is a small business stationary source as defined in §382.0365 and will not have a significant effect on air quality.” Both the criteria of §382.0365 and no significant effect on air quality must be included in the rule. TCAA, §382.0365(g)(2) defines a “small business stationary source” as one which meets the requirements of the Federal Clean Air Act (FCAA), §507(c) (42 USC Section 7661f) and the FCAA Amendments of 1990, §501 (federal publication No. 101-549). This federal definition is incorporated in §39.603(e)(1)(A)(i)-(iv). TCAA, §382.057(a) empowers the TNRCC to establish by rule the criteria for facilities which “will not make a significant contribution of air contaminants to the atmosphere.” These facilities and associated sources are prescribed in 30 TAC Chapter 106 (relating to Exemptions from Permitting). The emissions criteria from §106.4(a) are used in §39.603(e)(1)(B) to codify the requirements of §382.056(a).

TCGA and TABCC commented that the criteria for a small business should simply include the proposed 39.603 (c)(1)(A)(i) and (iv) (criteria that the source is not a major stationary source for federal air quality permitting and it is owned/operated by a person that employs 100 or fewer individuals). This is the criteria used in the past by the TNRCC. It is believed that the intent of the new legislation was to use the existing definition for these purposes. TCGA expressed support for this provision.

**Section 39.603(c) has been renumbered to §39.603(e). HB 801 amends TCAA, §382.056(a) which states that the commission shall establish rules for alternate notice procedures “if the applicant is a small business stationary source as defined in TCAA, §382.0365 and will not have a significant effect on air quality.” Both the criteria of TCAA, §382.0365 and no significant effect on air quality must be included in the rule. TCAA, §382.0365(g)(2) defines a “small business stationary source” as one which meets the requirements of the Federal Clean Air Act (FCAA), §507(c) (42 USC Section 7661f) and the FCAA Amendments of 1990, §501 (federal publication No. 101-549). This federal definition is incorporated in §39.603(e)(1)(A)(i)-(iv). TCAA, §382.057(a) empowers the TNRCC to establish by rule the criteria for facilities which “will not make a significant contribution of air contaminants to the atmosphere.” These facilities and associated sources are prescribed in 30 TAC Chapter 106 (relating to Exemptions from Permitting). The emissions criteria from §106.4(a) are used in §39.603(e)(1)(B) to codify the requirements of TCAA, §382.056(a).**

The TABCC commented that §39.603(c)(1)(B) is confusing. Although it appears this clause is intended to provide a definition of what it means to “not have a significant impact on air quality,” it is not clear how to meet the statute.

**Section 39.603(c) has been renumbered to §39.603(e). The commission has revised the wording of this subsection to clarify the intent.**

TABCC commented that the criteria listed in §39.603(c)(2) are not understandable. They requested clarification as to whether this wording meant to match the requirements for not making a significant contribution.

**Section 39.603(c) has been renumbered to §39.603(e). TCAA, §382.057(a) empowers the commission to establish by rule the criteria for facilities which “will not make a significant contribution of air contaminants to the atmosphere.” These facilities and associated sources are prescribed in 30 TAC Chapter 106 (relating to Exemptions from Permitting). The emissions criteria from §106.4(a) are used in §39.603(e)(1)(B) to codify the requirements of §382.056(a).**

The commission has revised §39.603(e)(1)(A)(iii), to clarify that 75 tons per year applies to the combination of all pollutants rather than 75 tons for each contaminant, to clarify the statutory requirement. In addition, §39.603(e)(1)(B) has been revised to be consistent with the wording of §39.403(b)(8)(B) with regard to the definition of insignificant emissions.

§39.604. *Sign-Posting.*

Section 39.604 establishes the requirements for applicants to post signs at the location of the facility for which notice is required, including information which must be on the signs, locations of the signs, when signs must be posted, and the circumstances under which variations may be approved by the executive director. These rules implement the statutory requirements of TCAA, §382.056(c) which requires a sign to be posted in a prominent location at the property where the facility is or will be located. This section also readopts the requirements of §116.133.

Henry, Lowerre commented that the change in sign posting seems appropriate. The commenter also stated that the commission should solve the problem that signs currently are too small to be noticed and the agency should increase the size of signs.

**The only changes originally proposed to the sign posting requirements were renumbering, reorganization, and clarification of location along a public street, highway, or road. Additional changes in response to comments have occurred with respect to changing the lettering size to a single consistent height instead of various different sizes for easier creation by applicants and viewing by the public. No changes or limitations are proposed for the existing location of the signs at facility sites. The commission has determined that the size of the signs does not need further revision. Sign posting has proven to be an extremely effective method of notification of the public as demonstrated over the last 15 years. The rules clearly state that the signs must be visible with multiple placement along the property lines. The rule takes into account the size of the site upon**

**which the facility will be/is located. For a large site, there is more notice provided by multiple signs.**

Baker & Botts, TI, and Eastman commented that the requirement to post multiple signs at the facility is burdensome and expensive. Additionally, TCAA only requires “a” sign to be posted; not multiple signs.

**TCAA, §382.056(a) allows the commission to require additional notice and the substantive requirements adopted in §39.604 are only moved from Chapter 116 with no significant changes. The sign posting requirements, including multiple signage, has been in the rules for over 15 years and has proven to be an extremely effective method of notification of the public. The rule takes into account the size of the site upon which the facility will be/is located. For a large site, there is more notice provided by multiple signs. If only one sign were used at the entrance to a large facility, it is likely that it would not be discernable from the other plant signage and therefore would not serve its purpose to inform the public.**

TABCC commented that the sign requirements under §39.604(a)(1) seem too complex.

**The commission has adjusted these requirements for simplicity by stating that all lettering would be the same size as opposed to varying sizes.**

Brown McCarroll suggested that §39.604(a)(2) be revised to improve readability.

**The commission agrees the change clarifies the rule and has incorporated these revisions.**

Brown McCarroll suggested that §39.604(b) specify when signs must be posted. The commenter also recommended revising the name of the notice from Notice of Receipt of Application and Intent to Obtain Permit to Notice of Intent to Obtain Permit.

**The commission has added the reference to when the application should be available for review.**

**The commission declines to change the name of the notice for reasons explained in §39.418 of this preamble. Primarily the title of this notice is required by overlapping statutory requirements.**

CAP states that “certification” should be replaced with another term due to the significance of the word “certification” under the TCAA.

**The commission agrees and changed “certification” to “verification” throughout this subchapter.**

Section 39.604(a) has been revised to add “substantial compliance” provision since alternatives can be approved by executive director under the current rule.

*§39.605. Notice to Affected Agencies.*

Section 39.605 establishes the requirements for notifying and sending copies of the notices, affidavits, and verifications to certain agencies. This rule readopts the existing requirements of §116.134, and adds requirements for verifications to be sent for sign posting and alternative language notice to demonstrate

compliance with the requirements under §39.603(d) and §39.604. The commission has the discretion to require this verification under TCAA, §382.051(3), which states that a person applying for a permit shall submit to the commission “any other information the commission considers necessary.”

Baker & Botts noted that the text of the proposed §39.605 as published in the *Texas Register* at 24 TexReg 5337 was not underlined. This may require corrective action to ensure the valid promulgation of the rule.

**This correction was published in the Texas Register at 24 TexReg 6572 on August 20, 1999.**

Brown McCarroll questioned the statutory basis for requiring all applicants to provide copies of newspaper notices, affidavits and certification to each of the entities listed in §39.605(1), (2)(C), and (3). These requirements merely increase administrative burdens and the potential for delays in permitting if the requirement is inadvertently overlooked. They recommend that the section be deleted entirely.

**The commission has made no change in response to this comment, as this rule only codifies the long-standing practice of the air permitting program. Many of these contacts are required for program delegation or due to contractual requirements (EPA and local air pollution control programs). Codifying this practice does not increase any burden on applicants or add any delays to the current permitting process. This verification is authorized under TCAA, §382.051(3).**

*§39.606. Alternative Means of Notice for Voluntary Emission Reduction Permits.*

Section 39.606 establishes the requirements for small business stationary source VERP applicants to request and use an alternative means of notice to implement the statutory requirements of SB 766.

Brown McCarroll commented that the title §39.606 “Alternative Means for Certain Actions” is awkwardly phrased. In addition, several other recommendations were suggested, including changing the word “means” to “method.”

**The commission has revised the title of this section to specify this section applies to VERPs. The commission declines to incorporate the other changes as proposed as the word “means” is directly from the statute from SB 766.**

*Subchapter L, §39.651. Application for Injection Well Permit.*

Section 39.651 sets forth the public notice requirements specifically applicable to injection well applications. The rule incorporates the requirements of existing §39.251, but has added provisions to comply with HB 801 notice requirements. Section 39.651(a) has been added to the rule since proposal to specify that §39.651 applies to applications declared administratively complete on or after September 1, 1999, pursuant to HB 801.

Because of the addition of new §39.651(a), proposed §39.651(b) is now §39.651(c). Section 39.651(c)(2) has been revised since proposal to specifically reference §39.418, which contains the HB 801 requirements for Notice of Receipt of Application and Intent to Obtain Permit. The new Notice of

Receipt of Application and Intent to Obtain Permit replaces the current requirements in §281.17(d) of this title (relating to Notice of Receipt of Application and Determination of Administrative Completeness). The notice under §39.418 now satisfies TWC, §5.552 and THSC, §361.079. Specific references to §39.413 mailed notice requirements have been deleted because these requirements are now incorporated through §39.418. This subsection has been revised to reference more specifically particular parts of §39.411 which contain the notice contents required by HB 801.

Section 39.651(d) requires the §39.419 (Notice of Application and Preliminary Decision) mandated by HB 801. The subsection has been revised to reference more specifically particular parts of §39.411 which contain the notice contents required by HB 801. Specific references to §39.413 mailed notice requirements have been deleted because these requirements are now incorporated through §39.419. The commission has revised §39.651(d)(1) since proposal to clarify that the §39.419 notice may be satisfied by publication in one newspaper, if that paper meets the requirements of both §39.405(f)(2) and §39.651(d)(1). Under §39.651(d)(1), the §39.419 notice must be published once in a newspaper of general circulation in each county which is adjacent or contiguous to each county in which the proposed facility is located. Under THSC, §361.003(24), the definition of “affected person” includes persons who may reside in the county where the facility is located, or in counties adjacent or contiguous to the county where the facility is located. Accordingly, the commission will require notice to be published in these counties to ensure that residents of these counties, potentially affected persons under the statute, are given proper notice.

Section 39.651(e) mirrors existing requirements for notices of public meeting.

Section 39.651(f) contains the requirements for notices of contested case hearings for injection well applications.

In §39.651(f)(2)(A) and (B), the commission has revised the notice of contested case hearing publication requirements to clarify that under (A) all injection well application notices of hearing must be published in the county where the facility is located and in adjacent and contiguous counties, whereas the publication requirements under (B) apply additionally only to a hazardous waste facility. These revisions harmonize notice requirements derived from THSC, §261.003(24) and §361.080(b). Since proposal, §39.651(f)(3)(B) has been revised to mirror the requirement in existing §39.251(f)(3)(B) that the applicant must file an affidavit certifying compliance with its obligation to mail notice of hearing. This requirement is not included in §39.405(e), which only requires an affidavit of newspaper publication, and must be included in the rules to satisfy THSC, §361.081(b).

Section 39.653 sets forth notice requirements which are specific to production area authorizations.

Section 39.653(b) has been revised since proposal to reference specifically §39.418 which contains the HB 801 requirements for Notice of Receipt of Application and intent to Obtain Permit. This subsection has also been revised to reference specifically the parts of §39.411 which contain the text of this notice required by HB 801. Section 39.653(c) has been revised since proposal to reference specifically §39.419 which contains the HB 801 requirements for Notice of Application and Preliminary Decision mandated by HB 801. This subsection has also been revised to reference specifically the parts of §39.411 which contain the text of this notice required by HB 801.

Brown McCarroll submitted proposed revisions to §39.651 intended to reorganize and clarify the rule and make it consistent with other provisions of Chapter 39. The commenter's proposal changed the names of the notices required and would have set forth the required contents of each required notice in the text of this rule, rather than referring to portions of §39.411.

**The commission has not made the changes requested by the commenter because the rule has been revised in other ways to achieve more clarity. The rule now specifically references §39.418 in §39.651(b) and specifically references §39.419 in §39.651(c), setting forth clearly the specific types of notice required and when the specific type of notice is required pursuant to those sections. When a specific type of notice is required under §39.651(b) or (c), references have also been included as to the required contents of the specific notice by reference to the pertinent subsections of §39.411. The names of the notices are not changed as suggested because they are specifically named so as to comply with existing statutory requirements, as well as HB 801 requirements. Section 39.411 has been revised to include the text of notice requirements for public meetings. Because of these clarifications, the additional suggested revisions are not necessary.**

Brown McCarroll proposed to add a new §39.651(a) applicability clause stating that Subchapter L applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

**The commission agrees that an applicability clause is necessary and has modified the rule accordingly.**

Jenkins & Gilchrist commented that §39.651(b)(2) should be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish his Notice of Receipt of Application and Intent to Obtain Permit.

**The commission responds that publishing the notice required under §39.418 before an application is declared administratively complete would not further the goal of meaningful early public participation. Before being declared administratively complete, an application may lack sufficient information to allow for a meaningful review by the public. If the application lacks sufficient information necessary for the public to formulate substantive comments and identify relevant and material issues, the Notice of Receipt of Application and Intent to Obtain Permit would not serve HB 801's objectives of enhanced early public participation.**

Brown McCarroll proposed a revision to §39.651(c)(2) that required the executive director to give notice to certain persons and entities required by law to receive notice after the application is declared administratively complete.

**Section 39.651(b)(2) has been renumbered to §39.651(b)(3) and subsequent subsection have been renumbered. The commission has made no changes in response to this comment and has not incorporated the requested change to because the chief clerk, not the executive director, makes this notification as required by TWC, §5.552(b)(2).**

Baker & Botts and TI commented that the §39.651(c)(1) requirement to publish notice in a newspaper circulated in each county that is adjacent and contiguous to the county in which the facility is to be located is overly burdensome and should be eliminated. The commenter believes that this requirement is not expressly required by HB 801 nor any other state law.

**The commission has made no changes in response to this comment. Under THSC, §361.003(24), the definition of “affected person” includes persons who may reside in the county where the facility is located, or in counties adjacent or contiguous to the county where the facility is located. Accordingly, the commission will require notice to be published in these counties to ensure that residents of these counties, potentially affected persons under the statute, are given proper notice.**

*§39.653. Production Area Authorizations.*

Section 39.653 establishes the notice requirements and determination of administrative completeness for Production Area Authorizations. The commission has revised this section from the requirements of §39.253 to include notices under §39.418 and §39.419 in accordance with HB 801 and TWC, §5.552(a) and §5.553(a).

Jenkins & Gilchrist suggested that §39.653(b)(2), be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish the Notice of Receipt of Application and Intent to Obtain Permit.

**The commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues. Therefore, the commission has not made any changes in response to this comment.**

*Subchapter M, §39.701. Applicability*

Adopted Subchapter M mirrors current Subchapter F, except for minor changes to correct references to Subchapter F and Subchapter H of Chapter 336, and to clarify that certain requirements in Subchapter H of this chapter also apply to Subchapter M. New §39.701 clarifies that Subchapter M only applies to those radioactive material licenses declared administratively complete on or after September 1, 1999.

Current Subchapter F will remain effective and apply to all applications declared administratively complete before September 1, 1999. The amendments adopted by this section are intended to conform with HB 801 Section 7(b) which provide that former law is continued in effect for applications declared administratively complete before September 1, 1999 and that the changes made by the new law are applicable only to applications administratively complete on or after September 1, 1999.

TABCC, and Brown McCarroll commented that §39.701 should be amended to specify the text of the notice that is required to be mailed and published under Subchapter M.

**The commission believes that the text of the notice by publication or mail does not need to be specified in this section because it is already specified in proposed §39.411 (Text of Public Notice)**

**which applies to Subchapter M. However, language generally referencing applicable sections in Subchapter H has been added for clarification. This additional language will assist in the interpretation of the requirements of this Subchapter by clarifying that certain provisions in Subchapter H of this chapter also apply to public notices for radioactive material licenses.**

*§39.702. Notice of Declaration of Administrative Completeness.*

Proposed new §39.702 mirrors language in §39.301 regarding mailing of notice of declaration of administrative completeness, except for the renumbering of the section to accommodate the applicability section. Therefore, we are readopting this section without any substantive changes.

Jenkins & Gilchrist suggested that §39.702 be amended to state that it is not necessary to wait until after the administrative completeness review is complete before an applicant may publish the Notice of Receipt of Application and Intent to Obtain Permit.

**The commission believes that publishing notice before an application is declared administratively complete may not provide meaningful information to the general public in that an application may not have enough information for any substantial review by the public to identify all or any relevant and material issues. Therefore, the commission has not made any changes in response to this comment.**

*§39.703. Notice of License Applications Upon Completion of Technical Review.*

Proposed new §39.703 contains language identical to §39.303 regarding notice of license applications upon completion of technical review. This section is adopted without any substantive changes.

*§39.705. Mailed Notice for Radioactive Material Licenses.*

New §39.705 contains language equivalent to §39.305 regarding mailed notice for radioactive material licenses. The language changes in §39.705 consolidate the description of the specific recipients of mailed notice for these licenses by referencing the applicable recipients from the list already provided in proposed §39.413. The substantive list of recipients for mailed notice under this Subchapter remain unchanged from existing §39.305. This change is necessary to maintain consistency in the interpretation and application of the commission's requirements for mailed notice under this chapter.

Brown McCarroll commented that §39.705 contained references to §39.413(b), (c), (h), (i), and (l), which do not exist in the proposed rule as published.

**The commission has corrected the language to refer to the appropriate subparts of §39.413(2), (3), (8), (9), and (12). This change to correct the references in §39.705 is necessary to clarify the requirements for mailed notice and to provide consistency in the interpretation and application of the TNRCC's requirements.**

*§39.707. Published Notice.*

New §39.707 mirrors language in §39.307 regarding published notice, and this section is adopted without changes.

Brown McCarroll commented that this section should be amended to specify the text of the notice that is required to be mailed and published.

**The commission believes that the language specified in proposed §39.411 is sufficient because it applies generally to Subchapters H through M, unless specified otherwise. The nonsubstantive changes in the language for proposed §39.707 are necessary to clarify and maintain consistency in the interpretation and application of commission rules.**

*§39.709. Notice of Contested Case Hearing on Application.*

New §39.709 contains language identical to §39.309 regarding notice of contested case hearing on Application, except that subsection (b) references to Chapter 336, Subchapters F and H have been corrected to state the full titles of those Subchapters.

Brown McCarroll commented that this section should be amended to contain a cross-reference to a new rule which would establish the text of the Notices for Contested Case Hearings.

**The commission has added a new §39.709(c) to refer to proposed §39.411(d) which specifies the requirements for the text of the Notice for Contested Case hearings. The change in the language for proposed §39.709 is necessary to clarify and maintain consistency in the interpretation and application of commission rules.**

*§39.711. Proof and Certification of Notice.*

Proposed new §39.711 contains language identical to §39.311 regarding proof and certification of notice, except that the proposed section would apply to applications declared administratively complete on or after September 1, 1999. The language of §39.711(b) has been changed to state that the filing of an affidavit is required to maintain consistency with §39.405.

Brown McCarroll commented that §39.711(b) should be modified to delete the words “acceptance of” because it is ambiguous as to who would be accepting the publisher’s affidavit and it is not the acceptance of the affidavit that creates the rebuttable presumption, but the publisher’s affidavit itself which creates the rebuttable presumption of actual publication of the notice.

**The commission agrees with this comment and has changed the language to maintain consistency with §39.405 which specifies that filing of the publisher’s affidavit creates the rebuttable presumption of compliance. This change is necessary to clarify and maintain consistency in the interpretation and application of commission rules.**

*§39.713. Public Notification and Public Participation.*

Proposed new §39.713 is identical to §39.313 regarding public notification and public participation, except that the proposed section would apply to applications declared administratively complete on or after September 1, 1999. Therefore, it is adopted without any substantive changes.

STATUTORY AUTHORITY

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's

authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and Texas Utilities Code, §39.264

## **CHAPTER 39 - PUBLIC NOTICE**

### **SUBCHAPTER A : APPLICABILITY AND GENERAL PROVISIONS**

#### **§39.1**

##### **§39.1. Applicability.**

Any permit applications listed below that are declared administratively complete before September 1, 1999 are subject to Subchapter A of this chapter (relating to Applicability and General Provisions), and Subchapters B-F of this chapter (relating to Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications, Public Notice of Air Quality Applications, Public Notice of Other Specific Applications, and Public Notice for Radioactive Material Licenses), as applicable.

Any permit applications listed below that are declared administratively complete on or after September 1, 1999 are subject to Subchapter H of this chapter (relating to Applicability and General Provisions), and Subchapters I-M of this chapter (relating to 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 Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses), as applicable. All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits), regardless of when they were declared administratively complete. This chapter applies to:

(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.

(A) This paragraph includes:

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

(ii) applications for permits under Chapter 321, Subchapter B of this title (relating to Commercial Livestock and Poultry Production Operations).

(B) This paragraph does not include:

(i) applications for authorizations under Chapter 321 of this title (relating to Control of Certain Activities by Rule), other than applications under Subchapter B of this chapter;

(ii) applications for authorizations under Chapter 312 of this title, except applications for a permit under the chapter; and

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

(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) hearings under Chapter 80 of this title (relating to Contested Case Hearings) concerning applications for air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(6) hearings on contested enforcement cases under Chapter 80 of this title; and

(7) applications for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules);

(8) 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).

## **SUBCHAPTER B : PUBLIC NOTICE OF SOLID WASTE APPLICATIONS**

### **§39.101**

#### **STATUTORY AUTHORITY**

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for

waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which

establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

**§39.101. Application for Municipal Solid Waste Permit.**

(a) Applicability. This subchapter applies to applications for municipal solid waste permits that are declared administratively complete before September 1, 1999. Any permit application that is declared administratively complete on or after September 1, 1999 is subject to Subchapter I of this chapter (relating to Public Notice of Solid Waste Applications).

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit to the executive director a notice of intent to file an application, setting forth the proposed location and type of facility. The executive director shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall also be mailed to the mayor of the municipality. The executive director shall also mail notice to the appropriate regional solid waste planning agency or council of government. The mailing shall be by certified mail.

(c) Notice of intent to obtain a permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, the following actions shall be taken.

(A) The applicant shall publish notice of intent to obtain a permit at least once under §39.5(g) of this title (relating to General Provisions).

(B) The chief clerk shall publish notice of the application in the *Texas Register*.

(C) The chief clerk shall mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice).

(D) The executive director shall mail notice of this determination along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of draft permit.

(1) The applicant shall publish notice at least once under §39.5(g) of this title.

(2) The chief clerk shall mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice).

(3) The notice shall specify the deadline to file public comment or hearing requests, which shall be not less than 30 days after newspaper publication.

(e) Notice of public meeting.

(1) If the application proposes a new facility, the executive director shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of this subsection if public notice is provided under this subsection.

(2) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.5(g) of this title. The published notice shall not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches.

(3) The chief clerk shall mail notice to the persons listed in §39.13 of this title.

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.5(g) of this title.

(3) Mailed notice.

(A) If the applicant proposes a new facility, the applicant shall mail notice of the hearing to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant must file an affidavit certifying compliance with this paragraph with the chief clerk. Filing an affidavit certifying facts that constitute compliance with the notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes an amendment of a permit, the chief clerk shall mail notice to the persons listed in §39.13 of this title.

(4) Notice under paragraphs (2) and (3)(B) of this subsection shall be completed at least 30 days before the hearing.

## **SUBCHAPTER C : PUBLIC NOTICE OF WATER QUALITY APPLICATIONS**

### **§39.151**

#### **STATUTORY AUTHORITY**

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for

waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which

establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.151. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.**

(a) Applicability. This subchapter applies to applications for wastewater discharge permits, including sludge disposal applications, that are declared administratively complete before September 1, 1999. Any permit application that is declared administratively complete on or after September 1, 1999 is subject to Subchapter J of this chapter (relating to Public Notice of Water Quality Applications and Water Quality Management Plans).

(b) Notice of receipt of application and administrative completeness. The chief clerk shall mail notice to the School Land Board if the requirements of Texas Water Code, §5.115(c) apply to an application that will affect lands dedicated to the permanent school fund. The notice shall be in the form required by that section. The chief clerk shall also mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice), except that mailed notice to adjacent or downstream landowners is not required for:

- (1) an application to renew a permit; or

(2) an application for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment).

(c) Notice of draft permit. For all draft permits except those in subsection (d) of this section, the following provisions apply.

(1) The applicant shall publish notice that the executive director has prepared a draft permit at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(2) The chief clerk shall mail notice to the persons listed in §39.13 of this title, except that mailed notice to adjacent or downstream landowners is not required for an application to renew a permit. For any application involving an average daily discharge of five million gallons or more, in addition to the persons listed in §39.13 of this title, the chief clerk shall mail notice to each county judge in the county or counties located within 100 statute miles of the point of discharge who has requested in writing that the commission give notice, and through which water into or adjacent to which waste or pollutants are to be discharged under the permit, flows after the discharge.

(3) The notice must set a deadline to file public comment or hearing requests with the chief clerk that is not less than 30 days after newspaper publication. However, the notice may be mailed to the county judges under paragraph (2) of this subsection no later than 20 days before the deadline to file public comment or hearing requests.

(4) For TPDES permits, the text of the notice shall include:

(A) everything that is required by §39.11 of this title (relating to Text of Public Notice); and

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(d) Notice of certain draft TPDES permits. For a new TPDES permit for which the discharge is authorized by an existing state permit issued before September 14, 1998, the following shall apply.

(1) If the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the following mailed and published notice is required.

(A) The applicant shall publish notice that the executive director has prepared a draft permit at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(B) The chief clerk shall mail notice of the application and draft permit, providing an opportunity to submit public comments, to request a public meeting, or to request a public hearing to:

(i) the mayor and health authorities of the city or town in which the facility is or will be located or in which pollutants are or will be discharged;

(ii) the county judge and health authorities of the county in which the facility is or will be located or in which pollutant are or will be discharged;

(iii) if applicable, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR) §124.10(c);

(iv) if applicable, persons on a mailing list developed and maintained according to 40 CFR §124.10(c)(1)(ix);

(v) the applicant;

(vi) persons on a relevant mailing list kept under §39.7 of this title (relating to Mailing Lists);

(vii) any other person the executive director or chief clerk may elect to include; and

(viii) if applicable, the secretary of the Coastal Coordination Council.

(C) The notice must set a deadline to file public comment, to request a public meeting, or to request a public hearing with the chief clerk that is at least 30 days after newspaper publication.

(D) The text of the notice shall include:

(i) everything that is required by §39.11 of this title;

(ii) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(iii) for applications concerning the disposal of sludge:

(I) the use and disposal practices;

(II) the location of the sludge treatment works treating domestic sewage sludge; and

(III) the use and disposal sites known at the time of permit application.

(2) If the application proposes any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the applicant must follow the notice requirements of subsection (c) of this section.

(e) Notice for other types of applications. Except as required by subsections (b), (c), and (d) of this section, the following notice is required for certain applications.

(1) For an application for a minor amendment to a permit other than a TPDES permit, or for an application for a minor modification of a TPDES permit, under Chapter 305, Subchapter D of this title (relating to Amendments, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the chief clerk shall mail notice, that the executive director has determined the application is technically complete and has prepared a draft permit, to the mayor and health authorities for the city or town, and to the county judge and health authorities for the county in which the waste will be discharged. The notice shall state the deadline to file public comment, which shall be no earlier than ten days after mailing notice.

(2) For an application for a renewal of a confined animal feeding operation permit which was issued between July 1, 1974, and December 31, 1977, for which the applicant does not propose to discharge into or adjacent to water in the state and does not seek to change materially the pattern or place of disposal, no notice is required.

(3) For an application for a minor amendment to a TPDES permit under Chapter 305, Subchapter D of this title (relating to Amendment, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the following requirements apply.

(A) The chief clerk shall mail notice of the application and draft permit, providing an opportunity to submit public comments and to request a public meeting to:

(i) the mayor and health authorities of the city or town in which the facility is or will be located or in which pollutants are or will be discharged;

(ii) the county judge and health authorities of the county in which the facility is or will be located or in which pollutants are or will be discharged;

(iii) if applicable, state and federal agencies for which notice is required in 40 CFR §124.10(c);

(iv) if applicable, persons on a mailing list developed and maintained according to 40 CFR §124.10(c)(1)(ix);

(v) the applicant;

(vi) persons on a relevant mailing list kept under §39.7 of this title (relating to Mailing Lists); and

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

(B) For TPDES major facility permits, notice shall be published in the *Texas Register*.

(C) The text shall meet the requirements in §39.11 of this title and subsection (b)(4) of this section.

(D) The notice shall provide at least a 30-day public comment period.

(E) The executive director shall prepare a response to all significant public comments received by the commission under §55.25 of this title (relating to Public Comment Processing).

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Not less than 30 days before the hearing, the applicant shall publish notice at least once in a newspaper regularly published or circulated in each county where, by virtue of the county's geographical relation to the subject matter of the hearing, a person may reasonably believe persons reside who may be affected by the action that may be taken as a result of the hearing. The executive director shall provide to the chief clerk a list of the appropriate counties.

(3) Not less than 30 days before the hearing, the chief clerk shall mail notice to the persons listed in §39.13 of this title, except that mailed notice to adjacent or downstream landowners is not required for an application to renew a permit.

(4) For TPDES permits, the text of notice shall include:

(A) everything that is required by §39.11 of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(g) Notice for discharges with a thermal component. For requests for a discharge with a thermal component filed pursuant to Clean Water Act, §316(a), 40 CFR Part 124, Subsection D,

§124.57(a), public notice, which is in effect as of the date of TPDES program authorization, as amended, is adopted by reference. A copy of 40 CFR Part 124 is available for inspection at the library of the agency, Park 35, 12100 North Interstate 35, Austin.

## **SUBCHAPTER D : PUBLIC NOTICE OF AIR QUALITY APPLICATIONS**

### **§39.201**

#### **STATUTORY AUTHORITY**

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for

waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which

establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes the authority of the commission to delegate to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.201. Application for a Preconstruction Permit.**

(a) Applicability. This section applies to the following types of air actions that are declared administratively complete before September 1, 1999:

(1) hearings under Chapter 80 of this title (relating to Contested Case Hearings) on applications for permits, permit amendments or permit renewals under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); and

(2) hearings under Chapter 80 of this title on applications for a registration for a standard exemption required to provide public notice under Chapter 116 of this title.

(b) Notice of hearing. The applicant shall publish notice of the hearing in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility. The notice must be published not less than 30 days before the hearing.

(c) Any application listed in subsection (a) of this section that is declared administratively complete on or after September 1, 1999 is subject to Subchapter K of this chapter (relating to Public Notice of Air Quality Applications).

## **SUBCHAPTER E : PUBLIC NOTICE OF OTHER SPECIFIC APPLICATIONS**

### **§39.251, §39.253**

#### **STATUTORY AUTHORITY**

The amendments are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for

waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which

establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.251. Application for Injection Well Permit.**

(a) Applicability. This section applies to applications for injection well permits that are declared administratively complete before September 1, 1999. Any permit applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapter L of this chapter (relating to Public Notice of Injection Well and Other Specific Applications).

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall be mailed to the mayor of the municipality.

(c) Notice of receipt of application. When the executive director receives an application for, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(d) Notice of administratively complete application.

(1) The chief clerk shall mail notice to the School Land Board if the requirements of Texas Water Code, §5.115 apply concerning an application that will affect lands dedicated to the permanent school fund. The notice shall be in the form required by that section. The chief clerk shall also mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice), and to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title (relating to Definitions).

(2) After the executive director determines that the application is administratively complete, the executive director shall mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located. The executive director shall also mail a copy of the application or a summary of its contents to the county judge and the health authority of the county in which the facility is located.

(e) Notice of draft permit.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county in which the facility is located.

(2) The chief clerk shall mail notice to the persons listed in §39.13 of this title, to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title, and to local governments located in the county of the facility. “Local governments” shall have the meaning provided for that term in Texas Water Code, Chapter 26.

(3) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.5(h) of this title (relating to General Provisions).

(4) The notice shall specify the deadline to file public comment or hearing requests. The deadline shall be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(f) Notice of public meeting.

(1) If the applicant proposes a new hazardous waste facility, the executive director shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application. If the applicant proposes a major amendment of an existing hazardous waste facility permit, the executive director shall hold a public meeting if a person affected files with the chief clerk a request for public meeting concerning the application before the deadline to file public comment or hearing requests. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(2) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.5(g) of this title. The published notice shall not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches.

(3) The chief clerk shall mail notice to the persons listed in §39.13 of this title.

(g) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) If the application concerns a facility other than a hazardous waste facility, the applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county wherein the proposed facility is located.

(B) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.5(g) of this title.

The published notice shall not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. The text of the notice shall include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.13 of this title, and to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title (relating to Definitions).

(B) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subsection.

(4) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.5(h) of this title.

(5) Notice under paragraphs (2)(A), (3), and (4) of this subsection shall be completed at least 30 days before the hearing.

**§39.253. Application for Production Area Authorization.**

(a) Applicability. This section applies to an application for a production area authorization under Chapter 331 of this title (relating to Underground Injection Control) that is declared administratively complete before September 1, 1999. Any permit application that is declared administratively complete on or after September 1, 1999 is subject to Subchapter L of this chapter (relating to Public Notice of Injection Well and Other Specific Applications).

(b) Notice of administratively complete application. The chief clerk shall mail notice to the persons listed in §39.13 of this title (relating to Mailed Notice).

(c) Notice of executive director's preparation of draft production area authorization. The chief clerk shall mail notice to the persons listed in §39.13 of this title. The notice shall specify the deadline to file with the chief clerk public comment, which is 30 days after mailing.

(d) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.5(g) of this title.

(3) The chief clerk shall mail notice to the persons listed in §39.13 of this title.

(4) Notice under paragraphs (2) and (3) this subsection shall be completed at least 30 days before the hearing.

## **SUBCHAPTER F : PUBLIC NOTICE OF RADIOACTIVE MATERIAL LICENSE**

### **APPLICATIONS**

#### **§39.302**

#### **STATUTORY AUTHORITY**

The new section is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality

standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the

commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.302. Applicability**

Applicability. This subchapter applies to applications for radioactive material licenses, under Chapter 336 of this title, that are declared administratively complete before September 1, 1999. Any applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapter M of this chapter (relating to Public Notice of Radioactive Material License Applications).

**SUBCHAPTER G : PUBLIC NOTICE FOR APPLICATIONS FOR CONSOLIDATED**

**PERMITS**

**§39.351**

**STATUTORY AUTHORITY**

The new section is adopted under TWC, Chapter 5, Subchapter J, which establishes the commission's authority concerning consolidated permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for

waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which

establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.351. Public Notice for Applications for Consolidated Permits.**

(a) Applicability. This section applies to applications for consolidated permits, which combine authorizations under two or more program areas.

(b) Combined public notices shall be given for applications consolidated under Texas Water Code, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing) only when:

(1) combined notice is requested by the applicant; and

(2) combined notice satisfies all statutory and regulatory requirements that would apply if each application had been processed separately, including, without limitation, all requirements for notice content, publication, mailing, broadcasting, and the posting of signs.

**SUBCHAPTER G : PUBLIC NOTICE FOR APPLICATIONS FOR CONSOLIDATED  
PERMITS  
§39.401**

**STATUTORY AUTHORITY**

The repeal is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include:

§5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality

standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the

commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.401. Public Notice for Applications for Consolidated Permits.**

## **SUBCHAPTER H : APPLICABILITY AND GENERAL PROVISIONS**

**§§39.401, 39.403, 39.405, 39.407, 39.409, 39.411, 39.413, 39.418, 39.419, 39.420, 39.421, 39.423,  
39.425**

### **STATUTORY AUTHORITY**

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality

standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the

commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which

provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.401. Purpose.**

Subchapters H-M 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 Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses) specify notice requirements for applications and certain other actions described in these subchapters such as notices for public meetings, contested case hearings on permit applications and enforcement cases, notice and comment hearings, and Water Quality Management Plan (WQMP) updates.

**§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).

(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), 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 §382.0518 and §382.055 of the Texas Health and Safety Code. 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 CFR 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 §39.264 of the Utilities Code;

(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 §39.403(b)(10) of this title (relating to Applicability).

(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) (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, Hazardous Waste, or Municipal Solid 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 Class I modifications of municipal solid waste permits under §305.70 of this title (relating to Municipal Solid Waste Class I Modifications). Notice for Class I modifications shall comply with the requirements of §39.105 of this title, without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 of this title;

(11) applications for Class 2 modifications of industrial or hazardous waste permits under §305.69(c) (relating to Solid Waste Permit Modification at the Request of the Permittee). 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).

**§39.405. General Notice Provisions.**

(a) Failure to Publish Notice. If the chief clerk prepares a newspaper notice that is required by Subchapters H-M 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 Injection Well and Other Specific

Applications, and Public Notice for Radioactive Material Licenses) or Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits) and the applicant does not cause the notice to be published within 45 days of mailing of the notice from the chief clerk, or for Notice of Receipt of Application and Intent to Obtain Permit, within 30 days after the executive director declares the application administratively complete, or fails to submit the copies of notices or affidavit required in subsection (e) of this section, the executive director may cause one of the following actions to occur:

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

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

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

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

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

(e) Notice and Affidavit. When Subchapters H-L of this chapter or Subchapter G of this chapter require an applicant to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice which shows the date of publication and the name of the newspaper is 10 business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (a) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

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

(1) the applicant shall publish notice in the newspaper of largest circulation in the county in which the facility is located or proposed to be located, except for air applications required to publish in a newspaper of general circulation in a municipality under §39.603 of this title (relating to Newspaper Notice); and

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

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

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

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

**§39.407. Mailing Lists.**

The chief clerk shall maintain mailing lists of persons requesting notice of an application. Persons, including participants in past agency permit proceedings, may request in writing to be on a mailing list. The chief clerk may from time to time request confirmation that persons on a list wish to remain on the list, and may delete from the list the name of any person who fails to respond to such request.

**§39.409. Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing.**

Notice given under this chapter will specify any applicable deadline to file public comment specified under §55.152 of this title (relating to Public Comment) and, if applicable, any deadlines to file requests for reconsideration, contested case hearing, or notice and comment hearing. After the deadline, final action on an application may be taken under Chapter 50 of this title (relating to Action on Applications and Other Authorizations).

**§39.411. Text of Public Notice.**

(a) Applicants shall use notice text provided and approved by the agency. The executive director may approve changes to notice text before notice being given.

(b) When notice of receipt of application and intent to obtain permit by publication or by mail is required by Subchapters H-L 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, and Public Notice of Injection Well and Other Specific Applications), Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits), or for Subchapter M of this chapter (relating to Mailed Notice for Radioactive Material Licenses), the text of the notice must include the following information:

(1) the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information;

(2) the name, address, and telephone number of the applicant and a description of the manner in which a person may contact the applicant for further information;

(3) a brief description of the location and nature of the proposed activity;

(4) a brief description of public comment procedures, including:

(A) a statement that the executive director will respond to comments raising issues that are relevant and material or otherwise significant; and

(B) a statement in the notice for any permit application for which there is an opportunity for a contested case hearing, that only disputed factual issues that are relevant and material to the commissions's decision that are raised during the comment period can be considered if a contested case hearing is granted.

(5) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting, contested case hearing, reconsideration of the executive director's decision, a notice and comment hearing, or a statement that later notice will describe procedures for public participation, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity;

(6) the application or permit number;

(7) if applicable, a statement that the application or requested action is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(8) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the application is available for review and copying;

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application;

(10) for notices of air applications:

(A) at a minimum, a listing of criteria pollutants for which authorization is sought in the application which are regulated under national ambient air quality standards (NAAQS) or under state standards in Chapters 111, 112, 113, 115, and 117 of this title (relating to Control of Air Pollution from Visible Emissions and Particulate Matter, Control of Air Pollution from Sulfur Compounds, Control of Air Pollution from Toxic Materials, Control of Air Pollution from Volatile Organic Compounds, and Control of Air Pollution from Nitrogen Compounds);

(B) if notice is for applications described in §39.403(b)(11) or (12) of this title (relating to Applicability), a statement that any person is entitled to request a notice and comment hearing from the commission. If notice is for any other air application the following information which must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice:

(i) a statement that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission; ;

(ii) a statement that a contested case hearing request must include the requester's location relative to the proposed facility or activity;

(iii) a statement that a contested case hearing request should include a description of how the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity; and

(iv) and that only relevant and material issues raised during the comment period can be considered if a contested case hearing request is granted; and

(C) notification that a person residing within 440 yards of a concrete batch plant under an exemption from permitting or permit by rule adopted by the commission is an affected person who is entitled to request a contested case hearing;

(D) the statement: "The facility's compliance file, if any exists, is available for public review in the regional office of the Texas Natural Resource Conservation Commission;" and

(11) for notices of municipal solid waste applications, a statement that a person who may be affected by the facility or proposed facility is entitled to request a contested case hearing from the commission. This statement must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice; and

(12) any additional information required by the executive director or needed to satisfy public notice requirements of any federally authorized program; or

(13) for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted.

(14) for Class 3 modifications of hazardous industrial solid waste permits the statement “The permittees compliance history during the life of the permit being modified is available from the agency contact person.”

(c) Unless mailed notice is otherwise provided for under this section, the chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.413 of this title (relating to Mailed Notice). When notice of application and preliminary decision by publication or by mail is required by Subchapters G-L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1)-(12) of this section;

(2) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director’s preliminary decision may be submitted, or a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted. The public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(3) if the application is subject to final approval by the executive director under Chapter 50 of this title (relating to Action on Applications), a statement that the executive director may issue final approval of the application unless a timely contested case hearing request or a timely request for reconsideration (if applicable) is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit; and

(5) the location, at a public place in the county in which the facility is located or proposed to be located, at which a copy of the complete application and the executive director's preliminary decision are available for review and copying;

(6) the deadline to file comments or request a public meeting. The notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or there is substantial public interest in the proposed activity;

(7) for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), if applicable, a statement that a written environmental analysis on the application has been prepared by the executive director, is available to the public for review, and that written comments may be submitted.

(d) When notice of a public meeting or notice of a hearing by publication or by mail is required by Subchapters G-L of this chapter, the text of the notice must include the following information:

(1) the information required by subsection (b)(1)-(3), (6)-(8), and (12) of this section;

(2) the date, time, and place of the meeting or hearing, and a brief description of the nature and purpose of the meeting or hearing, including the applicable rules and procedures;

(3) for notices of public meetings only, a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

**§39.413. Mailed Notice.**

Unless otherwise specified in Subchapters I-M of this chapter (relating to 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 Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses), when this chapter requires mailed notice, the chief clerk shall mail notice to:

- (1) the landowners named on the application map or supplemental map, or the sheet attached to the application map or supplemental map;
- (2) the mayor and health authorities of the city or town in which the facility is or will be located or in which waste is or will be disposed of;
- (3) The county judge and health authorities of the county in which the facility is or will be located or in which waste is or will be disposed of;
- (4) the Texas Department of Health;
- (5) the Texas Parks and Wildlife Department;
- (6) the Texas Railroad Commission;
- (7) if applicable, local, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR), §124.10(c), as amended and adopted in the CFR through May 2, 1989 at 54 FedReg 18786;
- (8) if applicable, persons on a mailing list developed and maintained in accordance with 40 CFR §124.10(c)(1)(ix);

(9) the applicant;

(10) if the application concerns an injection well, the Water Well Drillers Advisory Council;

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

(12) any other person the executive director or chief clerk may elect to include;

(13) if applicable, the secretary of the Coastal Coordination Council; and

(14) persons who filed public comment or hearing requests on or before the deadline for filing public comment or hearing requests.

**§39.418. Notice of Receipt of Application and Intent to Obtain Permit.**

(a) When the executive director determines that an application is administratively complete, the chief clerk shall mail this determination concurrently with the Notice of Receipt of Application and Intent to Obtain Permit to the applicant.

(b) Not later than 30 days after the executive director declares an application administratively complete:

(1) the applicant shall publish Notice of Receipt of Application and Intent to Obtain Permit once under §39.405(f)(1) of this title (relating to General Notice Provisions) and, for solid waste applications and injection well applications, also under §39.405(f)(2) of this title;

(2) the chief clerk shall mail Notice of Receipt of Application and Intent to Obtain Permit to those listed in §39.413 of this title (relating to Mailed Notice), and to:

(A) the state senator and representative who represent the general area in which the facility is located or proposed to be located; and

(B) the river authority in which the facility is located or proposed to be located if the application is under Texas Water Code, Chapter 26.

(3) for air applications, paragraphs (1) and (2) of this subsection do not apply. Instead the applicant shall provide notice as specified in Subchapter K of this chapter (relating to Public Notice of Air Quality Applications). Specifically, publication in the newspaper shall follow the requirements under §39.603 of this title (relating to Newspaper Notice), sign posting shall follow the requirements under §39.604 of this title (relating to Sign-Posting), and the chief clerk shall mail notice according to §39.602 of this title (relating to Mailed Notice); and

(4) the notice must include the applicable information required by §39.411(b) of this title (relating to Text of Public Notice).

**§39.419. Notice of Application and Preliminary Decision.**

(a) After technical review is complete, the executive director shall file the preliminary decision and the draft permit with the chief clerk, except for air applications under subsection (e)(1) of this section. The chief clerk shall mail the preliminary decision concurrently with the Notice of Application and Preliminary Decision. Then, when this chapter requires notice under this section, notice shall be given as required by subsections (b)-(e) of this section.

(b) The applicant shall publish Notice of Application and Preliminary Decision at least once in the same newspaper as the Notice of Receipt of Application and Intent to Obtain Permit, unless there are different requirements in this section or a specific subchapter in this chapter for a particular type of permit.

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

(d) The notice must include the information required by §39.411(c) of this title.

(e) For air applications:

(1) the applicant is not required to publish Notice of Application and Preliminary Decision, if:

(A) no hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit;

(B) a hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and the request is withdrawn before the date the preliminary decision is issued;

(C) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations; or

(D) the application is for initial issuance of a permit described in §39.403(b)(11) or (12) of this title (related to Applicability);

(2) If notice under this section is required, the agency shall mail notice according to §39.602 of this title (relating to Mailed Notice); and

(3) Notice of Application and Preliminary Decision shall be published as specified in Subchapter K of this chapter (relating to Public Notification of Air Quality Applications) for permits that are not exempt under paragraph (1)(A)-(C) of this subsection or are for the following federal preconstruction approvals:

(A) applications under Chapter 116, Subchapter B, Division 5 of this title (relating to Nonattainment Review);

(B) applications under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review); and

(C) applications under Chapter 116, Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

**§39.420. Transmittal of the Executive Director's Response to Comments and Decision**

(a) When required by and subject to §55.156 of this chapter (relating to Public Comment Processing), after the close of the comment period, the chief clerk shall transmit to the people listed in subsection (b) of this section the following information:

- (1) the executive director's decision;
- (2) the executive director's response to public comments;
- (3) instructions for requesting that the commission reconsider the executive director's decision; and
- (4) instructions for requesting a contested case hearing.

(b) The following persons shall be sent the information listed in subsection (a) of this section:

- (1) the applicant;
- (2) any person who requested to be on the mailing list for the permit action;
- (3) any person who submitted comments during the public comment period;
- (4) any person who timely filed a request for a contested case hearing;

(5) Office of the Public Interest Counsel; and

(6) Office of Public Assistance.

(c) For air applications which meet the following conditions, items listed in subsection (a)(3) and (4) of this section are not required to be included in the transmittals:

(1) applications for initial issuance of voluntary emission reduction permits under Texas Health and Safety Code, §382.0519;

(2) applications for initial issuance of electric generating facility permits under Texas Utilities Code, §39.264;

(3) applications where a hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and the request is withdrawn before the date the preliminary decision is issued; or

(4) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of

egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

**§39.421. Notice of Commission Meeting to Evaluate a Request for Reconsideration or Hearing on an Application.**

If, under Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), a request for reconsideration or hearing on an application is set for consideration during a commission meeting, the chief clerk shall mail notice to the applicant, executive director, public interest counsel, all persons who commented (or a representative of a group or association), and the persons making the request, no later than 30 days before the first meeting at which the commission considers the request.

**§39.423. Notice of Contested Case Hearing.**

(a) The chief clerk shall mail notice of a contested case hearing to the applicant, executive director, and public interest counsel. The chief clerk shall also mail notice to persons who filed public comment, or requests for reconsideration or contested case hearing. The notice shall be mailed to the parties no less than 13 days before the hearing. The chief clerk may combine the mailed notice required by this section with other mailed notice of hearing required by this chapter. If the commission refers an application to SOAH on the sole question of whether the requestor is an affected person, the notice in this subsection shall be the only notice required.

(b) For specific types of applications, additional requirements for notice of hearing are in Subchapters H-M 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 Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses).

(c) After an initial preliminary hearing, the judge shall give reasonable notice of subsequent prehearing conferences or the evidentiary hearing by making a statement on the record in a prehearing conference or by written notice to the parties.

**§39.425. Notice of Contested Enforcement Case Hearing.**

For any contested enforcement case hearing, the chief clerk shall mail notice to the statutory parties, respondents, and persons who have requested to be on a mailing list for the pleadings in the formal enforcement action no less than 13 days before a hearing in accordance with the APA, §2001.052. In addition, public notice and opportunity for comment before the commission regarding a proposed enforcement action shall be given under Chapter 10 of this title (relating to Commission Meetings).

## **SUBCHAPTER I : PUBLIC NOTICE OF SOLID WASTE APPLICATIONS**

### **§§39.501, 39.503, 39.509**

#### **STATUTORY AUTHORITY**

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the

commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial solid waste and hazardous municipal waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which

establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.501. Application for Municipal Solid Waste Permit.**

(a) Applicability. This section applies to applications for municipal solid waste (MSW) permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant for an MSW permit decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit to the executive director a notice of intent to file an application, setting forth the proposed location and type of facility. The executive director shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall also be mailed to the mayor of the municipality. The executive director shall also mail notice to the appropriate regional solid waste planning agency or council of government. The mailing shall be by certified mail.

(c) Notice of Receipt of Application and Intent to Obtain a Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete:

(A) notice shall be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) and, if a newspaper is not published in the county, then the applicant shall publish notice in a newspaper of circulation in the immediate vicinity in which the facility is located or proposed to be located. This notice must contain the text as required by §39.411(b)(1)-(9), (11), and (12) of this title (relating to Text of Public Notice);

(B) the chief clerk shall publish Notice of Receipt of Application and Intent to Obtain Permit in the *Texas Register*; and

(C) the executive director or chief clerk shall mail Notice of Receipt of Application and Intent to Obtain Permit, along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) shall be published once as required by §39.405(f)(2) of this title (relating to General Notice Provisions). The notice shall be published after the

chief clerk has mailed the Notice of Application and Preliminary Decision to the applicant. The notice must contain the text as required by §39.411(c)(1)-(6) of this title.

(e) Notice of public meeting.

(1) If the application proposes a new facility, the agency shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (a) of this section meets the requirements of this subsection if public notice is provided under this subsection.

(2) The applicant shall publish notice of the public meeting, as required by §39.405(f)(2) of this title, once each week during the three weeks preceding a public meeting. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters).

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.405(f)(2) of this title.

(3) Mailed notice.

(A) If the applicant proposes a new facility, the applicant shall mail notice of the hearing to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes to amend a permit, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(4) Notice under paragraphs (2) and (3)(B) of this subsection shall be completed at least 30 days before the hearing.

**§39.503. Application for Industrial or Hazardous Waste Facility Permit.**

(a) Applicability. This section applies to applications for industrial or hazardous waste facility permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication requirements

(1) If an applicant for an industrial or hazardous waste facility permit decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall also be mailed to the mayor of the municipality. Mailed notice shall be by certified mail. When the applicant submits the notice of intent to the executive director, the applicant shall publish notice of the submission in a paper of general circulation in the county in which the facility is to be located.

(2) The requirements of this paragraph are set forth at 40 Code of Federal Regulations (CFR) §124.31(b)-(d), which is adopted by reference as amended and adopted in the CFR through

December 11, 1995, at 60 FedReg 63417, and apply to all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, where the renewal application is proposing a significant change in facility operations. For the purposes of this paragraph, a “significant change” is any change that would qualify as a Class 3 permit modification under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). The requirements of this paragraph do not apply to an application for minor amendment under §305.62 of this title (relating to Amendment), correction under §50.45 of this title (relating to Corrections to Permits), or modification under §305.69 of this title, or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit, where the renewal application is proposing a significant change in facility operations.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) On the executive director’s receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located and to the persons listed in §39.413 of this title (relating to Mailed Notice). For all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, the chief clerk shall provide notice to meet the

requirements of this subsection and 40 CFR §124.32(b), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, and the executive director shall meet the requirements of 40 CFR §124.32(c), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417. The requirements of this paragraph relating to 40 CFR §124.32(b)-(c) do not apply to an application for minor amendment under §305.62 of this title, correction under §50.45 of this title, or modification under §305.69 of this title, or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit.

(2) After the executive director determines that the application is administratively complete:

(A) notice shall be given as required by §39.418 of this title. Notice under §39.418 will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness).

(B) the executive director or chief clerk shall mail notice of this determination along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title shall be published once as required by §39.405(f)(2) of this title. In addition to the requirements of §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county which is adjacent or contiguous to each county in which the facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) If the application concerns a hazardous waste facility, the applicant shall broadcast notice of the application on one or more local radio stations that broadcast to an area that includes all of the county in which the facility is located. The executive director may require that the broadcasts be made to an area that also includes contiguous counties.

(3) The notice shall comply with §39.411 of this title. The deadline for public comments on industrial solid waste applications shall be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If the applicant proposes a new hazardous waste facility, the executive director shall hold a public meeting in the county in which the facility is to be located to receive public comment

concerning the application. If the applicant proposes a major amendment of an existing hazardous waste facility permit, this subsection applies if a person affected files a request for public meeting with the chief clerk concerning the application before the deadline to file public comment or hearing requests. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (a) of this section meets the requirements of this subsection if public notice is provided under this subsection.

(2) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting. The applicant shall publish notice under §39.405(f)(2) of this title. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters).

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (concerning Contested Case Hearings).

(2) Newspaper notice.

(A) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county in which the proposed facility is located.

(B) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters) or have a total size of at least 9 column inches (18 square inches). The text of the notice shall include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The chief clerk shall mail notice to the persons listed in §39.413 of this title, except that the chief clerk shall not mail notice to the persons listed in paragraph (1) of that section. The notice must be mailed no more than 45 days and no less than 30 days before the

hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes to amend or renew an existing permit, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(4) If the application concerns a hazardous waste facility, the applicant shall broadcast notice of the hearing under subsection (d)(2) of this section.

(5) Notice under paragraphs (2)(A), (3), and (4) of this subsection shall be completed at least 30 days before the hearing.

(g) This section does not apply to applications for an injection well permit.

(h) Information repository. The requirements of 40 CFR §124.33(b)-(f), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, apply to all applications for hazardous waste permits.

**§39.509. Application for a Class 3 Modification of an Industrial or Hazardous Waste Permit.**

(a) Applicability. This section applies to applications for Class 3 modification of industrial or hazardous waste permits that are declared administratively complete on or after September 1, 1999.

(b) Notice shall be given under §39.418 of the this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), instead of giving notice under §305.69(d)(2) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice shall also be given under §39.419 of the title (relating to Notice of Application and Preliminary Decision).

(c) Notice of the public meeting required by §305.69(d)(4) shall be included with the Notice of Receipt of Application and Intent to Obtain Permit under §39.418.

**SUBCHAPTER J : PUBLIC NOTICE OF WATER QUALITY APPLICATIONS AND WATER  
QUALITY MANAGEMENT PLANS**

**§39.551, §39.553**

**STATUTORY AUTHORITY**

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the

commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to

state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.551. Application for Wastewater Discharge Permit, Including Application for the Disposal of Sewage Sludge or Water Treatment Sludge.**

(a) Applicability. This section applies to applications for wastewater discharge permits, including disposal of sewage sludge or water treatment sludge applications, that are declared administratively complete on or after September 1, 1999. This subchapter does not apply to registrations and notifications for sludge disposal under §312.13 of this title (relating to Actions and Notice).

(b) Notice of receipt of application and intent to obtain permit.

(1) Notice under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) is required to be published no later than 30 days after the executive director deems an application administratively complete. This notice must contain the text as required by §39.411(b)(1)-(9) and (12) of this title (relating to Text of Public Notice). In addition to the requirements of §39.418 of this title, the chief clerk shall mail notice to the School Land Board if the application will affect lands dedicated to the permanent school fund. The notice shall be in the form required by Texas Water Code, §5.115(c).

(2) Mailed notice to adjacent or downstream landowners is not required for:

(A) an application to renew a permit; or

(B) an application for a new Texas Pollutant Discharge Elimination System (TPDES) permit for a discharge authorized by an existing state permit issued before September 14, 1998 for which the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment).

(c) Notice of application and preliminary decision. Notice under §39.419 of this title (relating to Notice of Application and Preliminary Decision) is required to be published after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(b)(1)-(3), (5)-(7), (9), and (12), and (c)(2)-(6). In addition to §39.419 of this title, for all applications except applications to renew permits and those in subsection (c)(1) of this section, the following provisions apply.

(1) The applicant shall publish notice of application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(2) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice). For any application involving an average daily discharge of five million gallons or

more, in addition to the persons listed in §39.413 of this title, the chief clerk shall mail notice to each county judge in the county or counties located within 100 statute miles of the point of discharge who has requested in writing that the commission give notice, and through which water into or adjacent to which waste or pollutants are to be discharged under the permit, flows after the discharge.

(3) The notice must set a deadline to file public comment with the chief clerk that is not less than 30 days after newspaper publication. However, the notice may be mailed to the county judges under paragraph (2) of this subsection no later than 20 days before the deadline to file public comment.

(4) For TPDES permits, the text of the notice shall include:

(A) everything that is required by §39.411(b)(1)-(3), (5)-(7), (9), and (12), and (c)(2)-(6) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(d) Notice of application and preliminary decision for certain TPDES permits. For a new TPDES permit for which the discharge is authorized by an existing state permit issued before September 14, 1998, the following shall apply:

(1) If the application does not propose any term or condition that would constitute a major amendment to the state permit under §305.62 of this title (relating to Amendment), the following mailed and published notice is required.

(A) The applicant shall publish notice of the application and preliminary decision at least once in a newspaper regularly published or circulated within each county where the proposed facility or discharge is located and in each county affected by the discharge. The executive director shall provide to the chief clerk a list of the appropriate counties, and the chief clerk shall provide the list to the applicant.

(B) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments, to request a public meeting, or to request a public hearing to those listed in §39.413 of this title.

(C) The notice must set a deadline to file public comment, or to request a public meeting, with the chief clerk that is at least 30 days after newspaper publication.

(D) The text of the notice shall include:

(i) everything that is required by §39.411(b)(1)-(3), (5)-(7), (9), and (12), and (c)(2)-(6) of this title;

(ii) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(iii) for applications concerning the disposal of sludge:

(I) the use and disposal practices;

(II) the location of the sludge treatment works treating domestic sewage sludge; and

(III) the use and disposal sites known at the time of permit application.

(2) If the application proposes any term or condition that would constitute a major amendment to the state permit under §305.62 of this title, the applicant must follow the notice requirements of subsection (b) of this section.

(e) Notice for other types of applications. Except as required by subsections (a), (b), and (c) of this section, the following notice is required for certain applications.

(1) For an application for a minor amendment to a permit other than a TPDES permit, or for an application for a minor modification of a TPDES permit, under Chapter 305, Subchapter D of this title (relating to Amendments, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits), the chief clerk shall mail notice, that the executive director has determined the application is technically complete and has prepared a draft permit, to the mayor and health authorities for the city or town, and to the county judge and health authorities for the county in which the waste will be discharged. The notice shall state the deadline to file public comment, which shall be no earlier than ten days after mailing notice.

(2) For an application for a renewal of a confined animal feeding operation permit which was issued between July 1, 1974, and December 31, 1977, for which the applicant does not propose to discharge into or adjacent to water in the state and does not seek to change materially the pattern or place of disposal, no notice is required.

(3) For an application for a minor amendment to a TPDES permit under Chapter 305, Subchapter D of this title, the following requirements apply.

(A) The chief clerk shall mail notice of the application and preliminary decision, providing an opportunity to submit public comments and to request a public meeting to:

(i) the mayor and health authorities of the city or town in which the facility is or will be located or in which pollutants are or will be discharged;

(ii) the county judge and health authorities of the county in which the facility is or will be located or in which pollutants are or will be discharged;

(iii) if applicable, state and federal agencies for which notice is required in 40 Code of Federal Regulations (CFR) §124.10(c);

(iv) if applicable, persons on a mailing list developed and maintained according to 40 CFR §124.10(c)(1)(ix);

(v) the applicant;

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

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

(B) For TPDES major facility permits as designated by EPA on an annual basis, notice shall be published in the *Texas Register*.

(C) The text shall meet the requirements in §39.411(b)(1)-(4)(A), (6)-(7), (9), and (12), and (c)(4)-(6).

(D) The notice shall provide at least a 30-day public comment period.

(E) The executive director shall prepare a response to all relevant and material or significant public comments received by the commission under §55.152 of this title (relating to Public Comment Processing).

(f) Notice of contested case hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Not less than 30 days before the hearing, the applicant shall publish notice at least once in a newspaper regularly published or circulated in each county where, by virtue of the county's

geographical relation to the subject matter of the hearing, a person may reasonably believe persons reside who may be affected by the action that may be taken as a result of the hearing. The executive director shall provide to the chief clerk a list of the appropriate counties.

(3) Not less than 30 days before the hearing, the chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice), except that mailed notice to adjacent or downstream landowners is not required for an application to renew a permit.

(4) For TPDES permits, the text of notice shall include:

(A) everything that is required by §39.411(d)(1) and (2) of this title;

(B) a general description of the location of each existing or proposed discharge point and the name of the receiving water; and

(C) for applications concerning the disposal of sludge:

(i) the use and disposal practices;

(ii) the location of the sludge treatment works treating domestic sewage sludge; and

(iii) the use and disposal sites known at the time of permit application.

(g) Notice for discharges with a thermal component. For requests for a discharge with a thermal component filed pursuant to Clean Water Act, §316(a), 40 CFR Part 124, Subsection D, §124.57(a), public notice, which is in effect as of the date of TPDES program authorization, as amended, is adopted by reference. A copy of 40 CFR Part 124 is available for inspection at the library of the agency, Park 35, 12015 North Interstate 35, Austin.

**§39.553. Water Quality Management Plan Updates.**

(a) Applicability. This section applies to Water Quality Management Plan (WQMP) Updates.

(b) Notice of WQMP updates.

(1) The chief clerk shall publish notice of the WQMP update in the *Texas Register*.

(2) The chief clerk shall mail the notice of the WQMP update to persons known to the commission to be interested in the WQMP update, and to persons requesting notices of the WQMP identified on mailing lists maintained by the chief clerk, in accordance with §39.407 of this title (relating to Mailing Lists).

(3) Section 39.411 of this title (relating to Text of Public Notice) does not apply to WQMP updates. However, the notice of the WQMP update shall:

(A) include the name and address of the agency;

(B) provide an opportunity to submit written comments on the proposed WQMP update;

(C) describe the public comment procedures and the time and place of any public meeting; and

(D) include the name, address, and telephone number of an agency contact person from whom interested persons may obtain information.

(4) The notice shall provide at least a 30-day public comment period.

(5) Any public meeting shall be held and conducted in accordance with the requirements and procedures of §55.156 of this title (relating to Public Comment Processing).

(c) The executive director shall prepare a response to all significant public comments received by the commission before the end of the comment period. The executive director may revise the WQMP update based on public comment, if appropriate.

(d) As described in §50.133 of this title (relating to Executive Director Action on Application or WQMP Update), the executive director may certify the WQMP update.

(e) After the executive director certifies a WQMP update, the Chief Clerk shall mail a copy of the Response to Comments and certified WQMP update to all persons who submitted timely comments.

## **SUBCHAPTER K : PUBLIC NOTICE OF AIR QUALITY APPLICATIONS**

### **§§39.601-606**

#### **STATUTORY AUTHORITY**

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the

commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to

state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.601. Applicability.**

Air applications or registrations that are declared administratively complete before September 1, 1999 are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures) (effective March 21, 1999) or §106.5 of this title (relating to Public Notice) (effective December 24, 1998). Air applications or registrations that are declared administratively complete by the executive director on or after September 1, 1999 are subject to this subchapter.

**§39.602. Mailed Notice.**

When this chapter requires notice for air applications, the chief clerk shall mail notice only to those persons listed in §39.413 (9), (11), (12), and (14) of this title (relating to Mailed Notice). When Notice of Receipt of Application and Intent to Obtain Permit is required, mailed notice shall be sent to the state senator and representative who represent the area in which the facility is or will be located.

**§39.603. Newspaper Notice**

(a) 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) is required to be published no later than 30 days after the executive director declares an application administratively complete. This notice must contain the text as required by §39.411(b)(1)-(6) and (8)-(10) of this title (relating to Text of Public Notice).

(b) Notice of Application and Preliminary Decision under §39.419 of this title (relating to Notice of Application and Preliminary Decision) is required to be published within 33 days after the chief clerk has mailed the preliminary decision concurrently with the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1)-(6) of this title (relating to Text of Public Notice).

(c) General newspaper notice. Unless otherwise specified, when this chapter requires published notice of an air application, the applicant shall publish notice in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility, as follows.

(1) One notice shall be published in the public notice section of the newspaper and shall comply with §39.411 of this title (relating to Text of Notice).

(2) Another notice with a total size of at least 6 column inches, with a vertical dimension of at least 3 inches and a horizontal dimension of at least 2 column widths, or a size of at least

12 square inches, shall be published in a prominent location elsewhere in the same issue of the newspaper. This notice shall contain the following information:

(A) permit application number;

(B) company name;

(C) type of facility;

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

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

(d) Alternative language newspaper notice.

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

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

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

(C) the school that otherwise would be required to provide a bilingual education program waives out of this requirement under 19 TAC §89.1205(g).

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

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

(4) The newspaper or publication must be of general circulation in the municipality or county in which the facility is located or proposed to be located. Notice under this subsection shall only be required to be published within the United States.

(5) The requirements of this subsection are waived for each language in which no publication exists, or if the publishers of all alternative language publications refuse to publish the

notice. If the alternative language publication is published less frequently than once a month, this notice requirement may be waived by the executive director on a case-by-case basis.

(6) Each alternative language publication shall follow the requirements of this chapter that are consistent with this section.

(7) If a waiver is received under this section, the applicant shall complete a verification and submit it as required under §39.605(3) of this title (relating to Notice to Affected Agencies).

(e) Alternative publication procedures for small businesses.

(1) The applicant does not have to comply with subsection (a)(2) of this section if all of the following conditions are met:

(A) the applicant and source meets the definition of a small business stationary source in §382.0365 of the Texas Health and Safety Code including, but not limited to, those which:

(i) are not a major stationary source for federal air quality permitting;

(ii) do not emit 50 tons or more per year of any regulated air pollutant;

(iii) emit less than 75 tons per year of all regulated air pollutants combined; and

(iv) are owned or operated by a person that employs 100 or fewer individuals; and

(B) if the applicant's site meets the emission limits in §106.4(a) of this title (relating to Requirements for Exemption from Permitting) it will be considered to not have a significant effect on air quality.

(2) The executive director may post information regarding pending air permit applications on its website, such as the permit number, company name, project type, facility type, nearest city, county, date public notice authorized, information on comment periods, and information on how to contact the agency for further information.

(f) If an air application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings), the applicant shall publish notice once in a newspaper as described in (c) of this section, containing the information under §39.411(d) of this title. This notice shall be published and affidavits filed with the chief clerk no later than 30 days before the scheduled date of the hearing.

**§39.604. Sign-Posting.**

(a) At the applicant's expense, a sign or signs shall be placed at the site of the existing or proposed facility declaring the filing of an application for a permit and stating the manner in which the commission may be contacted for further information. Such signs shall be provided by the applicant and shall substantially meet the following requirements:

(1) Signs shall consist of dark lettering on a white background and shall be no smaller than 18 inches by 28 inches and all lettering shall be no less than one and one-half inches in size and block printed capital lettering;

(2) Signs shall be headed by the words listed below:

(A) "PROPOSED AIR QUALITY PERMIT" for new permits and permit amendments; or

(B) "PROPOSED RENEWAL OF AIR QUALITY PERMIT" for permit renewals.

(3) Signs shall include the words "APPLICATION NO." and the number of the permit application. More than one application number may be included on the signs if the respective public comment periods coincide;

(4) Signs shall include the words "for further information contact";

(5) Signs shall include the words “Texas Natural Resource Conservation Commission,” and the address of the appropriate commission regional office;

(6) Signs shall include the telephone number of the appropriate commission office;

(b) The sign or signs must be in place by the date of publication of the Notice of Receipt of Application and Intent to Obtain Permit and must remain in place and legible throughout that public comment period. The applicant must provide a verification that the sign posting was conducted according to this section.

(c) Each sign placed at the site must be located within ten feet of every property line paralleling a public highway, street, or road. Signs must be visible from the street and spaced at not more than 1,500-foot intervals. A minimum of one sign, but no more than three signs shall be required along any property line paralleling a public highway, street, or road. The executive director may approve variations from these requirements if it is determined that alternative sign posting plans proposed by the applicant are more effective in providing notice to the public. This section’s sign requirements do not apply to properties under the same ownership which are noncontiguous or separated by intervening public highway, street, or road, unless directly involved by the permit application.

(d) The executive director may approve variations from the requirements of this subsection if the applicant has demonstrated that it is not practical to comply with the specific requirements of this subsection and alternative sign posting plans proposed by the applicant are at least as effective in

providing notice to the public. The approval from the executive director under this subsection must be received before posting signs for purposes of satisfying the requirements of this section.

(e) Alternative language sign posting is required whenever alternative language newspaper notice would be required under §39.603 of this title (relating to Newspaper Notice). The applicant shall post additional signs in each alternative language in which the bilingual education program is taught. The alternative language signs shall be posted adjacent to each English language sign required in this section. The alternative language sign posting requirements of this subsection shall be satisfied without regard to whether alternative language newspaper notice is waived under §39.703(d)(5) of this title (relating to Newspaper Notice). The alternative language signs shall meet all other requirements of this section.

**§39.605. Notice to Affected Agencies.**

In addition to the requirements in §39.405(f) of this title (relating to General Notice Provisions):

(1) when newspaper notices are published under this section, the applicant shall furnish a copy of the notices and affidavit to:

(A) the EPA regional administrator in Dallas;

(B) all local air pollution control agencies with jurisdiction in the county in which the construction is to occur; and

(C) the air pollution control agency of any nearby state in which air quality may be adversely affected by the emissions from the new or modified facility;

(2) when sign posting is required under this section, the applicant shall furnish a copy of sign posting verification, within 10 business days after the end of the comment period associated with the notice under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), to:

(A) the chief clerk;

(B) the executive director; and

(C) those listed in paragraph (1)(A)-(C) of this section; and

(3) when alternative language waiver verification are required under this section, the applicant shall furnish a copy to those listed in paragraph (2)(A)-(C) of this section.

**§39.606. Alternative Means of Notice for Voluntary Emission Reduction Permits.**

(a) An applicant for a voluntary emission reduction permit, under Texas Health and Safety Code, §382.05191, for a facility that constitutes or is part of a small business stationary source, as defined in Texas Health and Safety Code, §382.0365(g)(2), may request that the executive director approve an alternative means from the notice methods required under this subchapter.

(b) The executive director may approve the request upon a determination that the alternative means will result in equal or better communication with the public, considering the following factors:

- (1) the effectiveness of the method of notice in reaching potentially affected persons;
- (2) the cost of the method of notice; and
- (3) whether the method is consistent with federal requirements.

(c) The applicant may not use the alternative means of notice until the executive director gives written approval.

(d) Notice of hearing. The applicant shall publish notice of the hearing in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility. The notice must be published not less than 30 days before the hearing.

**SUBCHAPTER L : PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC  
APPLICATIONS  
§39.651, §39.653**

**STATUTORY AUTHORITY**

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the

commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial solid waste and hazardous municipal waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which

establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.651. Application for Injection Well Permit.**

(a) Applicability. This subchapter applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall be mailed to the mayor of the municipality.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, notice shall be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain a Permit). This notice must contain the text as required by §39.411(b)(1)-(9) and (12) of this title (relating to Text of Public Notice). Notice under §38.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness).

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, the following persons shall be notified:

(A) the School Land Board, if the application will affect lands dedicated to the permanent school fund. The notice shall be in the form required by Texas Water Code, §5.115(c); and

(B) the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title (relating to Definitions).

(4) The chief clerk or executive director shall also mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Application and Preliminary Decision) shall be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1)-(6) of this title. In addition to the requirements of §39.419 of this title, the following requirements apply:

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county which is adjacent or contiguous to each county in which the proposed facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice), to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title, and to local governments located in the county of the facility. “Local governments” shall have the meaning provided for that term in Texas Water Code, Chapter 26.

(3) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title (relating to Application for Industrial or Hazardous Waste Facility Permit).

(4) The deadline for public comments on industrial solid waste applications shall be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If the applicant proposes a new hazardous waste facility, the executive director shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application. If the applicant proposes a major amendment of an existing hazardous waste facility permit, the executive director shall hold a public meeting if a person affected files with the chief clerk a request for public meeting concerning the application before the deadline to file public comment or requests for reconsideration or hearing. A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (a) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(2) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.405(f)(2) of this title. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters).

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of contested case hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county wherein the proposed facility is located.

(B) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters). The text of the notice shall include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.413 of this title, and to the persons who own mineral rights within the cone of influence, as that term is defined by §331.2 of this title.

(B) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the contested case hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(4) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title).

(5) Notice under paragraphs (2)(A), (3), and (4) of this subsection shall be completed at least 30 days before the contested case hearing.

**§39.653. Application for Production Area Authorization.**

(a) Applicability. This section applies to an application for a production area authorization under Chapter 331 of this title (relating to Underground Injection Control).

(b) Notice of Receipt of Application and Intent to Obtain Permit. After the executive director determines that the application is administratively complete, notice shall be given as required by §39.418 of this title (relating to Notice of Receipt and Intent to Obtain Permit). This notice must contain the text as required by §39.411(b)(1)-(9) and (12) of this title (relating to Text of Public Notice).

(c) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) shall be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1)-(6) of this title. The notice shall specify the deadline to file with the chief clerk public comment, which is 30 days after mailing.

(d) Notice of contested case hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.405(f)(2) of this title.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(4) Notice under paragraphs (2) and (3) this subsection shall be completed at least 30 days before the hearing.

**SUBCHAPTER M : PUBLIC NOTICE FOR RADIOACTIVE MATERIAL LICENSES**

**§39.701, §39.702, §39.703, §39.705, §39.707, §39.709, §39.711, §39.713**

**STATUTORY AUTHORITY**

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.132, which requires notice for water rights permits; §11.133, which requires the commission to hold hearings for water rights permits; §12.013, which requires the commission to determine certain water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the

commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641, which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA, §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA, §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA, §382.017, which establishes the commission's rulemaking authority under the TCAA, §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.0516, which establishes the requirement for notice to

state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment, and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the

commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§39.701. Applicability**

Any license application under Chapter 336 of this title (relating to Radioactive Substance Rules) that is declared administratively complete on or after September 1, 1999 is subject to this subchapter and applicable requirements under subchapter H of this chapter (relating to Applicability and General Provisions).

**§39.702. Notice of Declaration of Administrative Completeness.**

When an application under Chapter 336 of this title (relating to Radioactive Substance Rules) has been declared administratively complete, the chief clerk shall mail notice under this subchapter.

**§39.703. Notice of License Applications Upon Completion of Technical Review.**

(a) When the executive director has completed the technical review of an application for a license, major amendment, or renewal of a license issued under Chapter 336 of this title (relating to Radioactive Substance Rules) or for a minor amendment issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Radioactive Waste), notice

shall be mailed and published under this subchapter. The deadline to file public comment, protests, or hearing requests is 30 days after publication.

(b) For any other application for a minor amendment to a license issued under Chapter 336, Subchapter F of this title (relating to Alternative Methods of Disposal of Radioactive Material), notice shall be mailed under this subchapter. The deadline to file public comment, protests, or hearing requests is ten days after mailing.

**§39.705. Mailed Notice for Radioactive Material Licenses.**

When notice by mail is required under this subchapter, the chief clerk shall mail notice under only §39.413(2), (3), (8), (9), and (12) of this title (relating to Mailed Notice), and to each owner of property adjacent to the proposed site. For purposes of determining the ownership of property adjacent to the proposed site under this subchapter, the applicant shall provide the chief clerk with the names of the landowners from the county tax rolls that are available no more than 30 days before the date of newspaper publication of the notice.

**§39.707. Published Notice.**

(a) For applications under Chapter 336, Subchapter F of this title (relating to Alternative Methods of Disposal of Radioactive Material), when notice is required to be published under this

subchapter, the applicant shall publish notice at least once in a newspaper of largest general circulation in the county in which the facility is located.

(b) For applications for a new license, renewal license, or major amendment to a license issued under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Radioactive Waste), when notice is required to be published under this subchapter, the applicant shall publish notice in a newspaper published in the county or counties in which the facility is or will be located. If no newspaper is published in the county or counties in which the facility is or will be located, a written copy of the notice shall be posted at the courthouse door and five other public places in the immediate locality to be affected. The notice shall be posted for at least 31 days.

(c) In addition to published notice requirements in subsection (b) of this section, for an amendment of a license under Chapter 336, Subchapter H of this title, the chief clerk shall publish notice once in the *Texas Register*.

**§39.709. Notice of Contested Case Hearing on Application.**

(a) The requirements of this section apply when an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(b) For applications under Chapter 336, Subchapter F of this title (relating to Alternative Methods of Disposal of Radioactive Material), notice shall be mailed no later than 30 days before the

hearing. For applications under Chapter 336, Subchapter H of this title (relating to Licensing Requirements for Near-Surface Land Disposal of Radioactive Waste), notice shall be mailed no later than 31 days before the hearing.

(c) When notice is required under this section, the text of the notice must include the applicable information specified in §39.411(b)(13) and (d) of this title (relating to Text of Public Notice).

**§39.711. Proof and Certification of Notice.**

(a) Notice shall be mailed by certified mail, return receipt requested. Proof of mailing to the proper address on the return receipt shall be accepted as conclusive evidence of the fact of the mailing.

(b) The applicant shall file proof of publication with the chief clerk within 30 days after publication. Filing an affidavit executed by the publisher accompanied by a printed copy of the notice as published creates a rebuttable presumption of compliance with the requirement to publish notice.

(c) The applicant shall file proof of posting with the chief clerk within 30 days of posting. Proof of posting may be made by the return affidavit of the sheriff or constable; or, by the affidavit of a credible person made on a copy of the posted notice showing the fact of the posting.

**§39.713. Public Notification and Public Participation.**

Upon the receipt of a license termination plan or decommissioning plan from the licensee, or a proposal by the licensee for release of a site under §336.607 of this title (relating to Criteria for License Termination under Restricted Conditions) or §336.609 of this title (relating to Alternate Criteria for License Termination), or whenever the commission deems notice to be in the public interest, the commission shall:

(1) notify and solicit comments from:

(A) local and state governments in the vicinity of the site and any Indian Nation or other indigenous people that have treaty or statutory rights that could be affected by the decommissioning; and

(B) the United States Environmental Protection Agency for cases where the licensee proposes to release a site under §336.609 of this title (relating to Alternate Criteria for License Termination); and

(2) publish a notice in the *Texas Register* and in a forum, such as local newspapers, letters to state or local organizations, or other appropriate forum, that is readily accessible to individuals in the vicinity of the site, and solicit comments from affected parties.

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§50.2, 50.13, and 50.31, and new §§50.102, 50.113, 50.115, 50.117, 50.119, 50.131, 50.133, 50.135, 50.137, 50.139, 50.141, 50.143, and 50.145 concerning action on applications. Sections §50.2, 50.13, 50.31, 50.102, 50.113, 50.115, 50.117, 50.119, 50.131, 50.133, 50.139, 50.141, and 50.143 are adopted with changes to the proposed text as published in the July 16, 1999 issue of the *Texas Register* (24 TexReg 5342). Sections 50.135, 50.137, and 50.145 are adopted without changes and will not be republished. Concurrently with this rulemaking, the commission is also adopting the rules review of and readopting the existing rules in Chapter 50, concerning Action on Applications in accordance with the rule review requirements of the General Appropriations Act, Article IX, §167, 75th Legislature, 1997.

## BACKGROUND

Corrections to the proposed rules for Chapter 50 were published in the *Texas Register* on August 20, 1999 (24 TexReg 6573). The corrections were primarily of typographical errors and incorrect cross-references. The corrections are in the adopted rule text.

The primary purpose of the adopted amendments and new sections is to implement House Bill (HB) 801, and portions of Senate Bill (SB) 7, SB 211, SB 766, SB 1308, and HB 1479, 76th Legislature (1999).

HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing for certain actions. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary

to satisfy air quality federal program authorization requirements. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305; changes for all of these chapters are published in this edition of the *Texas Register*. Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

#### OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting procedures of the commission by adding new Texas Water Code, Chapter 5, Subchapter M; revising Texas Health and Safety Code, Solid Waste Disposal Act, §361.088; revising the Texas Clean Air Act (TCAA), Texas Health and Safety Code, §382.056; and revising Texas Government Code, §2003.047. The changes in law made by HB 801 only apply to applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is also required to respond to relevant and material public comment received in response to the notices or at public meetings, and file the responses with the chief clerk. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this edition of the *Texas Register*. Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission.

## OVERVIEW OF SB 7 AND IMPLEMENTATION

SB 7, also enacted by the 76th Legislature, restructures electric utility service in Texas. Owners of grandfathered facilities that generate electric energy for compensation are required to apply for an electric generating facility permit from the commission by September 1, 2000. These permits are subject to notice under §382.056 of the Texas Health and Safety Code. SB 7 provides that initial issuance of these permits requires notice and comment proceedings. However, renewal of these permits requires notice, comment, and opportunity for contested case hearing.

The notice provisions for electric generating facility permits are implemented through changes to Chapters 39 and to a limited extent, to Chapter 50. Renewals are subject to Chapters 50 and 80 as amended. Additional implementation of the requirements of SB 7 is expected in future rulemaking by the commission.

#### OVERVIEW OF SB 766 AND IMPLEMENTATION

SB 766, enacted by the 76th Legislature, also amends TCAA, Chapter 382 by, among other things: (1) requiring the commission to establish procedures to authorize standard permits and permits by rule; (2) dividing the current category of exemptions from permitting into two categories: permits by rule for construction of facilities with insignificant air emissions, and exemptions from permitting for changes to certain existing facilities with insignificant air emissions; and (3) creating a voluntary emission reduction permit (VERP) for grandfathered facilities that must be applied for by September 1, 2001. Notice requirements for these changes are implemented in the changes to Chapter 39 because of the critical nature of the timing of the permit program. Public participation requirements applicable to VERPs under SB 766 are included in these chapters, specifically §§39.403(b)(11), 39.403(d), and 39.606.

Additional implementation of the requirements of SB 766 is expected to occur in future rulemaking by the commission.

#### OVERVIEW OF SB 1308 AND IMPLEMENTATION

SB 1308 allows the executive director to approve water quality management plans (WQMP) and revisions, so long as an opportunity for public participation has been provided. This bill, which amends Texas Water Code, §26.037, also requires rules to provide for commission review of the executive director's decision on a plan approval or revision. This adoption incorporates these requirements through §§39.401, 39.403, and 39.553.

#### OVERVIEW OF HB 1479 AND IMPLEMENTATION

HB 1479 amended §26.028 of the Texas Water Code and allows the commission to approve an application to renew or amend a permit without the necessity of a public hearing if: (1) the applicant is not applying to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge; (2) the activities to be authorized will maintain or improve the quality of waste; (3) the applicant's compliance history raises no issues regarding the applicant's ability to comply with a material term of its permit; and (4) for Texas pollutant discharge elimination system (TPDES) permits, notice and opportunity to comment is provided in accordance with federal program requirements. This adoption implements these provisions.

#### OVERVIEW OF SB 211 AND IMPLEMENTATION

SB 211 amends §2001.142(c) of the Texas Government Code, relating to notice of decision in an administrative hearing, and provides that a party is presumed to have been notified on the third day after notice has been mailed. This requirement has been implemented and has guided rule drafting in Chapters 39, 50, and 80.

#### ORGANIZATION OF CHAPTER

HB 801 applies only to certain applications that are administratively complete on or after September 1, 1999. Thus, in the adopted rules in Chapter 50, Subchapters A-C are amended to apply only to applications that were administratively complete *before* September 1, 1999. Subchapter D is not used here; it is reserved for future rulemaking. At the same time, new Subchapters E-G apply only to applications that are administratively complete *on or after* September 1, 1999. Generally, new Subchapters E-G are duplicated versions of the existing rules in Subchapters A-C, modified to incorporate substantive changes either related to HB 801 implementation, implementation of other bills, or other changes adopted under this chapter. While HB 801 continues former law in effect for applications administratively complete before September 1, 1999, the commission recognizes that it may be a year or more before all of those applications have been acted on, especially those that go to contested case hearing. Therefore, the commission has chosen this parallel subchapter structure because the commission believes it is useful for the public to have easy access to rules for older applications as well as for new ones. Once all applications that were administratively complete before September 1, 1999 have been processed, the commission can delete the subchapters that apply to those applications.

In this adoption publication, only the applicability sections of Subchapters A-C are reproduced. For Subchapters E-G, the entire new subchapters are printed. Many of the sections of Subchapters E-G are the same or very similar to sections in Subchapters A-C. Where possible, section numbers are parallel; for example, §50.13 (Action on Applications) is similar to §50.113 (Applicability and Action on Applications). Nonetheless, since Subchapters E-G are entirely new, it may be difficult to quickly see the differences between those new and existing subchapters. In this preamble, the agency has tried to point out any important differences. Additionally, to facilitate review, the agency will make copies of the rule available, which will show the differences between old and new subchapters. Copies may be obtained by calling Casey Vise, in the Office of Environmental Policy, Analysis, and Assessment, at (512) 239-1932 and on the commission's website at:  
<http://www.tnrcc.state.tx.us/oprd/forum.html#hb801>.

#### FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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 the Texas Government Code. Furthermore, 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, productivity, competition, jobs, the environment, or the public health and safety of

the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and establishes procedures associated with actions on permit applications, the rulemaking does not meet the definition of a “major environmental rule.”

In addition, even if the rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and Texas Water Code, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not 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 because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with Texas Water Code, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., Texas Water Code, Chapter 5, Subchapter M, and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the amendments and new sections is to revise the commission's rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting public hearing. The rule would also consolidate already existing notice procedures for some of the air quality permitting programs; correct, clarify, and/or update the air quality permit amendment process, requirements relating to sign posting for concrete batch plants, and clarification of requirements relating to bilingual education notices; and consolidate commission procedural rules. The adopted rules will substantially advance these stated purposes by 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 adopted language consists of amendments and new sections relating to the commission's procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The adopted actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely

affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40, et seq.).

#### HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. Oral comments were provided by an individual and Locke, Liddell and Sapp, L.L.P. (Locke Liddell). The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999.

Written comments were submitted by Baker & Botts, L.L.P. (Baker & Botts), on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce, and Texas Oil and Gas Association; Brown, Potts & Reilly, L.L.P. (Brown, Potts), on behalf of Merco Joint Venture, L.L.C.; City Public Service (CPS-San Antonio) of San Antonio, Texas; Dow Chemical Company (Dow); Eastman Chemical Company, Texas Eastman Division (Eastman); Exxon Chemical Company's Baytown Chemical Plant, Baytown Olefins Plant, and Mont Belvieu Plastics Plant (Exxon Chemical); Exxon Company, U.S.A., Baytown Refinery (Exxon Company); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center for Policy Studies, and Texas Committee on Natural Resources; Jackson Walker L.L.P. (Jackson Walker); Jenkins & Gilchrist, P.C. (Jenkins & Gilchrist); Public Interest Counsel, Texas Natural Resource Conservation Commission (PIC); Roller and Allensworth, L.L.P.(Roller and Allensworth), on behalf of the Greenbelt

Municipal and Industrial Water Authority; Small Business Compliance Advisory Panel (SBCAP); Texas Association of Business & Chambers of Commerce (TABCC); Texas Cattle Feeders Association (TCFA); Texas Cotton Ginners' Association (TGCA); Texas Instruments Incorporated (TI); Thompson & Knight, L.L.P. (Thompson & Knight); and the United States Environmental Protection Agency Region 6 Office (EPA).

## ANALYSIS OF COMMENTS AND ADOPTED RULES

### *Public Hearing*

The commission held a public hearing on this rulemaking on August 10, 1999. Two people commented, one individual and one attorney from the law firm Locke Liddell & Sapp (LLS). The individual's comments related to notice and are addressed in the preamble to Chapter 39. LLS's comments related to contested case hearings, and are addressed specifically in the analysis of §50.115 and §80.152.

### *General Comments on Chapter 50*

Brown McCarroll observed that the commission has undertaken a quadrennial review of the commission's procedural rules in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, while simultaneously adopting new rules to implement HB 801. The commenter stated that the quadrennial review should not be a bar to future consideration of necessary changes to the new rules following adoption. The commenter recommended that the commission clearly indicate that the rules will be revisited after their implementation to address any problems resulting from the "fast track" time line for this rulemaking.

**The commission agrees with the commenter that the new procedural rules being adopted should be subject to review to correct any deficiencies which may become apparent following adoption. The quadrennial review applied only to the existing Chapters 39, 50, and 80 of the commission's rules. The fact that the existing procedural rules have undergone the statutorily required quadrennial review, and the commission has determined that those rules continue to be necessary, will not prevent the commission from revisiting the procedural rules following implementation of HB 801.**

*Chapter 50 Generally*

In this preamble, the reasons for adopting each section are discussed individually, along with responses to relevant comments. Certain changes have been made throughout the rule. They include correcting references to chapter and subchapter, renumbering where subsections have been added or deleted, and revising for readability. Additionally, each applicability section has been revised to mention only "application" rather than "permit application" or "application to issue, amend, modify, renew, correct, endorse, or transfer a permit, license, registration, or other authorization or approval." This change is not meant to make a substantive change to the rule. Rather, it is made to enhance readability. This is not a substantive change because the term "application," which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of actions on applications. Finally, numerous other grammatical and organizational changes were made to enhance readability.

*Section 50.2*

Section 50.2 (Applicability) states that Subchapters A-C apply to any application that is declared administratively complete before September 1, 1999, and that the similar Subchapters E-G apply to any

application that is declared administratively complete on or after September 1, 1999. Section 50.2(c) clarifies that this chapter does not apply to federal operating permits, which continue to be regulated under the provisions of Chapter 122 (Federal Operating Permits). Section 50.2 was amended from the proposed version to reflect that only Subchapters A-C, and not the whole chapter, apply to applications that are declared administratively complete before September 1, 1999. Proposed §50.2(a) was also amended to reflect that Subchapters E-G apply to applications that are administratively complete on or after September 1, 1999. In one other change, which is made consistently throughout the applicability sections of Chapter 50, the phrase “application to issue, amend, modify, renew, correct, endorse, or transfer a permit, license, registration, or other authorization or approval” was changed to read simply “application.” This change is not meant to make a substantive change to the rule. Rather, it is made to enhance readability. This is not a substantive change because the term “application,” which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of actions on applications. The adopted subsection is revised from the proposal to enhance readability.

#### *Section 50.13*

Section 50.13 (Action on Application) reiterates that Subchapter B applies to any application that is declared administratively complete before September 1, 1999, and that Subchapter F applies to any application that is declared administratively complete on or after September 1, 1999. The term “application” is now used, rather than “permit application” because the term “application,” which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of applications. This change is not meant to make a substantive change to the rule. Rather, it is made to enhance readability. Cross-references were also corrected.

*Section 50.31(b)*

§50.31(b) (Purpose and Applicability) provides that Subchapter C applies to any application for a permit that is declared administratively complete before September 1, 1999, and that Subchapter G applies to any application that is declared administratively complete on or after September 1, 1999. This section was revised for readability. Further, as explained above, the term “application” is used rather than a complete list of actions on applications. This is not a substantive change because the term “application,” which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of actions on applications. No substantive changes were made to this section since proposal.

*§50.102*

Section 50.102 (Applicability), which parallels §50.2, specifies that applications declared administratively complete on or after September 1, 1999 are subject to the requirements of Subchapters E-G; while those declared administratively complete before September 1, 1999 are subject to Subchapters A-C. Proposed subsection (b) was deleted because the term “application” is now used throughout this chapter rather than a complete list of types of applications and actions on applications. This is not a substantive change because the term “application,” which is defined in Chapter 3 of the TNRCC rules, is broad enough to cover all types of actions on applications. New subsection (b) (proposed (c)) specifies that only Subchapters E-G apply to water quality management plan updates. Adopted 50.102(c) (proposed (d)) lists the sections of this chapter that apply to voluntary emission reduction permits or electric generating facility permits.

Adopted §50.102(e) provides that Subchapters E-G do not apply to air quality applications for federal operating permits, which continue to be regulated under Chapter 122 of this title (Federal Operating Permits). Voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code, and emission reduction permits for electric generating facilities under §39.264 of the Texas Utilities Code, are only subject to §§50.117, 50.131, 50.133, 50.135, and 50.145 of this chapter. This section has been revised for readability; several sections have been renumbered, and references to chapters and subchapters have been corrected.

*§50.102. Generally.*

Brown, Potts suggested that TNRCC exclude Chapter 312 registrations and any other similar agency authorizations from coverage under Chapter 50 because Chapter 50 provides for requests for reconsideration, and delegation of authority, to the executive director in certain circumstances. Chapter 312 already provides for motions for reconsideration for registrations. The commenter indicated that the inclusion of Chapter 312 registrations under Chapter 50 is duplicative. Further, Brown, Potts noted that the Chapter 312 registration process has been reviewed by the legislature and approved by the courts. They suggested that Chapter 312 notification/registrations should not be subject to the new Chapter 50 requirements.

**The commission agrees that Chapter 312 provides the applicable procedures for registrations, including notice and comment procedures and procedures for challenging the executive director's action. The changes to Chapter 50 are not intended to create new procedures for Chapter 312 registrations or any other registrations. The proposed changes to these rules are not generally**

**intended to require new procedures for actions that do not require notice and opportunity for hearing. Chapter 5, Subchapter M, Texas Water Code, added by HB 801, expressly reflects this and the commission does not intend to expand or retract current requirements for such actions. Thus, the request for reconsideration process does not apply to registrations. To clarify these concepts in the rules, the commission added §50.113(b), as follows: “This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law.”**

*§50.102(a)*

Baker & Botts noted that the phrase “applications that are” in the section should be “application that is.” Baker & Botts and Brown McCarroll also suggested corrections to the references to “chapter” and “subchapter.”

**The commission recognizes that the construction in this section was not parallel. The commission has changed the second sentence to the plural form to make the sentences parallel. The commission has reviewed references to “chapters” and “subchapters” throughout the rulemaking package to assure consistency and correct usage.**

*§50.102(c)(3)*

Brown McCarroll suggested that §50.102(d)(3) (§50.102(c)(3)) would subject initial applications for voluntary emissions reduction permits to the requirements of §50.133, concerning Executive Director

action on applications for water quality management plan updates. They recommended the agency delete that requirement.

**The commission has made no changes in response to this comment. The commenter appears to have misread the title for §50.102(c)(3) (Executive Director Action on Application or WQMP Updates) by substituting “for” where it should correctly be read as “or.”**

*§50.111*

Brown McCarroll suggested adding a new §50.111: “Any permit application that is declared administratively complete on or after September 1, 1999 is subject to this subchapter.”

**The commission agrees that an applicability section would be useful, and has added one to §50.113(a). The commission is not adding a new section, as suggested by the commenter, because Texas Register rules do not allow adding a new section at the time of adoption.**

*§50.113*

New §50.113 (Applicability and Action on Application) generally parallels current §50.13 (Action on Application), but also introduces the request for reconsideration provided by HB 801. As discussed further in this preamble, the adopted rule adds an applicability section and two subsections regarding when the opportunity for contested case hearing is not provided by other law (discussed further below). The rule has been renumbered accordingly. Additionally, the list of types of applications that the

commission can act on without holding a hearing, in adopted §50.113(d), has been amended to add applications for initial issuance of air voluntary emission reduction or electric generating facility permits.

Requests for reconsideration are considered on the same schedule as hearing requests, so in most sections where a hearing request is mentioned in current rules, provision for requests for reconsideration is added. Under §50.113 (Action by the Commission) the commission may act on an application without holding a contested case hearing: (1) when no timely hearing requests have been received; (2) when all timely filed requests for reconsideration or contested case hearing have been withdrawn or denied; or (3) when an application has been remanded because of a settlement. Additionally, adopted §50.113(c)(4) departs from current §50.13 by adding the HB 801 provisions that allow the commission to act on certain applications without a contested case hearing only if the commission finds that: (1) there are no issues involving disputed questions of fact; (2) that were raised during the comment period; and (3) that are relevant and material to the decision on the application.

*50.113(c)*

TI and Brown, Potts suggested that listing specific types of applications on which the commission can act without a hearing implies that those are the only applications that the TNRCC can grant without a contested case hearing. They suggested including a §50.113(c) that expressly states that Chapter 50 is a procedural chapter only and does not create a right to a contested case hearing.

**The commission agrees with this clarification because this is mainly a procedural rulemaking and does not create new rights to hearing. HB 801 expressly states that it does not expand or restrict**

**the types of commission actions for which public notice an opportunity for public comment and an opportunity for public hearing are provided. Therefore, the commission is adding §50.113(b) which reads as follows: “This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law.” In addition, the commission adds §50.113(a) to clarify the applicability of this subchapter and current §50.113(a) was renumbered as §50.113(c).**

*50.113(c)(4)*

Thompson Knight, TI, Baker & Botts, and Brown McCarroll raised comments relating to §50.113(c)(4) (proposed §50.113(a)(4)), regarding whether the commission should make findings on issues not referred to the State Office of Administrative Hearings (SOAH).

**The commission responds that findings of fact and conclusions of law are appropriate only where an evidentiary hearing has been held. Since the commission will not take evidence on issues not referred to SOAH, findings of fact are not appropriate. Moreover, HB 801 does not provide for such a requirement. Therefore, the commission has made not changes in response to these comments.**

*§50.113(d)*

Section 50.113(d) lists types of applications on which the commission may act without a contested case hearing. Adopted §50.113(d)(1) deletes the proposed sentence “This does not include applications that involve a facility for which the applicant’s compliance history contains violations that are unresolved and

that constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.” This sentence was deleted because the statutory requirement, from §382.056(o), Texas Health and Safety Code, does not prohibit the commission from acting without a hearing in those circumstances. Rather, it allows the commission to hold a hearing where otherwise the opportunity for hearing is not allowed.

Section 50.113(d)(2) was added at adoption for clarification based on the statutory requirements of SB 766 and SB7. Adopted §50.113(d)(3) implements Texas Health and Safety Code, §361.088, as amended by Section 4 of HB 801, allowing the commission to act without a contested case hearing on hazardous waste permit renewals under §305.631(a)(8). Similarly, implementing HB 1479, §50.113(d)(4) allows the commission to act without a hearing on wastewater discharge permit renewals or amendments under §26.028(d) of the Texas Water Code. While Texas Water Code, §26.028 has long allowed the commission to act on certain permit amendments without offering the opportunity for a hearing, the amendment to §26.028 in HB 1479 granted that option to renewal applications. This section was renumbered from the proposal.

*Section 50.113(d)(5)*

Baker & Botts and TI recommended that, as with §50.133(a)(5)(E), the rules should expressly allow the commission to act on an application where a contested case hearing request has been filed but no opportunity for hearing is provided by law. TI further pointed out that there are several other types of

applications that the commission may act on without holding a contested case hearing. They also provided a list of various types of applications.

**The commission agrees and has added §50.113(d)(5), which parallels §50.133(a)(5)(E), and allows the commission to act on an application where a hearing request has been filed but no opportunity for hearing is provided by law. This reflects current commission practice. Further, the changes to Chapter 50 are not intended to expand or contract those types of applications that receive notice or contested case hearing. Therefore, the rule now explicitly states that the commission may act on applications without a hearing where a contested case hearing request has been filed but no opportunity for a hearing is provided by law.**

*§50.113(d)*

Brown McCarroll pointed out that voluntary emission reduction permits under Texas Health and Safety Code, §382.0519 are not subject to contested case hearings. They recommended that the commission add a new subsection (4) adding these air quality applications to the list of those which may be issued without a contested case hearing.

**The commission agrees that, as specified in SB 766, Section 5, adding Texas Health and Safety Code, §382.05191, initial applications for voluntary emission reduction permits are not subject to the contested case hearing process. The commission also recognizes that under SB 7 initial applications for electric generating facility permits are not subject to the contested case hearing**

**process. Section 50.113(d)(2) has been added to clarify that the commission may act on these applications without granting a contested case hearing.**

*§50.113(c)(4) and §50.115(c)(4)*

Henry, Lowerre suggested adding a new subsection (D) to §50.113(c)(4) (proposed §50.113(b)(4)) and a new subsection (4) to §50.115(c) (proposed §50.115(b)) to read: “(D) involve a disputed issue of law.” The commenter goes on to suggest that the commission may want the administrative law judge (ALJ) to: 1) develop a factual record on a matter in dispute or on the implications for future decisions, or 2) provide a recommendation on how the law could be interpreted. The commenter also stated that a request for hearing based on a legal issue is a request for a contested case hearing according to the Texas Administrative Procedures Act (APA) and should be treated as such. The commission itself can hold the hearing to prepare the findings and conclusions.

**The commission declines to adopt this recommendation. If there are disputed issues of fact that are relevant and material, the commission will refer them to SOAH for a hearing. If there is a dispute over a pure issue of law, the commission has the authority to decide that issue themselves, without the assistance of a SOAH judge. The commission notes that a hearing request that raises an issue of law is a hearing request under the APA, and the commission will decide whether a contested case hearing is appropriate in the specific case.**

*§50.113(c) and §50.115(c)*

Henry, Lowerre suggested adding a new subsection (E) to 50.113(c)(4) (proposed §50.113(a)(4)) and a new subsection (4) to §50.115(c) (proposed §50.115(b)) to read: “the public interest does not warrant the holding of a hearing.” The commenter referred to §5.556 (f) of Texas Water Code (HB 801) and pointed out that Chapter 27 (and perhaps other law) also allows the commission to consider the public interest when issuing a permit for an injection well.

**The commission declines to adopt this recommendation. HB 801, amending Texas Water Code, §5.556(f), allows the commission to hold a hearing if the public interest warrants doing so, even where the requirements for relevant and material issues raised during the comment period are not met. This provision is an exception to the limitation on which applications the commission may send to hearing. It does not require that the commission decide in each case whether the public interest warrants holding a hearing. HB 801 and these sections state explicitly the criteria that the commission must consider before acting on an application or refers a matter to SOAH. The commission has discretion to decide when to exercise it’s authority to grant a hearing in the public interest even when no qualifying hearing request has been submitted.**

*§50.115. Scope of Contested Case Hearings*

Adopted §50.115 (Scope of Contested Case Hearing) parallels current §50.15, but is substantially changed to implement the requirements of HB 801. Section 50.115 requires the commission to specify the number and scope of issues that may be referred to hearing. Most of proposed subsection (e) was moved to subsection (a), because it was about applicability, and appropriately comes first. The

remaining subsections have been renumbered accordingly. In §50.115(b) the word “it” was changed to “the commission.”

Implementing Texas Water Code, §5.556, added by HB 801, §50.115(c) provides that the commission may refer an issue for contested case hearing if the commission determines that the issue involves a disputed question of fact which is relevant and material to a decision on the application and which was raised during the public comment period. Again implementing HB 801, Section 6, amending Texas Government Code, §2003.047, §50.115(d) requires the commission to estimate the maximum expected duration of each hearing. Further, the rule specifies that the maximum duration, even for the most complex hearings, should not exceed one year from the preliminary hearing until the judge issues the proposal for decision. Less complex hearings should take less time.

Section 50.115(e) mirrors the language in current §50.15, and §50.115(e)(2) incorporates existing statutory requirements from Texas Health and Safety Code, §382.055. Finally, adopted subsection (f) applies to those applications that are not under Chapters 26 and 27 of the Texas Water Code or Chapters 361 or 382 of the Texas Health and Safety Code (HB 801, amending Texas Water Code, Chapter 5, Subchapter M and Texas Health and Safety Code, §382.056). Section 50.115(f) implements Texas Government Code, §2003.047, as amended by Section 6 of HB 801 and requires the commission to submit a list of disputed issues. The rule proposes, for those programs that are not under Chapters 26 and 27 of the Texas Water Code or Chapters 361 or 382--such as water rights or water utilities--that the list of disputed issues shall be those issues defined by the law governing those applications. It does not

appear to be the intent of HB 801 to include those applications in all of the procedures required by HB 801.

*§50.115 - title of subchapter*

Brown McCarroll suggested that §50.115 should be renamed to “Scope of Contested Case Hearing” because it would be more informative.

**The commission agrees that this change would add clarity and has retitled the section and changed the appropriate language in §50.115(e) to read “scope of contested case hearing,” instead of “proceeding.” Further, for clarity, the words “contested case” were inserted in several places before the word “hearing” in §50.115.**

*§50.115(c)(1)*

LLS suggested that only disputed issues of fact should be sent to SOAH and recommended that the commission define “disputed issue of fact.”

**The commission agrees that HB 801 requires that the commission should only send an issue to hearing when it involves a disputed question of fact (unless the commission finds it would be in the public interest to hold a hearing anyway). The commission, however, declines to define the phrase “disputed issue of fact” at this time until further consideration of the issues associated with the amendments to Chapter 55 implementing HB 801.**

§50.115(d)

Henry, Lowerre suggested that the one year “default” time for hearings in §50.115 is an arbitrary guideline that could do harm to applicants and protestants. The commenter went on to recommend the TNRCC develop data on its hearings to give the commission guidance on this issue.

**HB 801, amending Texas Government Code, §2003.047, requires the commission to limit the length of hearings by setting the maximum expected duration. Historical data on the length of numerous hearings show that most hearings last less than one year. (See letter dated June 18, 1999, from Bill Newchurch, Director Natural Resource Division, SOAH, to Duncan Norton, General Counsel, TNRCC). Of those that exceed one year, a number were stayed at the applicant’s request. The commission believes that with the additional efficiency added by HB 801--limiting the issues and setting a docket control order appropriate to the maximum expected duration of the hearing--there will no longer be a reason to have even the most complex hearings take more than one year. Additionally, having the one-year limit in the rule will give the public fair notice of the commission’s intention to keep hearings to a reasonable length. Finally, the judge has the power to extend the hearing, under §80.4(c)(17) if a party would be deprived of due process or another constitutional right.**

§50.115(d)

For §50.115(d), (proposed §50.115(c)) Brown McCarroll commented that most contested case hearings should require no more than *six months* rather than one year. They go on to suggest the commission should set the time limit accordingly.

**The commission does not agree with the suggested change and declines to adopt a six-month limit for contested case hearings. While most hearings take less than one year, there may be cases where the number and complexity of issues require longer than six months. The commission should retain the flexibility to set an appropriate maximum expected duration for contested case hearings, which may be more or less than six months. The adopted subsection is revised from the proposal for readability.**

*§50.115(e)*

Baker & Botts and TI suggested that the commission should limit issues in permit amendment actions to only those portions of a permit for which changes are requested and should limit the scope of a proceeding to the portions of a permit for which the applicant requests action that satisfy the threshold established in §50.115(b) (i.e., relevant and material disputed issue of fact raised during the comment period).

**The commission declines to impose this limitation because it is not required by HB 801. The commission does not believe it appropriate to limit commission authority in this way since it may be important to consider other factors, such as compliance history, in determining the scope of a proceeding. Nonetheless, §50.115(e) gives the commission the discretion to limit the scope of the proceeding if it deems appropriate.**

*§50.115(f)*

Jenkins Gilchrist suggested that the language of §50.115(e) (now §50.115(f)) is inconsistent with existing commission authority to limit issues referred to SOAH. In current commission rules, at 30 TAC §80.5(b), the commission is authorized to limit the issues or areas to be addressed by an administrative law judge at SOAH. The commenter suggested that fact that 801 *requires* the commission to limit issues does not change the commission's preexisting authority.

**The commission agrees that they may, by order, limit the issues in cases on applications to which Texas Water Code, §5.556 and Texas Health and Safety Code, §382.056 (Sections 2 and 5 of HB 801) do not apply. Adopting language slightly different than the suggested language, §50.115(f) is modified to read, "...For hearings on these applications, the disputed issues are deemed to be those defined by law governing these applications, unless the commission orders otherwise under §80.5(b)..."**

*§50.117. Commission Actions*

Section 50.117(a)-(e) mirror the current §50.17 (Commission Actions). Additionally, the commission adopts §50.117(f) (Commission Actions) to provide that the commission shall consider all timely public comments on an application and shall either adopt the executive director's response to comments or prepare its own response. This is done to comply with Texas Water Code, §5.555, and Texas Health and Safety Code, §382.056(p), as amended by HB 801 and with the requirements of federally authorized programs.

The commission has changed §50.117(f) from the proposal to clarify that the commission may adopt all or part of the executive director's response to comments. The adopted section also clarifies the reference to the commission's response to comments. To reflect the necessity of having a specific deadline for comments, to ensure that all timely comments are properly responded to, and to ensure separation of the public comment process and the contested case hearing process, adopted §50.117(f) also adds the word "timely" in referring to the public comment that the commission must consider. This is also important because it reflects the intent of HB 801 to encourage early public participation. However, this change does not prohibit the commission from considering other public comment.

The commission has added new §50.117(g) to reflect the commission's understanding of the intent of HB 801 regarding contested case hearings on limited issues. This section reflects that when limited issues are sent to contested case hearing, after a proposal for decision is issued, the commission shall issue a single decision that encompasses the decision on the issues considered at SOAH, as well as the response to comments.

*§50.117 (f)*

Baker and Botts commented that requiring the commission to adopt the executive director's response to public comments or prepare its own response is overly burdensome and not required by HB 801. The commenter also indicated that this section limits the commission's flexibility in making permitting decisions.

**The commission does not agree to the suggested change to §50.117. The commission disagrees that adopting or modifying the executive director’s response to comments limits the commission’s decision making flexibility. Further, when a member of the public makes a timely comment to the commission, it is incumbent upon the commission to respond. Additionally, under the TPDES, Resource Conservation and Recovery Act (RCRA), and underground injection control (UIC) permitting programs, the commission, as the permit issuing authority, must respond to all timely public comment.**

*§50.117(f) and (g)*

Henry, Lowerre provided recommended language to revise §50.117(f) concerning the separation of the comments and response to comments from the contested case hearing process.

**The commission believes that most of the issues raised in the suggested language are already covered elsewhere in the rules. Further, the commission has added §50.117(g), which states that “After the conclusion of the contested case hearing, if the commission issues a final decision on an application rather than remanding, continuing, or referring the case back to SOAH, the commission shall issue a single decision on the application.” The commission made no changes to §50.117(f) in response to the comment.**

*§50.119*

Section 50.119 (Notice of Commission Action, Motion for Rehearing) substantially parallels current § 50.19, but § 50.119(a) adds persons who submit timely requests for reconsideration to the list of

people who get notice of a commission action. The phrase “otherwise transmit” has been added to §50.119(a), to reflect the language in Texas Water Code, §5.555(b), added by Section 2, HB 801. Section 50.119(b) provides that a person is presumed to have been notified of the commission’s decision three days after the decision is mailed by first Class mail, in conformity with Texas Government Code, §2001.42(c), which was enacted by SB 211.

*§50.119(a)*

Henry, Lowerre suggested revising §50.119(a) to provide for the mailing of the order, the posting of the order on the Internet or other publication of the order (with the response to comments). They suggest that it is not sufficient to send just a notice of the action. The commenter noted that Texas and federal law require the commission to respond to comments, including providing a copy of the response to the person commenting by mail or by publishing the response in a location where the person can get easy access to the response. They recommended that TNRCC make it clear that it will not require a request for a copy of the order or response to comments under the Texas Public Information Act, with the resulting costs of research and copying.

**The commission agrees with this comment and has modified §50.119 to require the chief clerk to mail or transmit a copy of the Commission’s Order along with the notice of the commission’s decision on an application. This is current agency practice. It is reasonable, however, that the chief clerk send only one copy to the spokesperson of an organization or group of petitioners on behalf of the members. Further, if the commission adopts a response to comments that differs**

**substantially from that of the executive director, then the chief clerk will also send the commission's response to public comments with the notice and order.**

*§50.119(a)*

Brown McCarroll suggested amending §50.119(a) to require the chief clerk to mail notices on the same date and to include the date of mailing in the notice. The commenter believes this addition is crucial because the date of mailing (plus three days) is used to determine the 20-day period in which a motion for rehearing may be filed. The commenter noted that the mailing must occur on the same date, or else each recipient would have a different time line for filing a motion for rehearing.

**The commission recognizes the dilemma with regard to timing. However, the commission believes that the additional three days added by SB 211 will alleviate this problem. Additionally, the commission does not believe it is necessary for the rule to require that the date of mailing appears in the notice. As a matter of practice, the chief clerk's transmittal letter is always dated. Therefore, the commission is not making the suggested changes.**

*§50.119(a)*

Brown McCarroll suggested amending §50.119(a) to require the chief clerk to include the date of mailing in the notice. This addition is crucial because the date of mailing is used to determine the 20-day period in which a motion for rehearing may be filed.

**The commission declines to adopt this recommendation. The date of the mailing in the notice is unnecessary because the postmark date indicates when mailing occurred and accurately reflects the day of mailing. The proposed language reflects the precise language of the statute and there is no need to make this section more explicit. Further, as a matter of practice, the chief clerk's transmittal letter is always dated. Therefore, the commission is not making the suggested changes.**

*Subchapter G*

Adopted Subchapter G of Chapter 50 parallels current Subchapter C (Action by the Executive Director). Baker & Botts and Brown McCarroll pointed out that the title of Subchapter G was inadvertently labeled "Action by the Executive Order" instead of "Action by the Executive Director."

**The commission agrees that there was a typographical error and has changed the title of Subchapter G to read "Action by the Executive Director" rather than "Action by the Executive Order."**

*§50.131*

Section 50.131 (Purpose and Applicability) parallels current §50.31, except in three respects. First, § 50.131(b) delegates to the executive director the authority to certify WQMP updates, implementing Texas Water Code, §26.037(a), amended by Section 2, SB 1308. Second, §50.131(c) does not contain the statement that this subchapter does not apply to air federal operating permits under Chapter 122. This was deleted because §50.2 and §50.102 are adopted to contain a statement that none of Chapter 50, except §50.17 and §50.117, apply to federal operating permits. Third, the reference to §50.39 in

current §50.31(d) is changed in new §50.139 to the parallel cite to §50.131(d). SB 7 and SB 766 are effective September 1, 1999 and therefore the VERPs and electric generating facility (EGF) permits are listed in §50.102(c), to show the limited situations when the commission and executive director can act.

Proposed subsection 50.131(c)(5)--which provides that emergency or temporary orders and temporary authorizations are not subject to this subchapter--was deleted at adoption because they are already excluded from the entire chapter, in §50.102(e). The rule was renumbered accordingly.

*§50.131(a) and (b)*

Brown, Potts suggested that §50.131(a) and (b) may create conflicts between TNRCC regulations, since it could be inferred that if a particular application is not mentioned in either subsections 50.131(b) or (c), then the executive director does not have the delegated authority to act. They suggested that TNRCC should add the following language: "This subchapter does not affect the executive director's authority to grant or deny an application where the authority is delegated in other laws or regulations."

**The commission accepts the suggestion. This rulemaking generally, and Texas Water Code, §5.551(a), added by Section 2, HB 801, specifically do not expand or contract the types of applications for which notice and the opportunity for contested case hearing are available (except where specifically listed). Nor is this rulemaking meant to change those applications for which the executive director has delegated authority to act. Therefore, the commission has added the suggested language at the end of §50.131(a).**

*§50.131(b)*

TI suggested that the commission delegate to the executive director authority to act on petitions for single property designations filed under §101.2(b) of the TNRCC's rules.

**The commission declines to adopt the recommendation. As noted above, delegation of commission authority is beyond the scope of this rulemaking package.**

*§50.131(b)*

Brown McCarroll suggested adding language to the applicability section of §50.131(b).

**The commission agrees that this will make the rules easier to follow and has revised §50.131 (b) to read: "This subchapter applies to applications that are declared administratively complete on or after September 1, 1999 and to certifications of Water Quality Management Plan (WQMP) updates." In addition to adding the suggested language, we have edited this section to remove the references to "renew, modify, amend, correct, endorse or transfer" permits. The definitions of "permit" and "application" in Chapter 3 of the TNRCC rules are broad enough to encompass all of these types of permit actions. The commission believes that this change makes this rule easier to use, and makes the language consistent with many other applicability sections.**

*§50.133*

Section 50.133 (Executive Director Action on Application and WQMP Update) parallels current §50.33 and lists the circumstances under which the executive director may act on an application. New §50.133

differs slightly from existing §50.33 because it implements certain provisions of HB 801 and SB 1308 (amending Texas Water Code, §26.037(a)). Adopted §50.133(a)(1) adds the requirement that the executive director must consider public comment and prepare a response before acting on an application. New language is added to adopted §50.133(a)(5)(D) and (E) and §50.133(a)(6), to provide that an application is also considered uncontested if: (1) it has been remanded because of a settlement, or a contested case hearing request has been filed but no opportunity for hearing is provided by law, or (2) it is an application for renewal, modification or amendment of an air permit that would not result in an increase in emissions or the emission of a new contaminant.

Section 50.133(b) and (c) mirror current §50.33(b) and (c), which describe how persons who submit timely comments will be notified of the executive director's action and the opportunity to file a motion for reconsideration.

In §50.133(a)(6), the word "application" appearing after the word "renewal" in the proposed rule was a typographical error and has been deleted at adoption. Section 50.133(b) was also amended to clarify that the chief clerk mails the notice of executive director action. Section 50.133(d)(2) was corrected for clarity and grammar: the word "period" was added immediately after the phrase "end of the comment" and the phrase "the executive director's" was inserted before the word "staff."

### *§50.133*

Henry, Lowerre suggested that the commission require public notices to state when there is no opportunity for a hearing.

**The commission declines to make any change in response to this comment. The purpose of notices is to inform the public of the action and of their rights and opportunities to participate in the permitting process. The purpose is not to inform the public of nonexistent opportunities. Because it would likely be more confusing than helpful, the commission has made not changes in response to this comment.**

*§50.133(a)*

Henry, Lowerre suggested that the commission revise §50.133(a) by renumbering (5) as (6) adding a new (5) and revising (6) as follows: “5) the executive director has prepared responses to any public comments.”

**The commission agrees that the executive director may not act on an application until the response to comments has been prepared and sent to all commenters. However, §50.133(a) does not need to be changed because this is already satisfied by the terms of §50.133(a)(1), which requires the executive director to consider public comment and file a response before acting on an application.**

*§50.133(a)*

Henry, Lowerre suggested that the commission revise §50.133(a)(5) as follows: “the application is not subject to a request for hearing or a request for reconsideration because...”

**The commission declines to adopt this change because the commission must act on all contested applications, so it is important to retain the concept that the application is uncontested. Further,**

**the commission believe that the original language is easier to read. Therefore, the suggested change was not made.**

*§50.133(a)(5)(A)*

Henry, Lowerre suggested that the commission revise §50.133(a)(5)(A) as follows: “no timely requests have been filed and no request for extension of the time for filing such requests has been filed with the chief clerk...”

**The commission declines to adopt this change. This suggestion appears to create an additional process not contemplated by HB 801. HB 801 provides no mechanism for extensions to request a hearing or reconsideration and the commission believes sufficient notice and opportunity for comment as well as to request a hearing are provided by the rules.**

*§50.133(a)(5)(B) and (C)*

Henry, Lowerre suggested that the word “timely” be deleted from §50.133(a)(5)(B) and (C), which would make an application contested if late hearing requests or requests for reconsideration were received, and would thus prevent the executive director from acting on the application.

**The commission declines to adopt this recommendation. Section 2 of HB 801 (Texas Water Code, §5.556(a)) specifically requires that requests must be filed during the period provided by commission rule. Additionally, Section 5 of HB 801, amending Texas Health and Safety Code, §382.056(m)(4), refers to timely hearing requests. Therefore, the commission believes that the**

**legislature intended that an application is uncontested if no timely hearing requests or requests for reconsideration are submitted.**

*§50.133(a)(5)(B) and (C)*

Brown McCarroll suggested that the commission clarify the reference to “requests” in §50.133(a)(5)(B) and (C) by adding the phrase “for reconsideration or contested case hearing” after the word “request.”

**The commission agrees that this parallel construction adds clarity regarding the type of requests and has amended the two subparts to §50.133(a)(5) to include the suggested phrase.**

*§50.133(a)(5)(D)*

Henry, Lowerre recommends adding the phrase “with all parties” to §50.133(a)(5)(D), for a settlement reached in a contested case hearing.

**The commission declines to add this phrase because often, when applications are sent to contested case hearing, the cases settle before parties are officially named.**

*§50.133(a)(5)(D)*

Henry, Lowerre suggested that §50.133(a)(5)(D) be amended to add “and the application has been remanded from SOAH such that subsections (1)-(5) above are still satisfied and no significant change has been made to the executive director’s preliminary decision that would require new notice.”

**The commission does not believe the additional language is necessary. Whenever the executive director acts on an application, all of the requirements of this section must be met, regardless of whether the application has been remanded from SOAH. The commission agrees, however, that if a change is made that would constitute a major amendment, then new notice may be appropriate. Nonetheless, this section is not about notice, and the suggested language is not appropriate here.**

*§50.133(a)(5)(E)*

Henry, Lowerre suggested deleting §50.133(a)(5)(E), which provides that the executive director may act on an application if a hearing request has been filed but no opportunity for hearing is provided by law. The commenter believes this subsection should be deleted because the commission must have the opportunity to grant a hearing even if there is no right or opportunity for a hearing.

**The commission declines to adopt this recommendation. This section merely clarifies that the executive director may act on an application that is uncontested because there is no opportunity for hearing provided by law. This section does not change the commission's discretionary authority to grant a contested case hearing. Under HB 801, and other law, the commission has the authority to hold a hearing in the public interest even where there is no express opportunity for the public to request a hearing.**

*§50.133(a)(6)*

Henry, Lowerre commented that §50.133(a)(6) should provide clearly the trap door compliance language.

**The commission assumes that by “trap door compliance language” the commenter means Texas Health and Safety Code, §382.056(o), which allows the commission to hold a hearing on an air application if the applicant has an egregious compliance history. This subsection allows the commission to refer an application to hearing because of a facility’s bad compliance history, when no hearing would normally be authorized. Nonetheless, it is not necessary to put this language in §50.133(a)(6). This subsection allows the executive director to act on certain air applications, but it does not require him to do so. If an applicant’s compliance history is particularly bad, the case can be referred to hearing, as allowed under Texas Health and Safety Code, §382.056(o). Appropriate references to this authorization are in §55.201(i)(3) and §55.211(d)(2).**

*§50.133(b)*

Brown McCarroll suggested that §50.133(b) should be amended to require that the notice be mailed to everyone the same date.

**The commission recognizes the dilemma with regard to timing. However, the commission believes that the additional three days added by SB 211 will alleviate this problem. Additionally, the commission does not believe it is necessary for the rule to require that the date of mailing appears in the notice. As a matter of practice, the chief clerk’s transmittal letter is always dated. Therefore, the commission is not making the suggested changes.**

*§50.133(b)*

Brown McCarroll suggest amending §50.133(b) to require the chief clerk to include the date of mailing in the notice. This addition is crucial because the date of mailing is used to determine the 20-day period in which a motion for rehearing may be filed.

**The commission declines to adopt this recommendation. The date of the mailing in the notice is unnecessary because the postmark date indicates when mailing occurred and accurately reflects the day of mailing. The proposed language reflects the precise language of the statute and there is no need for making this section more explicit.**

*§50.133(d)*

Section 50.133(d) allows the executive director to certify a WQMP update after notice and, if appropriate, after revisions have been made to the WQMP in response to those comments. Additionally, the title of the section is proposed to be amended to include a reference to WQMP updates. These proposed changes implement requirements in Texas Water Code, §26.037(a), amended by Section 2, SB 1308.

*§50.135*

Section 50.135 (Effective Date of Executive Director Action) parallels current §50.35, providing that a permit is effective when signed by the executive director. This section adds the phrase “unless otherwise specified in the permit” to the end of the sentence to allow flexibility.

*§50.135*

Henry, Lowerre commented that HB 801 requires a change to the effective date of a permit, so that a permit is not effective until after all motions for reconsideration have been acted on or overruled. They further suggest that it is not a reasonable process if a person can act under a permit or other approval while the matter is: 1) not final; 2) cannot be appealed; and 3) could be reversed by the commission. Henry, Lowerre also stated that to make the effective date the date of action biases the process and that such a process could deny access to the courts. They also proposed suggested language.

**The commission declines to accept the recommendation. The commenter did not explain how HB 801 requires the commission to postpone the effective date of permits, nor is the commission able to find such a requirement in the bill. The commission also believes that adopting the recommendation would add time and complexity to the permitting process. Further, in this rulemaking, the commission did not propose to change the effective date of permits. Before making this change, which would affect every permittee, the commission believes that the change should be raised in a rule proposal so that everyone has a full opportunity to comment. See also, the response to the Henry, Lowerre comment on Section 50.139(d).**

*§50.137*

New §50.137 (Remand for Action by Executive Director), mirrors current §50.37, except for the addition of the phrase “request for reconsideration,” to implement HB 801. This section states that an application subject to this subchapter may be remanded to the executive director if all timely filed requests for reconsideration and requests for hearing are withdrawn or denied.

§50.139

New §50.139 (Motion to Overturn Executive Director's Decision) parallels §50.39 (Motion for Reconsideration), and allows a motion to overturn the executive director's decision on an application or WQMP update certification. This section identifies the manner in which an interested person may seek commission review of an executive director's action on a WQMP update. The title of the motion is changed from "motion for reconsideration" to "motion to overturn executive director's decision" to avoid confusion between this motion and the new "request for reconsideration" created by HB 801. A Motion to Overturn the Executive Director's Decision is filed in response to the executive director's final action on an application, as opposed to a *Request* for Reconsideration, which must be filed before an application is acted on. A *Request* for Reconsideration is filed after the executive director's response to comments is issued, but before a permit is issued; a *Motion* to Overturn Executive Director's Decision is filed after the executive director issues the permit. A *Request* for Reconsideration is not a prerequisite to a *Motion* to Overturn Executive Director's Decision.

A motion to overturn the executive director's decision must be filed no later than 20 days after notice of the executive director's action is mailed. Persons who file timely comments on WQMP update certifications, and who wish to file a motion to overturn, must do so within 20 days after the executive director's response to comments is mailed. The executive director's action on an application is not affected by a motion to overturn, unless the commission otherwise orders. To further clarify, procedures relating to motions for rehearing--which are filed after the commission acts on an application--do not apply to motions for reconsideration.

§50.139

Baker & Botts and TI suggest that only those persons who submitted timely public comment should be allowed to request reconsideration of the executive director's action. They further suggest that the TNRCC should require parties that are interested in a particular permit action to respond after public notice is issued and not wait until the last possible opportunity to question a permitting decision.

Baker & Botts and TI are commenting on §50.139, which deals with *motions* for reconsideration.

Although their comments use the term "request" for reconsideration, the commission believes that they mean "motion" for reconsideration since they are commenting on the section dealing with motions for reconsideration.

**The commission recognizes that it is easy to confuse the terms "request for reconsideration," "motion for reconsideration," and "motion for rehearing." Therefore, the commission has changed the name of "motion for reconsideration" to "motion to overturn" the executive director's decision. To clarify, a "request for reconsideration" is submitted after the executive director's response to comments is sent to those who commented or requested to be on the mailing list. This is before the permit is issued. In contrast, a "motion to overturn" is submitted after the executive director issues the permit. Finally, a "motion for rehearing" is submitted only if the *commission* acts on an application, and is submitted after the commission issues or denies an application.**

**Regarding the comment that the rules should limit who may file a motion to overturn of the executive director's decision, the commission does not agree that this limitation should be added to**

**the rules. Nothing in HB 801 limits the people who may file a motion to overturn. In addition, defects in the public notice are often raised in a motion to overturn. Therefore, the commission does not believe it is appropriate to limit who may file a motion for reconsideration of the executive director's action on an application.**

**Regarding the change from the term "motion for reconsideration" to the term "motion to overturn," the commission wishes to emphasize that this is not intended to make a substantive change. Rather, it is intended solely to avoid confusion with the new "request for reconsideration." Additionally, where other commission rules continue to refer to "motion for reconsideration," that term should be considered interchangeable with the term "motion to overturn" for purposes of these rules. Section 50.139(a) has been changed accordingly.**

*§50.139(b) and (c)*

Brown McCarroll pointed out that §50.139(b) and (c) should be amended to add the presumption that notice is received three days after mailing, which is consistent with Texas Government Code, §2001.142(c), as amended by SB 211, and with proposed §50.119(b), which concerns motions for rehearing of commission decisions. The commenter noted that it would be confusing to apply the three day "mailbox" rule to decisions of the commission but fail to apply it to actions of the executive director.

**The commission agrees that it would be helpful to apply the precepts of SB 211 to all final decisions, whether made by the commission or the executive director. Thus, §50.139 is amended to reflect a presumption that notice is received three days after mailing.**

*§50.139(d)*

Henry, Lowerre recommended that the commission strike §50.139(d) because it is not a reasonable process if a person can act under a permit or other approval while the approval could still be reversed by the commission or a court. They believe that making an approval effective on the date of action biases the process. They also suggest that such a process could deny access to the courts. Further, the commenters pointed out that there is no process for the commission to issue an order staying the effectiveness of an approval until the commission has considered the motion for reconsideration.

**The rule has not been changed in response to this comment. A review of commission files shows that the commission considers motions for reconsideration only in unusual or compelling circumstances, such as when the notice requirements have not been met or when there is an error in the permit. The permitting process can be lengthy, and the commission does not believe that it is necessary to further extend the process for every application. The commission must balance competing concerns for efficiency and public participation in the permitting process. Under the new process set out by HB 801, the public is afforded ample opportunity to become involved in the permitting process early to express their concerns. If their concerns are not addressed, they may file a hearing request or request for reconsideration, either of which will be considered by the commission. Only when no one files public comment and no one files a hearing request or a request for reconsideration will the executive director issue a permit. And only when the executive director issues a permit is a motion for reconsideration appropriate.**

**The commission is does not believe this process denies access to the courts. Further, if the commission decides it is appropriate to change or reverse an approval, only a short time will have elapsed during which the approval will have been effective. Therefore, no changes have been made in response to this comment.**

*§50.139(g)*

Henry, Lowerre suggested striking subsection (g), which provides guidance for motions to overturn the executive director's decision, because it is contrary to the APA.

**The commenter did not explain why they believe subsection (g) is contrary to the APA. The commission believes that the subsection complies with the APA. The commission has revised subsection (g) to make it easier to read and understand, without changing the meaning. The commission has also changed the title of “motion for reconsideration” to “motion to overturn,” to avoid confusion with the new “request for reconsideration” added by HB 801.**

*§50.139(g)*

Jenkins Gilchrist suggested that proposed §50.139(g) appears to have an error. The reference in the proposed rule to “subsection (e)” should more appropriately be a reference to “subsection (f).”

**The commission agrees and has changed the reference in §50.139(g) to refer to “subsection (f)” rather than “subsection (e).” This subsection has also been reorganized for readability.**

*§50.141*

Section 50.141 parallels existing §50.41, but deletes language pertaining to the pendency of delegation of the National Pollutant Discharge Elimination System authority because the commission received authorization to operate the program on September 14, 1998.

*§50.142*

Henry, Lowerre suggested that the commission create a new §50.142 to allow direct referrals to SOAH by the executive director or the applicant when there is agreement on the issues and timing.

**The commission agrees that it may be most efficient to allow direct referral of a case to hearing when all potential parties agree on the issues and maximum expected duration. Rather than creating a new section, however, the commission has modified §55.254(g) to allow direct referral under these circumstances. Texas Register requirements prohibit the creation of a new section that was not part of the proposed rulemaking.**

*§50.143*

Section 50.143 is unchanged from current §50.43 except for the removal of a sentence allowing the agency to return classified or confidential portions of an application to an applicant. This change conforms to changes to 30 TAC §1.5 (Records of the Agency) and to the Texas Public Information Act.

*§50.143*

Baker & Botts suggested that, consistent with 30 TAC §1.5(d), this section should be amended to provide for the return of classified or confidential information to the applicant upon withdrawal of a permit application. They suggested adding the following: “The agency may return to the applicant the classified or confidential portion of the application under §1.5(d) (relating to Records of the Agency).”

**The commission declines to make this change. Section 1.5(d)(2), which concerns confidentiality of information, previously allowed the agency to return confidential information to an applicant upon request. However, that subsection was amended, effective April 29, 1999, and commission rules no longer allow for return of classified or confidential documents. The Public Information Act and the Records Retention Act prohibit the return of documents that have been submitted to the agency and thus, have become public records. Please note that this does not imply that confidential information submitted by an applicant may automatically be disclosed to the public. If an applicant submits confidential information, and a member of the public submits an open records request to view the information, that request will be submitted to the Attorney General’s office for a determination on whether the information can be withheld.**

*§50.143*

Brown McCarroll recommended changing the cross-reference in this rule from §55.255 to §55.209(h).

**The commission recognizes that the reorganization of Chapter 55 has changed the sections where certain requirements are located. Therefore, the commission has corrected the cross-reference in**

**§50.143 to §55.209(h) (Processing Requests for Reconsideration and Contested Case Hearing)  
rather than §55.255 (Commission Action on Hearing Request).**

*§50.145*

Section 50.145 (Corrections to Permits) mirrors existing §50.45 of this title, and includes no substantive changes. This section, like many others, is added solely so that, after all applications that were administratively complete before September 1, 1999, have been processed, Subchapters A-C may be repealed. At that time, Subchapters E-G will contain all of the then-current rules for Action by the Executive Director.

## **CHAPTER 50 - ACTION ON APPLICATIONS AND OTHER AUTHORIZATIONS**

### **SUBCHAPTER A : PURPOSE, APPLICABILITY, AND DEFINITIONS**

#### **§50.2**

##### **STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for

waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which

establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§50.2. Applicability.**

(a) Subchapters A-C of this chapter (relating to Purpose, Applicability, and Definitions; Action by the Commission; and Action by Executive Director) apply to any application that is declared administratively complete before September 1, 1999. Any application that is declared administratively complete on or after September 1, 1999 is subject to Subchapters E-G of this chapter (relating to Purpose, Applicability, and Definitions, Action by the Commission; and Action by Executive Director).

(b) This chapter does not apply to applications for emergency or temporary orders or temporary authorizations.

(c) Subchapters A - C of this chapter do not apply to air quality applications under Chapter 122 of this title (relating to Federal Operating Permits) except for §50.17 of this title (relating to Commission Actions).

## **SUBCHAPTER B : ACTION BY THE COMMISSION**

### **§50.13**

#### **STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for

radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

**§50.13. Action on Application.**

Any application that is declared administratively complete before September 1, 1999 is subject to this subchapter. Any application that is declared administratively complete on or after September 1, 1999 is subject to Subchapter F of this chapter (relating to Action by the Commission). After the time for filing a hearing request as provided in §55.21 of this title (relating to Requests for Contested Case Hearings, Public Comment), the commission may act on an application without holding a contested case hearing when:

- (1) no timely hearing request has been received;
- (2) all timely hearing requests have been withdrawn or denied by the commission; or

(3) a judge has remanded the application because of settlement.

## **SUBCHAPTER C : ACTION BY EXECUTIVE DIRECTOR**

### **§50.31**

#### **STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the

commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

**§50.31. Purpose and Applicability.**

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the commission.

(b) This subchapter applies to any application that is declared administratively complete before September 1, 1999. Any application that is declared administratively complete on or after September 1, 1999 is subject to Subchapter G of this chapter (relating to Action by the Executive Director). Except as provided by subsection (c) of this section, this subchapter applies to:

- (1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);
- (2) appointments to the board of directors of districts created by special law;
- (3) certificates of adjudication;
- (4) certificates of convenience and necessity;
- (5) district matters under Chapters 49-66 of the Texas Water Code;
- (6) districts' proposed impact fees, charges, assessments, or contributions approvable under Local Government Code, Chapter 395;
- (7) extensions of time to commence or complete construction;
- (8) industrial and hazardous waste permits;
- (9) municipal solid waste permits;
- (10) on-site waste water disposal system permits;

- (11) radioactive waste or radioactive material permits or licenses;
- (12) rate matters for water and wastewater utilities under Texas Water Code, Chapters 11, 12, or 13;
- (13) underground injection control permits;
- (14) water rights permits;
- (15) wastewater permits;
- (16) weather modification measures permits;
- (17) driller licenses under Texas Water Code, Chapter 32;
- (18) pump installer licenses under Texas Water Code, Chapter 33;
- (19) irrigator or installer registrations under Texas Water Code, Chapter 34; and
- (20) municipal management district matters under Local Government Code, Chapter 375.

(c) This subchapter does not apply to:

(1) air quality standard permits under Chapter 116 of this title;

(2) air quality permits under Chapter 122 of this title (relating to Federal Operating Permits);

(3) air quality standard exemptions;

(4) consolidated proceedings covering additional matters not within the scope of subsection (b) of this section;

(5) district matters under Texas Water Code, Chapters 49-66, as follows:

(A) an appeal under Texas Water Code, §49.052 by a member of a district board concerning his removal from the board;

(B) an application under Texas Water Code, Chapter 49, Subchapter K, for the dissolution of a district;

(C) an application under Texas Water Code, §49.456 for authority to proceed in bankruptcy;

(D) an appeal under Texas Water Code, §54.239, of a board decision involving the cost, purchase, or use of facilities;

(E) an application under Texas Water Code, §49.351 for approval of a fire department or fire-fighting services plan; or

(F) an application under Texas Water Code, §54.030 for conversion of a district to a municipal utility district;

(6) emergency or temporary orders or temporary authorizations;

(7) actions of the executive director under Chapters 101, 111, 112, 113, 114, 115, 117, 118, and 119 of this title (relating to General Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Control of Air Pollution From Toxic Materials; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution From Nitrogen Compounds; Control of Air Pollution Episodes; and Control of Air Pollution From Carbon Monoxide);

(8) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting);

(9) concentrated animal feeding operations (CAFOs) under Chapter 321, Subchapter K of this title (relating to Concentrated Animal Feeding Operations);

(10) an application for creation of a municipal management district under Local Government Code, Chapter 375; and

(d) Notwithstanding subsections (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.39(b)-(f) of this title (relating to Motion for Reconsideration) applies. If the rules under which the executive director evaluates a registration application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.

## **SUBCHAPTER E : PURPOSE, APPLICABILITY, AND DEFINITIONS**

### **§50.102**

#### **STATUTORY AUTHORITY**

The new section is adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for

waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which

establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

**§50.102. Applicability.**

(a) Subchapters E - G of this chapter (relating to Purpose, Applicability and Definitions; Action by the Commission; and Action by the Executive Director) apply to any applications that are declared administratively complete on or after September 1, 1999, except as described below. Any applications that are declared administratively complete before September 1, 1999 are subject to Subchapters A - C of this chapter (relating to Purpose, Applicability and Definitions; Action by the Commission; and Action by Executive Director).

(b) Subchapters E - G of this chapter apply to certification of water quality management plan (WQMP) updates.

(c) Only the following sections of this chapter apply to initial applications for voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code or electric generating facility permits under §39.264 of the Texas Utilities Code:

(1) §50.117 of this title (relating to Commission Actions);

(2) §50.131 of this title (relating to Purpose and Applicability);

(3) §50.133 of this title (relating to Executive Director Action on Application or WQMP update);

(4) §50.135 of this title (relating to Effective Date of Executive Director Action); and

(5) §50.145 of this title (relating to Corrections to Permits)

(d) This chapter does not apply to applications for emergency or temporary orders or temporary authorizations.

(e) Subchapters E - G of this chapter do not apply to air quality applications under Chapter 122 of this title (relating to Federal Operating Permits) except for §50.117 of this title (relating to Commission Actions).

## **SUBCHAPTER F : ACTION BY THE COMMISSION**

### **§§50.113, 50.115, 50.117, 50.119**

#### **STATUTORY AUTHORITY**

The new sections are adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for

radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

**§50.113. Applicability and Action on Application.**

(a) Applicability. This subchapter applies to applications that are declared administratively complete on or after September 1, 1999. Applications that are declared administratively complete before September 1, 1999 are subject to Subchapter B of this chapter (relating to Action by the Commission.

(b) This chapter does not create a right to a contested case hearing where the opportunity for a contested case hearing does not exist under other law.

(c) After the deadline for filing a request for reconsideration or contested case hearing under §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing), the

commission may act on an application without holding a contested case hearing or acting on a request for reconsideration, if:

(1) no timely request for reconsideration or hearing has been received;

(2) all timely requests for reconsideration or hearing have been withdrawn, or have been denied by the commission;

(3) a judge has remanded the application because of settlement; or

(4) for applications under Chapters 26 and 27 of the Texas Water Code and 361 and 382 of the Texas Health and Safety Code, the commission finds that there are no issues that:

(A) involve a disputed question of fact;

(B) were raised during the public comment period; and

(C) are relevant and material to the decision on the application.

(d) Without holding a contested case hearing, the commission may act on:

(1) an application for any air permit amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted;

(2) an application for any initial issuance of an air permit for a voluntary emission reduction or electric generating facility;

(3) an application for a hazardous waste permit renewal under §305.631(a)(8) of this title (relating to Renewal);

(4) an application for a wastewater discharge permit renewal or amendment under §26.028(d) of the Texas Water Code, unless the commission determines that an applicant's compliance history for the preceding five years raises issues regarding the applicant's ability to comply with a material term of its permit; and

(5) other types of applications where a contested case hearing request has been filed but no opportunity for hearing is provided by law.

**§50.115. Scope of Contested Case Hearings.**

(a) Subsections (b)-(d) of this section apply to applications under Chapters 26 and 27 of the Texas Water Code and Chapters 361 and 382 of the Texas Health and Safety Code. Subsection (e)(1) of

this section applies to all applications under this subchapter. Subsections (e)(2) and (f) of this section apply as stated in the subsection.

(b) When the commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be referred to SOAH for a hearing.

(c) The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue:

(1) involves a disputed question of fact;

(2) was raised during the public comment period; and

(3) is relevant and material to the decision on the application.

(d) Consistent with the nature and number of the issues to be considered at the contested case hearing, the commission by order shall specify the maximum expected duration of the hearing by stating the date by which the judge is expected to issue a proposal for decision. No hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. A judge may extend any hearing if the judge determines that failure to grant an extension will deprive a party of due process or another constitutional right.

(e) The commission may limit the scope of a contested case hearing:

(1) to only those portions of a permit for which the applicant requests action through an amendment or modification. All terms, conditions, and provisions of an existing permit remain in full force and effect during the proceedings, and the permittee shall comply with an existing permit until the commission acts on the application; and

(2) to only those requirements in §382.055 of the Texas Health and Safety Code for the review of a permit renewal.

(f) When referring a case to SOAH, for applications other than those filed under Chapters 26 and 27 of the Texas Water Code and Chapters 361 and 382 of the Texas Health and Safety Code, the commission or executive director shall provide a list of disputed issues. For hearings on these applications, the disputed issues are deemed to be those defined by law governing these applications, unless the commission orders otherwise under §80.6(d) of this title (relating to Referral to SOAH).

**§50.117. Commission Actions.**

(a) The commission may grant or deny an application in whole or in part, suspend the authority to conduct an activity or dispose of waste for a specified period of time, dismiss proceedings, amend or modify a permit or order, or take any other appropriate action.

(b) For applications involving hazardous waste under the Texas Solid Waste Disposal Act, the commission may issue or deny a permit for one or more units at the facility. The interim status of any facility unit compliant with the provisions of Texas Health and Safety Code, §361.082(e), and §335.2(c) of this title (relating to Permit Required) for which a permit has not been issued or denied is not affected by the issuance or denial of a permit to any other unit at the facility.

(c) If the commission directs a person to perform or refrain from performing any act or activity, the order shall set forth the findings on which the directive is based. The commission may set a reasonable compliance deadline in its order in which to:

- (1) terminate the operation or activity;
- (2) cease disposal, handling, or storage of any waste;
- (3) conform to the permit requirements, including any new or additional conditions imposed by the commission; or
- (4) otherwise comply with the commission's order.

(d) For good cause, the commission may grant an extension of time to a compliance deadline upon application by the permittee.

(e) For applications involving radioactive material licenses under the Texas Radiation Control Act, the commission may incorporate in any license at the time of issuance, or thereafter by appropriate rule or order, additional requirements and conditions as it deems appropriate or necessary to:

(1) protect and minimize danger to public health and safety or the environment;

(2) require reports and the keeping of records and to provide for inspections of activities under the license as may be appropriate or necessary; and

(3) prevent loss or theft of radioactive material subject to this subchapter.

(f) Consistent with Chapter 5, Subchapter M of the Texas Water Code (for applications under Chapter 26 or 27 of the Texas Water Code and Chapter 361 of the Texas Health and Safety Code), and for applications under Chapter 382 of the Texas Health and Safety Code, the commission shall consider all timely public comment in making its decision and shall either adopt the executive director's response to public comment in whole or in part or prepare a commission response.

(g) After the conclusion of the contested case hearing, if the commission issues a final decision on an application rather than remanding, continuing, or referring the case back to SOAH, the commission shall issue a single decision on the application.

**§50.119. Notice of Commission Action, Motion for Rehearing.**

(a) If the commission acts on an application, the chief clerk shall mail or otherwise transmit the order and notice of the action to the applicant, executive director, public interest counsel, and to other persons who timely filed public comment, or requests for reconsideration or contested case hearing. The notice shall explain the opportunity to file a motion under §80.271 of this title (relating to Motion for Rehearing). If the commission adopts a response to comments that is different from the executive director's response to comments, the chief clerk shall also mail the final response to comments. The chief clerk need not mail notice of commission action to persons submitting public comment or requests for reconsideration or contested case hearing who have not provided a return mailing address. The chief clerk may mail the information to a representative group of persons when a substantial number of public comments have been submitted.

(b) If the commission acts on an application, §80.271 of this title applies. A motion for rehearing must be filed within 20 days after the date the person is notified of the commission's final decision or order on the application. A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail. If the motion is denied under §80.271 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

(c) Motions for rehearing may be filed on

(1) an issue that was referred to SOAH for contested case hearing, or an issue that was added by the judge;

(2) issues that the commission declined to send to SOAH for hearing; and

(3) the commission's decision on an application.

**SUBCHAPTER G : ACTION BY THE EXECUTIVE DIRECTOR**

**§§50.131, 50.133, 50.135, 50.137, 50.139, 50.141, 50.143, 50.145**

**STATUTORY AUTHORITY**

The new sections are adopted under Texas Water Code, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and Texas Health and Safety Code, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the Texas Water Code under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the Texas Health and Safety Code include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the

commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rule; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

**§50.131. Purpose and Applicability.**

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the commission. This subchapter does not affect the executive director's authority to act on an application where that authority is delegated elsewhere.

(b) This subchapter applies to applications that are administratively complete on or after September 1, 1999 to certifications of Water Quality Management Plan (WQMP) updates. Applications that are administratively complete before September 1, 1999 are subject to Subchapter B of this chapter. Except as provided by subsection (c) of this section, this subchapter applies to:

- (1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);
- (2) appointments to the board of directors of districts created by special law;
- (3) certificates of adjudication;
- (4) certificates of convenience and necessity;
- (5) district matters under Chapters 49 - 66 of the Texas Water Code;
- (6) districts' proposed impact fees, charges, assessments, or contributions approvable under Texas Local Government Code, Chapter 395;
- (7) extensions of time to commence or complete construction;
- (8) industrial and hazardous waste permits;
- (9) municipal solid waste permits;
- (10) on-site wastewater disposal system permits;

- (11) radioactive waste or radioactive material permits or licenses;
- (12) rate matters for water and wastewater utilities under Texas Water Code, Chapters 11, 12, or 13;
- (13) underground injection control permits;
- (14) water rights permits;
- (15) wastewater permits;
- (16) weather modification measures permits;
- (17) driller licenses under Texas Water Code, Chapter 32;
- (18) pump installer licenses under Texas Water Code, Chapter 33;
- (19) irrigator or installer registrations under Texas Water Code, Chapter 34; and
- (20) municipal management district matters under Texas Local Government Code, Chapter 375.

(c) In addition to those things excluded from coverage under this chapter in §50.102 of this title (relating to Applicability), this subchapter does not apply to:

(1) air quality standard permits under Chapter 116 of this title;

(2) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Exemptions from Permitting) except for concrete batch plants which are not contiguous or adjacent to a public works project;

(3) consolidated proceedings covering additional matters not within the scope of subsection (b) of this section;

(4) district matters under Texas Water Code, Chapters 49 - 66, as follows:

(A) an appeal under Texas Water Code, §49.052 by a member of a district board concerning his removal from the board;

(B) an application under Texas Water Code, Chapter 49, Subchapter K, for the dissolution of a district;

(C) an application under Texas Water Code, §49.456 for authority to proceed in bankruptcy;

(D) an appeal under Texas Water Code, §54.239, of a board decision involving the cost, purchase, or use of facilities;

(E) an application under Texas Water Code, §49.351 for approval of a fire department or fire-fighting services plan; or

(F) an application under Texas Water Code, §54.030 for conversion of a district to a municipal utility district;

(5) actions of the executive director under Chapters 101, 111, 112, 113, 114, 115, 117, 118, and 119 of this title (relating to General Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Control of Air Pollution From Toxic Materials; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution From Nitrogen Compounds; Control of Air Pollution Episodes; and Control of Air Pollution From Carbon Monoxide);

(6) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting);

(7) concentrated animal feeding operations (CAFOs) under Chapter 321, Subchapter K of this title (relating to Concentrated Animal Feeding Operations); and

(8) an application for creation of a municipal management district under Texas Local Government Code, Chapter 375.

(d) Notwithstanding subsections (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.139(b)-(f) of this title (relating to Motion to Overturn Executive Director's Decision) applies. If the rules under which the executive director evaluates a registration application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.

**§50.133. Executive Director Action on Application or WQMP Update.**

- (a) The executive director may act on an application subject to this subchapter if:
- (1) public notice requirements have been satisfied and the executive director has considered the public comment and filed a response;
  - (2) the application meets all relevant statutory and administrative criteria;
  - (3) the application does not raise new issues that require the interpretation of commission policy;
  - (4) the executive director's staff and public interest counsel do not raise objections; and

(5) the application is uncontested because:

(A) no timely requests for reconsideration or contested case hearing are filed with the chief clerk;

(B) the applicant and the persons who filed timely requests for reconsideration or contested case hearing have agreed in writing to the action to be taken by the executive director;

(C) any timely requests for reconsideration or contested case hearing have been withdrawn in writing or have been denied;

(D) a settlement was reached in a contested case hearing, and the application has been remanded from SOAH; or

(E) a contested case hearing request has been filed but no opportunity for hearing is provided by law.

(6) the application is for any air permit amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.

(b) If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action and an explanation of the opportunity to file a motion under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision), if applicable. The chief clerk shall mail this notice to the applicant, the public interest counsel, and to other persons who timely filed public comment in response to public notice. The chief clerk need not mail notice of executive director action to persons submitting public comment who have not provided a return mailing address. The chief clerk may mail the information to a representative group of persons when a substantial number of public comments have been submitted. If there were timely filed hearing requests that the commission denied, the chief clerk should also mail to the persons who timely filed hearing requests.

(c) If an application does not meet the requirements of subsection (a) of this section, the executive director shall refer the application to the chief clerk. The chief clerk shall schedule the application for consideration and action by the commission.

(d) The executive director may certify a water quality management plan (WQMP) update if:

(1) public notice has been issued as required by law and commission rules; and

(2) all significant comments received by the end of the comment period are considered by the executive director's staff and, if appropriate, revisions are made to the WQMP in response to those comments.

**§50.135. Effective Date of Executive Director Action.**

A permit or other approval is effective when signed by the executive director, unless otherwise specified in the permit.

**§50.137. Remand for Action by Executive Director.**

At any time during the processing of an application, if all timely requests for reconsideration or hearing on the application are withdrawn or denied, the commission or the general counsel, or the judge if SOAH holds jurisdiction over the application, may remand the application to the executive director. If the application has been scheduled for a commission meeting, the chief clerk shall remove it from the commission's agenda.

**§50.139. Motion to Overturn Executive Director's Decision.**

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion to overturn of the executive director's action on an application or water quality management plan (WQMP) update certification. Wherever other commission rules refer to a "motion for reconsideration, that term should be considered interchangeable with the term "motion to overturn executive director's decision."

(b) A motion to overturn must be filed no later than 20 days after the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant. The chief clerk shall mail notice of the action to the applicant, public interest counsel and to other persons who timely filed public comment in response to public notice. A person is presumed to have been notified on the third day after the date the notice of the executive director's action is mailed by first class mail.

(c) For WQMP updates, a motion to overturn must be filed no later than 20 days after the response to comments and the WQMP update, certified by the executive director, is mailed to persons who timely commented on the WQMP update. A person is presumed to have been notified on the third day after the date the notice of the executive director's action is mailed by first class mail.

(d) An action by the executive director under this subchapter is not affected by a motion to overturn filed under this section unless expressly ordered by the commission.

(e) Extension of time limits. With the agreement of the parties or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions for reconsideration and for taking action on the motions so long as the period for taking action is not extended beyond 90 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant.

(f) Disposition of motion.

(1) Unless an extension of time is granted, if a motion to overturn is not acted on by the commission within 45 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant, the motion is denied.

(2) In the event of an extension, the motion to overturn is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant.

(g) When a motion to overturn is denied under subsection (f) of this section, a motion for rehearing does not need to be filed as a prerequisite for appeal. Section 80.271 of this title (relating to Motion for Rehearing) and Texas Government Code, §2001.146, regarding motions for rehearing in contested cases do not apply when a motion to overturn is denied. If applicable, the commission decision may be subject to judicial review under Texas Water Code, §5.351, or the Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

**§50.141. Eligibility of Executive Director.**

The executive director may issue Texas pollutant discharge elimination system (TPDES) permits or other TPDES-related approvals only if he or she does not receive, and has not during the previous two years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For the purposes of this section:

(A) "Significant portion of income" means 10% or more of gross personal income for a calendar year, except that it means 50% or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement pension, or similar arrangement.

(B) "Permit holders or applicants for a permit" does not include any department or agency of a state government, such as a Department of Parks or a Department of Fish and Wildlife.

(C) "Income" includes retirement benefits, consultant fees, and stock dividends.

(2) For purposes of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

**§50.143. Withdrawing the Application.**

Upon a request by the applicant at any time before the application is referred to SOAH, the executive director shall allow the withdrawal of the application and shall file a written acknowledgment of the withdrawal with the chief clerk. If the application has been scheduled for a commission meeting,

the chief clerk shall remove it from the commission's agenda. For purposes of this rule, an application is referred to SOAH when the commission votes during a public meeting for referral or when the executive director or the applicant file a request to refer with the chief clerk under §55.209(h) of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing).

**§50.145. Corrections to Permits.**

(a) This section applies to a permit as defined in §3.2 of this title (relating to Definitions), except that it does not apply to air quality permits under Chapter 122 of this title (relating to Federal Operating Permits). The executive director, on his own motion or at the request of the permittee, may make a nonsubstantive correction to a permit either by reissuing the permit or by issuing an endorsement to the permit, without observing formal amendment or public notice procedures. The executive director must notify the permittee that the correction has been made and forward a copy of the endorsement or corrected permit for filing in the agency's official records.

(b) The executive director may issue nonsubstantive permit corrections under this section:

(1) to correct a clerical or typographical error;

(2) to change the mailing address of the permittee, if updated information is provided by the permittee;

(3) if updated information is provided by the permittee, to change the name of an incorporated permittee that amends its articles of incorporation only to reflect a name change, provided that the secretary of state can verify that a change in name alone has occurred;

(4) to describe more accurately the location of the area certificated under a certificate of convenience and necessity;

(5) to update or redraw maps that have been incorporated by reference in a certificate of convenience and necessity;

(6) to describe more accurately in a water rights permit or certificate of adjudication the boundary of or the point, rate, or period of diversion of water;

(7) to describe more accurately the location of the authorized point or place of discharge, injection, deposit, or disposal of any waste, or the route which any waste follows along the watercourses in the state after being discharged;

(8) to describe more accurately the pattern of discharge or disposal of any waste authorized to be disposed of;

(9) to describe more accurately the character, quality, or quantity of any waste authorized to be disposed of; or

(10) to state more accurately or update any provision in a permit without changing the authorizations or requirements addressed by the provision.

(c) Before the executive director makes a correction to a permit under this section, the executive director shall inform the general counsel of the proposed correction, and shall provide a copy of such information to the public interest counsel. Review by the general counsel and the public interest counsel under this subsection does not apply to a correction described in subsection (b)(2) or (3) of this section. The public interest counsel shall advise the general counsel of any objections to the proposed correction. The general counsel shall act within five business days of receiving the executive director's proposal. If the general counsel determines that the proposed correction should not be issued under this section, the executive director shall not issue the correction, but may set the matter for commission action during a commission meeting. If the general counsel fails to act within five business days, the executive director may issue the correction as proposed.

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§80.1, 80.3, 80.5, 80.17, 80.105, 80.109, 80.251, and 80.271; new §§80.4, 80.6, 80.152, 80.252, and 80.272; and the repeal of §80.7, §80.111, 80.201, 80.203, 80.205, 80.207, 80.209, 80.213, and 80.215, concerning Contested Case Hearings. Sections 80.3, 80.4, 80.5, 80.6, 80.17, 80.105, 80.152, and 80.252 are adopted with changes from the proposed rules as published in the July 16, 1999 issue of the *Texas Register* (24 TexReg 5376). Sections 80.1, 80.7, 80.109, 80.111, 80.201, 80.203, 80.205, 80.207, 80.209, 80.213, 80.215, 80.251, 80.271, and 80.272 are adopted without changes to the proposed text and will not be republished. Concurrently with this rulemaking, the commission is also adopting the rules review of and readopting the existing rules in Chapter 80, concerning Contested Case Hearings, in accordance with the rule review requirements of the General Appropriations Act, Article IX, §167, 75th Legislature, 1997.

## BACKGROUND

The primary purpose of the adopted amendments and new sections is to implement House Bill (HB) 801, and portions of Senate Bill (SB) 7, SB 211, SB 766, SB 1308, and HB 1479, 76th Legislature (1999). HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing for certain actions. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305; changes for these chapters are published in this issue of the *Texas Register*. Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission. The commission is withdrawing the proposed amendment to §80.137. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

#### OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising Texas Clean Air Act (TCAA), THSC, §382.056; and revising Texas Government Code, §2003.047. Except for the changes required under Texas Government Code, §2003.047, the new and amended statutory provisions expressly apply to the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for public hearing are provided for under TWC, Chapters 26 and 27, and THSC, Chapters 361 and 382. The changes in law made by HB 801 only apply to applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is required to prepare responses to relevant and material public comment. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are adopted in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this issue of the *Texas Register*. Changes to Chapter 321 were also proposed on July 16, 1999, but are not adopted at this time.

#### OVERVIEW OF SB 211 AND IMPLEMENTATION

SB 211 amends §2001.142(c) of the Texas Government Code, relating to notice of decision in an administrative hearing, and provides that a party is presumed to have been notified on the third day after

notice has been mailed. This requirement has been implemented and has guided rule drafting in Chapters 39, 50, and 80.

#### EXPLANATION OF ADOPTED RULES

The primary purpose of the changes to Chapter 80 is to modify commission procedures governing contested case hearings to conform with new requirements in HB 801. The most substantive changes in this chapter occur in Subchapter A, General Rules, and in Subchapter D, Discovery.

HB 801 applies only to certain applications that are administratively complete on or after September 1, 1999. Thus, the commission has created new §§80.4, 80.6, 80.252, and 80.272 to apply specifically to those applications. Similarly, new §80.152 contains only new requirements that apply to those applications. Meanwhile, existing §§80.3, 80.5, 80.251 and 80.271 are amended to apply only to applications that were administratively complete before September 1, 1999. While HB 801 continues former law in effect for applications administratively complete before September 1, 1999, the commission recognizes that it may be a year or more before all of those applications have been acted on, especially those that go to contested case hearing. Therefore, the commission has chosen to create this parallel section structure because the commission believes it is useful for the public to have easy access to rules for older applications as well as for new ones. Once all applications that were administratively complete before September 1, 1999 have been processed, the commission can delete the subchapters that apply to those applications. Overall, the commission is maintaining most of the current procedures for applications that are declared administratively complete before September 1, 1999, but is changing some of those procedures for applications declared administratively complete on or after September 1, 1999.

Some changes to Chapter 80 are not directly related to SB 801 implementation. Proposed language in §80.4(c)(5) prohibits the alignment of the executive director and public interest counsel with any other party in contested case hearings. The adopted repeal of §80.7 regarding the substitution of judges is based on existing overlap between commission and State Office of Administrative Hearings (SOAH) rules. The commission's adopted repeal of Subchapter E is not directly related to HB 801 implementation, but the lack of use of Subchapter E, in addition to equivalent coverage in other HB 801 changes made the subchapter unnecessary. In addition, the change to the notification requirements under adopted rule §80.272(b) incorporates provisions in SB 211.

Two other distinctions appear in the rules in Chapter 80. The first relates to applications under Chapters 26 and 27 of TWC, and Chapters 361 and 382 of THSC. The amendments to those chapters in §2 and §5 of HB 801 apply only to applications under those chapters. Thus, Chapter 80 contains certain rules that apply only to those applications, and not to applications under other chapters, such as those under TWC, Chapter 11 or Chapter 16. Some rules apply to all types of applications. Additionally, there are a number of applications that are not subject to contested case hearing, according to other rules and statutes. Thus, Chapter 80 will generally not apply to those applications.

#### FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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 the Texas

Government Code. Furthermore, 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and establishes procedures associated with actions on permit applications, the rulemaking does not meet the definition of a “major environmental rule.”

In addition, even if the rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and TWC, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not 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 because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with TWC, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program.

This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TWC, Chapter 5, Subchapter M, and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the amendments and new sections is to revise the TNRCC rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting contested case hearings as well as specific procedures for hearings. The rule would also consolidate already existing notice procedures for some of the air quality permitting programs, correct, clarify, and/or update the air quality permit amendment process, requirements relating to sign posting for concrete batch plants, and clarification of requirements relating to bilingual education notices; and consolidate commission procedural rules. The adopted rules will substantially advance these stated purposes by 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 language consists of amendments and new sections relating to the commission's procedural rules rather than substantive requirements.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505, 30 TAC §§281.40, et seq.).

#### HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. Oral comments were provided by an individual and Locke, Liddell and Sapp, L.L.P.. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P., on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce (TABCC), and Texas Oil and Gas Association; Brown, Potts & Reilly, L.L.P., on behalf of Merco Joint Venture, L.L.C.; City Public Service (CPS) of San Antonio, Texas; Dow Chemical Company (Dow); Eastman Chemical Company, Texas Eastman Division (Eastman); Exxon Chemical Company's Baytown Chemical Plant, Baytown Olefins Plant and Mont Belvieu Plastics Plant (Exxon Chemical); Exxon Company, U.S.A., Baytown Refinery (Exxon); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center for Policy Studies, and Texas Committee on Natural Resources; Jackson Walker L.L.P.; Jenkens

& Gilchrist, PIC; Public Interest Counsel, Texas Natural Resource Conservation Commission (PIC); Roller and Allensworth, L.L.P., on behalf of the Greenbelt Municipal and Industrial Water Authority; Small Business Compliance Advisory Panel (CAP); Texas Association of Business & Chambers of Commerce (TABCC); Texas Cattle Feeders Association (TCFA); Texas Cotton Ginners' Association; Texas Instruments Incorporated (TI); Thompson & Knight, L.L.P.; and the United States Environmental Protection Agency Region 6 Office (EPA).

#### COMMENTS REQUESTED

In the proposed rule preamble, the commission requested comments on four questions related to complex issues involving HB 801. The commission received a number of thoughtful comments on these questions. These comments have been very helpful to the agency in developing a framework for the new process. The comments, as well as commission thoughts on those comments are summarized below. In addition, many of these comments relate to specific sections of the rule, and responses are provided in the discussions of those sections.

**Question 1. When the commission certifies only a limited number of issues to SOAH after reviewing the public comments, executive director response to comments, and the hearing requests, HB 801 appears to relieve the applicant of any burden of presenting evidence on any other issues arising out of the application. Should §80.17 or §80.137 be amended to reflect this new procedure? Is there a way to use the Summary Disposition procedure to generate a ruling by the judge on the non-contested portion of the application and draft permit? If parties do not object to the absence of issues during the contested case hearing, can there be a presumption that the applicant has met**

**his burden of proof on all uncontested issues and that adequate evidence exists to support findings to that effect?**

a. Summary of Comments

Baker & Botts, Brown McCarroll, TI and Thompson Knight provided comments that responded to Question 1. The commenters agreed that HB 801 substantially narrows the scope of a contested case hearing. They were emphatic that a protestant is not granted a contested case hearing on the entire permit application; that a hearing is granted only on disputed issues that are referred to SOAH or that are added by the administrative law judge (ALJ).

b. Responses to Question 1

The commission generally agrees with observations made by the commenters. Specific responses to comments on the various sections of the chapter confirm the approach that HB 801 creates a new hearing process for environmental permit applications, under which only specific issues, not an entire application, are referred to a contested case hearing. The commission will consider all timely received public comments in determining what, if any, issues to refer for hearing. Issues not referred for contested case hearing will be those that can be decided without taking further evidence. Therefore, the applicant is not under a burden to prove up the entire application during the SOAH hearing. The commission agrees that the summary disposition process will be available only for those issues referred to SOAH. The SOAH judge will be expected to accept evidence only on those issues referred by the

commission or formally added by the judge at the hearing. The judge's proposal for decision and proposed order need address only those issues considered at the hearing. The commission will then consider the proposal for decision, the proposed order, the executive director's response to comments and will then issue a decision on the application and draft permit.

**Question 2. Is the possible absence of evidence in the record on those issues attackable on appeal under the substantial evidence standard of review? Are the application, technical review documents, the public comments and executive director's response to those comments part of the agency administrative record on appeal?**

a. Summary of Comments

Brown McCarroll commented that the absence of evidence in the record on *uncontested* issues is not attackable on appeal under the substantial evidence standard of review. The substantial evidence requirement in Administrative Procedure Act (APA), §2001.174 applies only to *fact findings*, for which *evidence* is required. *Evidence* only comes in an evidentiary hearing, that is, in a contested case hearing. Brown McCarroll, Locke Liddell and Thompson Knight commented on the contents of the administrative record. Brown McCarroll noted that the application, the technical review documents, the public comments, and the executive director's response to those comments *are* part of the agency's overall administrative record – but they are not parts of the more limited record to which the substantial evidence standard of review is applied. Baker & Botts and Thompson Knight concurred that it seems

unlikely that a court would set aside the entire process crafted by the legislature to require the development of further evidence on facts not involved in the contested case process.

b. Responses to Question 2

The commission appreciates these comments regarding appellate review. No changes have been made to the rules in response to these comments with the expectation that, given the lack of specificity in HB 801, judicial guidance harmonizing HB 801 and the APA will be forthcoming. The commission agrees that the overall administrative record will consist of the SOAH record as well as the response to comment record. Should future guidance be received on how commission decisions will be reviewed under §5.351 of the TWC alone *and* in conjunction with §2001.171 of the Texas Government Code, either through additional statutory changes or judicial interpretation, the commission will undertake additional rulemaking as appropriate.

**3. Can only those issues litigated at SOAH be the subject of a motion for rehearing or may parties raise issues that the commission either refused to certify or that parties neglected to request to be certified? At what point in the process is or should the commission's refusal to certify an issue become appealable? Should the commission's order certifying a matter to SOAH contain findings of fact and conclusions of law on those matters that will not be part of the contested case hearing or should that occur only after the proposal for decision (PFD) is considered by the commission?**

a. Summary of Comments

Brown McCarroll commented that parties to the contested hearing should be able to raise in a motion for rehearing issues of *law* challenging the commission's refusal to certify issues which they originally requested to be tried at the contested hearing. The commission should never, upon certification of issues to SOAH or upon final decision, make findings of fact and conclusions of law on matters not part of the contested case hearing. Thompson & Knight likewise commented that a party should only be permitted to raise the issues referred to or added by the ALJ on a motion for rehearing. The refusal to certify an issue should be appealable with the final decision of the commission. Of course, the standard of review and the record for review will be different. They also suggest there is no need for detailed findings of fact and conclusions of law on issues not referred. Baker & Botts suggests that the refusal to refer an issue to SOAH should only be subject to appeal after the conclusion of any contested case hearing and the issuance of a final decision.

b. Responses to Question 3

The commission declines to adopt a rule limiting what may be raised in a motion for rehearing. Nothing in HB 801 requires or suggests such a limitation. The commission's refusal to certify an issue is, in the opinion of the commission, an interlocutory order and becomes appealable only after the conclusion of the contested case hearing, if one is held. Although findings of fact for purposes of substantial evidence review may be limited to those issues litigated at SOAH, the final commission decision will consist of both the contested case order and the commission's response to comments. On motions for rehearing, the commission will consider points properly raised both by commenters and by participants in the SOAH hearing. The commission believes that persons who participated in the SOAH proceeding may proceed

under §2001.171 of the Texas Government Code but the commission does not read HB 801 to prevent commenters from appealing a final commission decision under §5.351 of the TWC. Harmonizing the two avenues and deciding upon the appropriate standard of review will be the subject of future judicial consideration, should the situation arise.

**Question 4. Are there provisions that could be added to the commission rules that might provide certainty to parties and guidance to the judiciary on these questions concerning judicial review of orders issued under the new HB 801 procedures?**

a. Summary of Comments

Brown McCarroll commented that additional and clearer provisions probably could be included in these rules to provide certainty to the parties, predictability to the commission's interpretation of them, and guidance to the judiciary. However, Brown McCarroll felt that most of the rules are about as good as any that could be written on such short notice. Thompson & Knight commented that the commission should adopt a rule clearly stating the status of all facts not referred as issues to SOAH. All facts associated with the permit application which are not referred to SOAH by the commission or added as fact issues by SOAH, should be deemed established in a manner consistent with the decision of the Executive director.

b. Responses to Question 4

The commission appreciates these thoughtful responses and agrees that the rules are sufficient, especially given the short implementation time frame. As the responses to the comments on the first three questions reflect, the commission will revisit these rules for possible additional rulemaking when experience or *judicial guidance* indicates change is needed on these matters. The commission believes that the judicial process, with all the benefits of full arguments and briefing by all parties that the adversary system can provide, may be a better forum to harmonize the various statutes than this initial rulemaking.

#### ANALYSIS OF COMMENTS AND ADOPTED RULES

##### *Public Hearing*

The commission held a public hearing on this rulemaking on August 10, 1999. Two people commented, one individual and one attorney from the law firm Locke Liddell & Sapp. The individual's comments related to notice and are addressed in the preamble to Chapter 39. Locke Liddell's comments related to contested case hearings, and are addressed specifically in the analysis of §§50.115 and 80.152, as well as Chapter 55.

##### *General Comments on Chapter 80*

Brown McCarroll observed that the commission has undertaken a quadrennial review of the commission's procedural rules in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997, while simultaneously adopting new rules to implement HB 801. The commenter stated that the quadrennial review should not be a bar to future consideration of necessary changes to the new rules

following adoption. The commenter recommended that the commission clearly indicate that the rules will be revisited after their implementation to address any problems resulting from the “fast track” time line for this rulemaking.

**The commission agrees with the commenter that the new procedural rules being adopted should be subject to review to correct any deficiencies which may become apparent following adoption. The quadrennial review applied only to the existing Chapters 39, 50, and 80 of the commission’s rules. The fact that the existing procedural rules have undergone the statutorily required quadrennial review, and the commission has determined that those rules continue to be necessary, will not prevent the commission from revisiting the procedural rules following implementation of HB 801.**

*Chapter 80; Contested Case Hearings*

Thompson Knight, TI, and Baker & Botts commented that the rules should be amended to make it clear that the applicant is under no burden to offer evidence on aspects of the application that are not referred to SOAH or added by the Judge. They also believe that facts not placed in issue and not referred to SOAH must be deemed to be established without the development of an evidentiary record.

**The commission agrees that the applicant has no burden to offer evidence on aspects of the application not considered by the judge, and has modified §50.115(e), and added §50.117(g) and §80.6(d) for that purpose. When a matter is referred to SOAH, only the limited issues referred by the commission or issues added by the judge will be considered in the hearing. The applicant is**

**required to put on evidence only on issues referred to SOAH or added by the judge. Likewise, the judge shall provide findings of facts and conclusions of law only on issues referred to SOAH or added by the judge. The commission will not make evidentiary findings on aspects of the application not considered by the judge.**

**The commission has not added a rule saying that facts not placed in issue and not referred to SOAH must be deemed to be established without the development of an evidentiary record. Findings of fact and conclusions of law are appropriate only where an evidentiary hearing has been held. Since no evidence will be taken on issues not referred to SOAH, findings of fact are not appropriate. Moreover, HB 801 does not provide for such a requirement.**

*Chapter 80 Generally*

Brown McCarroll suggested changing “permit application” to “application” in §§80.3(a), 80.4(a)(1), 80.6(a), 80.152(a), 80.252(a).

**The commission agrees that Texas Government Code, §2003.047, as amended by §6 of HB 801, applies to all applications and that §80.252(a) should parallel §80.251(a). Therefore, the term “permit application” has been changed to the more inclusive term “application.”**

*Chapter 80 Generally*

The PIC pointed out that, regardless of the date of administrative completeness, the PIC prefers to see SOAH judges continue to accept public comment at preliminary hearings in cases where no public

meeting has been held in the local area. However, the PIC is willing to provide that the Executive director has no obligation to prepare responses to comments received after the close of the comment period following the publication of Notice of Application and Preliminary Decision. This proposal could be set forth in Subchapter E of Chapter 55

**The commission responds that under the public comment procedures in Chapter 55, the commission anticipates that all public comment should be received during the designated public comment period so that it will be properly considered by the executive director and the commissioners when making determinations on permit actions and hearing requests. Further, under HB 801, when there is significant public interest in an application, the executive director is required to hold a public meeting. These are typically held in the local area. Once the commission refers a matter to SOAH for a contested case hearing, the public comment period is over and there is no further opportunity to provide comment on the record.**

*Section Chapter 80; General Comments*

Baker & Botts commented that refusal to refer an issue to SOAH should only be subject to appeal after the conclusion of any contested case hearing and the issuance of a final decision. They also suggested that any person who failed to file comments, failed to request a contested case hearing, or failed to participate in any hearing held on the permit application should be precluded from seeking rehearing of a final decision.

**The commission agrees that if it declines to refer an issue to SOAH, then the issue should be appealable only with the final decision of the commission. This will ensure that a final commission decision on the application has been reached before a court can be asked to intervene. This procedure is consistent with the procedure for appealing denials of hearing requests. The commission modified §55.211(e) to reflect this comment.**

**The commission disagrees with the suggested limitation on motions for rehearing. HB 801 does not limit who may file a motion for rehearing. Because a motion for rehearing is a prerequisite for appeal, interested persons must be allowed to submit a motion for rehearing. Moreover, §55.201(h) currently provides that such persons may file a motion to overturn the executive director's decision "are limited to the differences between the draft permit and the final decision."**

**The commission declines to further limit public participation because HB 801 contains no such limit. A motion for rehearing can be filed for: (a) issues referred to hearing and on which a hearing was held; (b) issues raised in hearing requests but which the commissioners declined to refer to hearing; or (c) any final decision by the commission.**

**The commission points out that the term "motion for reconsideration" has been changed to "motion to overturn executive director's decision" or simply "motion to overturn." Section 50.139(a) of this title makes clear that wherever commission rules refer to a "motion for reconsideration, that term should be considered interchangeable with the term "motion to overturn executive director's decision." The purpose of this change is to avoid confusion with the new term "request for reconsideration," created by HB 801.**

*Chapter 80 Generally*

The PIC did not believe that the proposed revisions apply to applications declared administratively complete before September 1, 1999.

**The commission agrees that §7 of HB 801 provides that the provisions of the bill apply only to applications that are administratively complete on or after September 1, 1999.**

*§80.1; Applicability and Purpose*

The commission has added the phrase “Except as provided in this chapter” to §80.1 to reflect the changes in applicability of various sections of Chapter 80. To implement HB 801, the commission has added new §80.4, which parallels existing §80.3.

*§80.3; Judges*

Existing §80.3 is amended to apply only to applications declared administratively complete before September 1, 1999, while §80.4 applies to applications declared administratively complete on or after September 1, 1999. Section 80.3(c)(5) has been amended to prohibit the judge from aligning the executive director and the public interest counsel with any other party. This provision is not required by HB 801, but is being incorporated because the executive director and public interest counsel are statutory parties and must maintain independent judgment in contested case hearings.

*§80.4; Judges*

New §80.4, relating to SOAH judges and their authority, mirrors existing §80.3, except that it applies to applications declared administratively complete on or after September 1, 1999. It also has several changes required by HB 801. Section 80.4(c)(5) prohibits the judge from aligning the executive director and the public interest counsel with any other party. This provision is not required by HB 801, but is being incorporated because the executive director and public interest counsel are statutory parties and must maintain independent judgment in contested case hearings. Section 80.4(c)(16) allows a judge to consider issues in addition to those provided on the commission's list of disputed issues referred to SOAH under Chapter 55. However, under Texas Government Code, §2003.047, as amended by §6 of HB 801, any additional issue considered by a judge must be material and supported by evidence. Moreover, before a judge considers an additional issue, §80.4(c)(16)(C) requires a judicial finding that there are "good reasons" for the failure of an interested person to supply available information regarding that issue during the public comment period. New §80.4(c)(17)(A) and (B) give judges the authority to extend the proceeding if they determine that not doing so would deprive a party of due process or some other constitutional right, or if the parties to the proceeding agree to the extension. Sections 80.4(c)(16) and 80.4(c)(17) are based on requirements in Texas Government Code, §2003.047, as amended by §6 of HB 801.

*§80.4(d)*

The commission has added new §80.4(d), which provides that a judge is not required to accept public comment into the evidentiary record. This subsection effectuates the intent of HB 801 to keep the public comment process and the contested case hearing process separate. As discussed in response to the comment on §80.127(f), this subsection supercedes §80.127(f).

*§80.5 and §80.6; Referral to SOAH*

The commission amends §80.5 to specify that this section applies to any permit applications declared administratively complete before September 1, 1999. New §80.6 mirrors existing §80.5, except that it applies to all permit applications declared administratively complete on or after September 1, 1999, and includes other changes based on TWC, §5.556(e), added by §2 of HB 801, as follows. Section 80.6(b)(5) requires the chief clerk to send to SOAH the commission's list of disputed issues and its determination on the maximum expected duration of the hearing, as required under Chapter 55. Section 80.6(b) does not require the commission to provide a list of issues or areas to be addressed by the judge because those requirements are included in Chapter 55. Section 80.6(c) retains the provision from §80.5(b) that the EDPR (Executive Director's Preliminary Report) shall serve as the list of issues for an enforcement case.

*§80.6; Referral to SOAH*

Jenkins & Gilchrist suggested that current §80.5 appears to contain language that is appropriate to any application, whether filed before, on, or after September 1, 1999. Jenkins & Gilchrist suggested that the commission delete §80.6.

**The commission disagrees with deleting §80.6 because §7 of HB 801 states the changes in law apply only to applications which are administratively complete on or after September 1, 1999.**

**Applications that are administratively complete before this date are governed by the former law, and that law is continued in effect for that purpose. As a result, the commission is using parallel sections in Chapter 80 to distinguish between applications administratively complete prior to**

**September 1, 1999 (the effective date of HB 801) from those administratively complete after this time.**

*§80.7; Substitution of Judges*

The commission is repealing §80.7 regarding the substitution of judges. This section is no longer necessary because SOAH has existing authority to substitute judges under its rules in 1 TAC §155.17(c).

*§80.17; Burden of Proof*

On §80.17, Brown McCarroll and Henry, Lowerre commented that the commission should not shift the burden of proof on an issue to the person requesting a hearing. Conversely, Baker & Botts commented that the protestants must carry the burden of proof on those issues referred to hearing.

**The commission has determined that it is not appropriate to add the proposed phrase “or otherwise provided by the commission” to §80.17. Further, the commission declines to shift the burden of proof in a contested case hearing. Nothing in HB 801 explicitly requires the burden of proof to shift from the current practice of requiring the applicant to show that the application complies with all requirements. While there may be circumstances when the burden of proof is appropriately on the protestants--as when a protestant demonstrates that it is an affected person--it is not appropriate to make such a sweeping change to current practice. Thus, an applicant will continue to carry the burden to demonstrate that an application meets applicable rules related to issues that are the subject of the hearing. The commission is also amending §80.17 by making grammatical changes to §80.17(a).**

§80.17

Brown McCarroll commented that the commission would err if it were to decide that the final commission order *may* incorporate findings on issues not submitted to SOAH for hearing. They believe that under the APA, it is clear that the commission may not properly include findings of fact on issues not submitted to SOAH. Brown McCarroll suggested that §80.17 should not be changed in a way that would suggest that a party could have a burden of proof on issues not referred to SOAH.

**The commission agrees that a final commission order should not incorporate findings of fact on issues not referred to SOAH. Therefore, as explained above, except for a grammatical change, §80.17 is not changed in this rulemaking. Issues that are not referred to SOAH will not be subject to §80.17.**

§80.105; *Preliminary Hearings*

To incorporate changes to public comment procedures required by HB 801 and to maintain consistency with proposed changes to Chapter 55, the commission is amending and repealing certain sections of Chapter 80. The commission amends §80.105, to change how SOAH conducts preliminary hearings, by repealing the requirement that judges accept public commentary at the preliminary hearing. In addition, the amendment to §80.109 removes language in subsection (a) which allows a judge to take written or oral comments from persons who are not parties to the proceeding. Finally, the commission repeals current §80.111 to clarify the separation between the public comment and contested case hearing processes.

Section 80.111 allowed persons not designated as parties to register protests or make comments orally or in writing. Under the public comment procedures in Chapter 55, the commission anticipates that all public comment should be received during the designated public comment period so that it will be properly considered by the executive director and the commissioners when making determinations on permit actions and hearing requests. Once the commission refers a matter to SOAH for a contested case hearing, the public comment period is over and there is no further opportunity to provide comment on the record.

*§80.105(b)(2)*

The PIC suggested the following revision to §80.105(b)(1): “accept public commentary only in accordance with the provisions of Chapter 55 of this title, and name parties.” A corresponding change to §80.109(a) would be to revise the sentence proposed to be stricken as follows: “At the discretion of the judge, and only in accordance with the provisions of Chapter 55 of this title, persons who are not parties may be permitted to make or file statements.” The PIC also suggested revising §80.111 in accordance with revisions to §80.105 and §80.109. Also, the PIC believes there is no need to revise the §80.111 provision allowing persons to submit questions for the judge to consider asking of witnesses, as this provision is unrelated to notice and comment procedures and does not conflict with 801.

**To reflect the intent of HB 801, the commission wishes to distinguish between the public comment process and the contested case hearing process. The public comment process and the contested case hearing process are two separate phases of the permitting process. Under HB 801, the public comment period ends before the start of the contested case hearing. During the public comment**

**period, the public will have ample opportunity to submit comments. Under HB 801, two public notices will be provided: (1) at administrative completeness (Notice of Receipt of Application and Intent to Obtain Permit); and (2) after technical review (Notice of Application and Preliminary Decision) (except that there may be only one notice for certain air applications).**

**Public comment will be solicited, and the executive director will consider all comments before reaching a decision on the application. Public meetings may also be held to receive additional comment. Indeed, if there is a significant degree of public interest, the agency is required to hold a public meeting when there is a substantial or significant degree of public interest in an application. A public meeting will typically be held in the local area. The executive director will then prepare a response to the comments, which will be distributed to the commenters. This is the end of the public comment process.**

**Then, people who are still unsatisfied may request reconsideration or a contested case hearing. If issues are sent for contested case hearing, then a judicial process begins. Only affected persons may participate in this judicial process, if they are admitted as parties to the hearing. Because, under HB 801, the public comment process is over, it is appropriate that only properly admitted parties participate in the contested case hearing.**

*§80.105(b)(1)*

Henry, Lowerre suggested that the rule retain the existing language requiring the judge to accept public commentary during a contested case hearing.

**The commission agrees in part, and disagrees in part. Under the new HB 801 process, the commission does not believe that it is appropriate for SOAH to take public comment during the contested case hearing process for applications. The commission wishes to distinguish between public comment and the hearing process. Under HB 801, the public comment period ends before the start of the contested case hearing process. The commission will have received and responded to all public comment before the time for the public to request a contested case hearing. The purpose of this timing is to try to resolve issues during the comment process, so that a contested case hearing may not be necessary. Raising issues early will provide the applicant the opportunity to resolve them before the contested case hearing process has begun, possibly avoiding a hearing and thus saving time and expense for all. Therefore, the commission declines to require the judge to accept public comment at contested case hearings on applications.**

**However, because the HB 801 public comment process does not apply to enforcement proceedings, public comment will continue to be accepted in enforcement hearings. Therefore, the commission has amended proposed §80.105(b)(1) to continue to require the judge to accept public comment at the hearing.**

*§80.105(b)(2)*

Baker & Botts suggested that §80.105(b)(2) should be amended in the rulemaking to conform to HB 801's requirement that "the administrative law judge shall establish a docket control order designed to complete the proceeding by the date specified by the commission."

**The commission agrees that Texas Government Code, §2003.047, as amended by §6 of HB 801, requires that SOAH judges enter a docket control order. Section 80.105(b)(2) has been modified to require a judge to enter a docket control order to ensure that the contested case hearing does not exceed the commission's maximum expected duration.**

*§80.109(a); Designation of Parties*

Henry, Lowerre suggested that the rule retain the existing language regarding public statements noting that the judge should have that discretion. The commenter also noted that the public hearing may be the only opportunity that the public has had to express their positions in the area where they live.

**Under the new HB 801 process, the commission does not believe that it is appropriate for SOAH to take public comment at the preliminary hearing. The commission wishes to distinguish between the public comment process and the hearing process. Under HB 801 the public comment process ends before the start of the contested case hearing process. Under §55.154, if there is significant or substantial public interest in an application, the executive director or Office of Public Assistance shall hold a public meeting. Thus, where there is a high level of interest in an application, the public will have the opportunity to provide public comment in the area where they live.**

*§80.109(b)*

Baker & Botts suggested that §80.109(b) should be revised to establish a mandatory requirement that a requestor must have participated in the public comment period in order to seek to be admitted as a party to a SOAH hearing.

**The commission has not made any changes to Chapter 80 in response to this comment. The issue raised by the commenter has a bearing on the standards to be used by the commission in referring an issue for hearing to the State Office of Administrative Hearing consistent with §5.556(d) of the Texas Water Code as added by HB 801. The commissions' implementation of this requirement will be addressed in future amendments to Chapter 55. However, the admission of parties to a proceeding once the commission has referred a matter to SOAH and a hearing has already been set is not related to the standards used by the commission to grant a hearing request. Therefore, the commission does not believe that it would be appropriate to limit the judge's designation of parties in the manner suggested by the commenter.**

*§80.109(b)*

Baker & Botts suggested that a requestor should only be admitted as a party to a SOAH hearing if he is an affected person with an interest that may be impacted by the issues to be covered at the hearing.

**The commission believes that only affected persons can be admitted as parties to SOAH hearings.**

*§80.109(b)(3)*

Baker & Botts suggested that the reference to §55.29 should be corrected to refer to §55.203 or §55.256.

**The commission has modified §80.109 to appropriately refer to both §55.203 and §55.256, rather than to §55.29. In this rulemaking, Chapter 55 has been reorganized in an attempt to make the chapter easier to use. Also, because most of HB 801 applies only to certain applications, parallel**

**subchapters have been created for applications that are subject to §§2-5 of HB 801, and those that are not subject to those sections. Existing §80.109 refers to §55.29 (Determination of Affected Person). Because of the reorganization, the new sections, §55.203 (in Subchapter F) and §55.256 (in Subchapter G) now both are titled Determination of Affected Person.**

*§80.111; Persons Not Parties*

Henry, Lowerre recommended that the commission not repeal §80.111 (Persons Not Parties). They believe that judges should have discretion to allow non-parties to provide information or identify important issues--just as district judges have such discretion.

**The commission disagrees and has repealed §80.111. Under HB 801, the public comment process ends before the start of the contested case hearing process. Only people who are admitted as parties should be allowed to participate in the contested case hearing process, which is a formal judicial process. There will be ample opportunity early in the permitting process for people to make public comment. Under HB 801, neither parties nor non-parties may bring up new issues at the hearing (except in limited circumstances). Further, if evidence on broader issues needs to be brought before the judge, both the protestants who have been admitted as parties and the public interest counsel will have the opportunity to present evidence on those issues.**

*§80.127(f); Evidence (Public Comment)*

The commission solicited comments on whether §80.127(f) should be repealed. Brown McCarroll commented it should be repealed. They believe that allowing public comment into the evidentiary

record, with the possibility that this would be construed to allow findings of fact and conclusions of law to be based on the comments, threatens the applicant's due process rights and may be contrary to the APA. They also point out that §80.127(f) is in conflict with the letter and spirit of HB 801, with its required separation between the public comment and contested case hearing processes. They believe that §80.127(f) was never required by the Resource Conservation and Recovery Act (RCRA), or the federal Clean Water Act, and that its repeal could in no way jeopardize the delegation of these programs.

**Because §80.127(f) was not opened in this rulemaking, the commission instead adopts a change to §80.4. The commission agrees that §80.127(f) should be deleted because the public comment process should be kept separate from the contested case hearing process. That subsection specifically applied to contested case hearings on permits under the Resource Conservation and Recovery Act, the Texas Injection Well Act, and the Texas Pollutant Discharge Elimination System. Subsection (f) required that all public comment on permit applications received by the commission during the comment period and the executive director's responses to comments be admitted into the evidentiary record. HB 801 keeps the public comment and contested case hearing processes separate, and only specific issues are to be considered at hearing. Thus, public comment and the executive director's response to comments should not be admitted into the evidentiary record. In making a recommendation to the commission, the judge should consider only evidence on issues referred to SOAH or added by the judge. Since §80.127(f) was not formally proposed to be changed, the commission will not repeal it in this rulemaking. However, the commission has adopted new §80.4, which provides that a judge is not required to accept public comment into**

**evidence. This new section supercedes §80.127(f), for applications declared administratively complete after September 1, 1999.**

*§80.137; Summary Disposition*

Regarding §80.137, Brown McCarroll commented that there is no justifiable reason to resort to a creatively manufactured Summary Disposition procedure to generate rulings by a judge on noncontested portions of the application and draft permit.

**The commission agrees that only disputed issues are referred to SOAH. Issues that are not referred to SOAH and portions of an application that are not before the judge cannot be subject to summary disposition. Accordingly, the commission has deleted the following proposed sentence from the end of §80.137(c): “The record of the commission’s consideration and disposition of public comment, requests for reconsideration, and request for contested case hearing may be used to support summary disposition on uncontested matters.” Therefore, the commission is withdrawing the proposed amendment to §80.137.**

*§80.137*

Brown McCarroll suggested that only issues litigated at SOAH should be proper subjects of a motion for rehearing.

**The commission declines to limit the subjects of motions for rehearing. HB 801 does not expressly provide for such a limitation. Because a motion for rehearing is a prerequisite for appeal,**

**interested persons must be allowed to submit a motion for rehearing. Moreover, §55.201(h) currently provides that such persons may file a motion to overturn the executive director’s decision “are limited to the differences between the draft permit and the final decision.” The commission declines to further limit public participation because HB 801 contains no such limit. A motion for rehearing can be filed for: (a) issues referred to hearing and on which a hearing was held; (b) issues raised in hearing requests but which the commissioners declined to refer to hearing; or (c) any final decision by the commission.**

*§80.137(c)*

For 80.137(c), Baker & Botts suggested that proceedings should be strictly limited to disputed issues referred to or added by SOAH.

**The commission agrees that a SOAH judge may only act on issues that are referred by the commission or that are added by the judge. Under §80.3(c)(16), a judge may only add issues that are material and supported by evidence, and if there are good reasons for the failure to supply available information regarding the issues during the public comment period. A judge may not consider issues or portions of the application that are not referred or added. The parties may not present evidence and the judge shall not prepare findings of fact and conclusions of law on issues that are not referred or added. Accordingly, we have modified §80.137(c) by deleting the last sentence which had read: “The record of the Commission’s consideration and disposition of public comment, requests for reconsideration, and requests for contested case hearing may be used to support summary disposition on uncontested matters.”**

*§80.152; Scope and Level of Discovery*

New §80.152 defines the scope and level of discovery for applications declared administratively complete on or after September 1, 1999. Section 80.152(a) and (b) reflect the commission's determination that HB 801 amendments to Texas Government Code, §2003.047 apply to all contested case hearings, not just those hearings for permits issued under TWC, Chapters 26 and 27; and to permits under THSC, Chapters 361 and 382. Brown McCarroll commented that they agree with this determination.

Texas Government Code, §2003.047, as amended by §6 of HB 801, requires the commission to set the level of discovery for each case based on the levels defined in Texas Rules of Civil Procedure (TRCP), §§190.2, 190.3, and 190.4. As proposed, §80.152(c) set the level of discovery for all contested cases at Level 3, as that term is defined in TRCP, §190.4, except that oral depositions and interrogatories were limited to no more than allowed in TRCP, §190.3 (Level 2). Level 3 allows a judge to set a discovery schedule tailored to the circumstance of the specific case. Level 2 limits the number of hours of interrogatories to 25 per party and the hours of depositions to 50, with 6 more for each expert over 2. Using Level 3 allows a judge to limit discovery to the limits in Level 1 or Level 2 or to set other limits that better suit that case. Using the limits in Level 2 as maximums for interrogatories and depositions limits the judge's discretion in the interest of the greater efficiency contemplated by HB 801.

Henry, Lowerre commented that the proposed rule appears appropriate and that after some experience, a better approach will likely develop. Brown McCarroll suggested that the rule further clarify that the 50-hour deposition/25 interrogatory limits of Level 2 should be the *maximum* that the ALJ may allow, and

that the ALJ may set the limit lower for less complex cases. This concern arises because, under Level 2 of the discovery rules, parties may be entitled to use the full 25 interrogatories and 50 deposition hours and the judge may not have the discretion to reduce this number.

In the proposal, the commission intended that the limits in Level 2 be the maximum that the judge could set, but also intended that the judge could set lower limits according to the needs of the case. To clarify that those limits are the maximum for interrogatories and depositions and that the judge may set lower limits, the adopted rule explicitly specifies the number of interrogatories and hours of depositions, rather than setting them at Level 2. The commission agrees with Brown McCarroll that the judge should have the flexibility to control discovery as appropriate to the complexity of the case and in a way that will allow them to complete the hearing within the maximum expected duration. Setting the level of discovery at Level 3 for all cases, while expressly limiting the maximum number of depositions and interrogatories, will achieve this goal while meeting the intent of HB 801.

#### *§80.152*

Section 80.152(a) specifies that discovery may be conducted on any matter reasonably calculated to lead to admissible evidence regarding an issue on the list of disputed issues referred to SOAH or on any issue the judge agrees to consider under § 80.4(c)(16). Discovery also includes the production of documents reviewed or relied on in the preparation of application materials or in the selection of the site and documents related to the ownership of the applicant or of the owner or operator of the facility or proposed facility.

Section 6 of HB 801, which amends Texas Government Code, §2003.047, could be read to limit the production of documents only to those specifically listed in §2003.047(g)(2). This would mean the applicant could not request documents from the protestants and the protestants could not obtain documents relating to the applicant's compliance history. The commission believes that the better interpretation of §2003.047(g) is that the listed documents are unquestionably discoverable, but that production of other documents may also be required.

In adoption of §80.152(b)(2)(B), the commission has also added the word "of" to the clause "relating to the ownership of the applicant or of the owner or operator of the facility or proposed facility." This clarifies that the phrase "relating to the ownership of" modifies both "the applicant" and "the owner or operator."

Thompson Knight and Locke Liddell suggested that there is some confusion over the scope of discovery intended by §6 of HB801. Thompson Knight suggested that the proposed language of subsections (g)(1) and (g)(2) from §2003.047 should be revised to comport with language of the statute. They pointed out that subsections (g)(1) and (2) are cumulative, and that subsection (g)(1) describes the scope of discovery, regardless of the form discovery takes. They said that subsection (g)(2) is intended to permit discovery of certain documents relating to a permit regardless of the issues referred by the commission or added by SOAH.

Conversely, Locke Liddell suggested that the discovery provisions in Texas Government Code, §2003.047, as amended by §6 of HB 801, were meant to be more narrow. They suggested that the only discovery that should be allowed is the production of the specified documents.

**The commission agrees with Thompson Knight that under the specific language of HB 801 there are two separate categories of discoverable documents: (1) those related to matters reasonably calculated to lead to the discovery of admissible evidence; and (2) the production of certain documents related to the application or site selection, or to ownership of the applicant or facility.**

**Therefore, §80.152(b) has been revised, consistent with the statutory language, to make it clear that the second category (production of certain specified documents) operates independently of the first category (matters reasonably calculated). For example, even where certain documents related to site selection are not reasonably calculated to lead to admissible evidence, they must be produced under the second prong.**

**Moreover, the commission disagrees with Locke Liddell that discovery should be more limited.**

**The plain language of the statute is clear that the two categories of discovery are cumulative.**

**Therefore, the commission declines to limit discovery as suggested by the commenter.**

*Subchapter E; Freezing the Process*

Henry, Lowerre suggested that the commission retain the freeze rules to allow time for the public to evaluate and comment on the benefits and problems with the rules. They commented that the rules do not need to be repealed now.

**The commission disagrees with this suggestion. The purpose of the freeze rules was to streamline the hearing process for complicated permits. Texas Government Code, §2003.047, as amended by §6 of HB 801, and TWC, §5.556, as amended by §2 of HB 801, accomplishes the same objectives by limiting the issues that will be sent to hearing and by setting a maximum expected duration for the hearing. In addition, it would be unnecessarily complicated to apply the freeze rules in a future hearing, because the freeze rule process would have to be overlaid on the HB 801 process. For example, the freeze rules set out a very specific discovery process. At the same time, HB 801 requires that the commission limit discovery by setting the level of discovery according to the levels of the Texas Rules of Civil Procedure. Texas Government Code, §2003.047, as amended by §6 of HB 801. Texas Government Code, §2003.047, as amended by §6 of HB 801, and TWC, §5.556, as amended by §2 of HB 801, also requires the commission to limit the maximum expected duration of hearings, which serves the goal of expediting the hearing process, just as the freeze rules were intended to do. The rules were rarely used; therefore, the commission sees no need to retain Subchapter E. Moreover, under rules review, the commission is required to determine whether the reason for the rules still exists. Given the changes under HB 801, the commission has determined that Subchapter E is no longer necessary.**

*§80.251, §80.252; Judge's Proposal for Decision*

Section 80.251 is amended to specify that any application declared administratively complete before September 1, 1999 is subject to this section, while an application declared administratively complete on or after September 1, 1999 is subject to §80.252. The existing subsections in §80.251 have been renumbered to accommodate new subsection (a). New §80.252 generally mirrors the provisions in §80.251, except that it applies to applications declared administratively complete on or after September 1, 1999.

Section 80.252 is retained separately from §80.251, because of a substantive change in §80.252(c). Section 80.252(c) does not contain the clause “and, in underground injection control, Texas Pollutant Discharge Elimination System, and Resource Conservation and Recovery Act permitting cases for which the commission’s permitting authority is authorized by the federal government, proposed changes to the draft permit recommended by the judge in response to public comment.” Because HB 801 creates a distinction between the public comment process and the contested case hearing process, it is not appropriate for the judge to consider public comment at a contested case hearing. Rather the judge should make a recommendation based on evidence presented on issues referred by the commission or added by the judge. Nonetheless, the commission will consider the comments when making a final decision on the application and will either adopt the executive director’s response to comments or create its own response.

*§80.252(b)*

Henry, Lowerre commented that the commission should eliminate the thirty-day deadline for a judge to submit a proposal for decision, in adopted §80.252(b). The thirty day limit would eliminate the

possibility of written final arguments or the filing of proposed findings of fact. Even without written argument, more than 30 days is often needed by an ALJ to evaluate the evidence and draft a proposal for decision (PFD). If TNRCC has data to support the position that 30 days is a reasonable deadline for a PFD, that information should have been provided in the preamble.

**The commission generally agrees with the comment, and has changed the rule to require that the judge file the proposal for decision within the maximum expected duration set by the commission. This is consistent with HB 801, and the commission agrees that no additional deadlines are necessary. The judge is required to set a docket control order to ensure that the hearing is complete within the maximum expected duration. With this new limitation, the commission does not believe it is necessary to further limit the judge's flexibility in controlling the hearing.**

*§80.252(c)*

Brown McCarroll suggested that the rule should be revised to make clear that the ALJ must make proposed findings of fact and conclusions of law only on those issues before the judge, including only those issues referred by the commission or added by the judge and any for which the ALJ expanded the hearing under HB801's amendment of Texas Government Code, §2003.047(f) and proposed §55.211(e) and §80.4(c)(16). They provided suggested language: "...If the proposal for decision is adverse to a party to the proceedings, it shall contain a statement of the reasons for the proposal as well as findings of fact and conclusions of law which support the proposal, on any contested issue referred by the commission or determined to be relevant and material or on which the judge admitted evidence at the contested hearing pursuant to §55.211(3) and §80.4(c)(16)."

**The commission agrees that a PFD should only address issues that were referred to SOAH or added by the judge. A judge should not make recommendations on matters not considered in the evidentiary hearing. Thus, the commission has revised §80.252(c) as follows: “. . . If the proposal for decision is adverse to a party to the proceedings, it shall contain a statement of the reasons for this proposal as well as findings of fact and conclusions of law which support the proposal, on any issue referred by the commission or added by the judge.”**

*§80.267; Decision*

Brown McCarroll suggested this section should be amended to make crystal clear that the commission's ultimate findings of fact and conclusions of law are to encompass only *contested* issues, and that the commission should soon propose such a revision to 30 TAC §80.267.

**The commission declines to adopt any amendments to this section at this time, since this section was not opened at proposal time. Texas Register requirements prohibit the creation of a new section that was not part of the proposed rulemaking. The commission decision will include findings of fact and conclusions of law that encompass only issues referred to SOAH or added by the judge.**

*§80.271; Motion for Rehearing*

The commission amends §80.271 to add subsection (a), specifying that any applications declared administratively complete before September 1, 1999 are subject to §80.271. The existing subsections in

§80.271 have been renumbered. Subsection (b) is amended to implement SB 211, which adds 3 days to the date on which a party is presumed to have received mailed notice of a decision or order.

*§80.272; Motion for Rehearing*

The commission adopts new §80.272 to implement SB 211, which adds 3 days to the date on which a party is presumed to have received mailed notice of a decision or order. New §80.272 applies to any applications declared administratively complete on or after September 1, 1999. The rule retains the requirement that a Motion for Rehearing (MFR) be filed within 20 days after notification of the commission decision or order. Under §80.272(b), the commission presumes a party or attorney of record has received notice on the third day after the date the decision or order is mailed.

**STATUTORY AUTHORITY**

The amendments and new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested

cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning

permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

## **CHAPTER 80 : CONTESTED CASE HEARINGS**

### **SUBCHAPTER A : GENERAL RULES**

#### **§§80.1, 80.3, 80.4, 80.5, 80.6, 80.17**

#### **§80.1. Applicability and Purpose.**

Except as provided in this chapter, this chapter applies to and provides procedures for all contested case hearings and other hearings held by SOAH.

#### **§80.3. Judges.**

(a) Applicability and delegation.

(1) Any application that is declared administratively complete before September 1, 1999 is subject to this section.

(2) The commission delegates to SOAH the authority to conduct hearings designated by the commission.

(b) The chief administrative law judge will assign judges to hearings. When more than one judge is assigned to a hearing, one of the judges will be designated as the presiding judge and shall

resolve all procedural questions. Evidentiary questions will ordinarily be resolved by the judge sitting in that phase of the case, but may be referred by that judge to the presiding judge.

(c) Judges shall have authority to:

- (1) set hearing dates;
- (2) convene the hearing at the time and place specified in the notice for the hearing;
- (3) establish the jurisdiction of the commission;
- (4) rule on motions and on the admissibility of evidence and amendments to pleadings;
- (5) designate and align parties and establish the order for presentation of evidence, except that the executive director and the public interest counsel shall not be aligned with any other party;
- (6) examine and administer oaths to witnesses;
- (7) issue subpoenas to compel the attendance of witnesses, or the production of papers and documents;

(8) authorize the taking of depositions and compel other forms of discovery;

(9) set prehearing conferences and issue prehearing orders;

(10) ensure that information and testimony are introduced as conveniently and expeditiously as possible, including limiting the time of argument and presentation of evidence and examination of witnesses without unfairly prejudicing any rights of parties to the proceeding;

(11) limit testimony to matters under the commission's jurisdiction;

(12) continue any hearing from time to time and from place to place;

(13) reopen the record of a hearing, before a proposal for decision is issued, for additional evidence where necessary to make the record more complete;

(14) impose appropriate sanctions;

(15) issue interim rate orders under Texas Water Code, Chapter 13;

(16) exercise any other appropriate powers necessary or convenient to carry out his responsibilities.

**§80.4. Judges.**

(a) Applicability and delegation is as follows:

(1) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(2) The commission delegates to SOAH the authority to conduct hearings designated by the commission.

(b) The chief administrative law judge will assign judges to hearings. When more than one judge is assigned to a hearing, one of the judges will be designated as the presiding judge and shall resolve all procedural questions. Evidentiary questions will ordinarily be resolved by the judge sitting in that phase of the case, but may be referred by that judge to the presiding judge.

(c) Judges shall have authority to:

(1) set hearing dates;

(2) convene the hearing at the time and place specified in the notice for the hearing;

(3) establish the jurisdiction of the commission;

(4) rule on motions and on the admissibility of evidence and amendments to pleadings;

(5) designate and align parties and establish the order for presentation of evidence, except that the executive director and the public interest counsel shall not be aligned with any other party;

(6) examine and administer oaths to witnesses;

(7) issue subpoenas to compel the attendance of witnesses, or the production of papers and documents;

(8) authorize the taking of depositions and compel other forms of discovery;

(9) set prehearing conferences and issue prehearing orders;

(10) ensure that information and testimony are introduced as conveniently and expeditiously as possible, including limiting the time of argument and presentation of evidence and examination of witnesses without unfairly prejudicing any rights of parties to the proceeding;

(11) limit testimony to matters under the commission's jurisdiction;

(12) continue any hearing from time to time and from place to place;

(13) reopen the record of a hearing, before a proposal for decision is issued, for additional evidence where necessary to make the record more complete;

(14) impose appropriate sanctions;

(15) issue interim rate orders under Texas Water Code, Chapter 13;

(16) consider additional issues beyond the list referred by the commission when:

(A) the issues are material;

(B) the issues are supported by evidence; and

(C) there are good reasons for the failure to supply available information regarding the issues during the public comment period;

(17) extend the proceeding beyond the expected completion date if:

(A) the judge determines that failure to grant an extension would deprive a party of due process or another constitutional right; and

(B) by agreement of the parties;

(18) exercise any other appropriate powers necessary or convenient to carry out his responsibilities.

(d) For applications declared administratively complete on or after September 1, 1999, notwithstanding §80.127(f) of this title (relating to Evidence), the judge is not required to accept public comment into the evidentiary record. This subsection supercedes §80.127(f) of this title.

**§80.5. Referral to SOAH.**

(a) Any application that is declared administratively complete before September 1, 1999 is subject to this section. When a case is referred to SOAH, the chief clerk shall:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing;

(3) issue public notice of the hearing as required by law and commission rules; and

(4) send a copy of the chief clerk's case file to SOAH.

(b) The commission shall provide to the judge a list of issues or areas that must be addressed. In addition, the commission may identify and provide additional issues or areas that must be addressed to the judge, or may limit issues or areas to be addressed, at any time. In an enforcement case, the executive director's petition or EDPR shall serve as the list of issues or areas that must be addressed.

**§80.6. Referral to SOAH.**

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) When a case is referred to SOAH, the chief clerk shall:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing;

(3) issue public notice of the hearing as required by law and commission rules;

(4) send a copy of the chief clerk's case file to SOAH; and

(5) send the commission's list of disputed issues and maximum expected duration of the hearing to SOAH.

(c) In an enforcement case, the executive director's petition or Executive Director Preliminary Report shall serve as the list of issues or areas that must be addressed.

(d) When a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title (relating to Judges) may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues.

**§80.17. Burden of Proof.**

(a) The burden of proof is on the moving party by a preponderance of the evidence, except as provided in subsections (b) - (d) of this section.

(b) Section 291.12 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding involving a proposed change of water and sewer rates not governed by Chapter 291, Subchapter I of this title (relating to Wholesale Water or Sewer Service).

(c) Section 291.136 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding related to a petition to review rates changed pursuant to a written contract for the sale of

water for resale filed under Texas Water Code, Chapter 11 or 12, and in an appeal under Texas Water Code, §13.043(f).

(d) In an enforcement case, the executive director has the burden of proving by a preponderance of the evidence the occurrence of any violation and the appropriateness of any proposed technical ordering provisions. The respondent has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. Any party submitting facts relevant to the factors prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty has the burden of proving those facts by a preponderance of the evidence.

## **SUBCHAPTER A : GENERAL RULES**

### **§80.7**

#### **STATUTORY AUTHORITY**

The repeal is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to

provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264.

**§80.7. Substitution of Judges.**

## **SUBCHAPTER C : HEARING PROCEDURES**

### **§80.105 and 80.109**

#### **STATUTORY AUTHORITY**

The amendments are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to

provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

**§80.105. Preliminary Hearings.**

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required in an enforcement matter, except in those under federally authorized underground injection control (UIC) or Texas Pollutant Discharge Elimination System (TPDES) programs.

(b) If jurisdiction is established, the judge shall:

(1) name the parties and, for enforcement hearings only, accept public comment;

(2) establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes; and

(3) allow the parties an opportunity for settlement negotiations.

(c) When agreed to by all parties in attendance at the preliminary hearing, the judge may proceed with the evidentiary hearing on the same date of the first preliminary hearing.

(d) One or more preliminary hearings may be held to discuss:

(1) formulating and simplifying issues;

(2) evaluating the necessity or desirability of amending pleadings;

(3) all pending motions;

(4) stipulations;

(5) the procedure at the hearing;

- (6) specifying the number and identity of witnesses;
- (7) filing and exchanging prepared testimony and exhibits;
- (8) scheduling discovery;
- (9) setting a schedule for filing, responding to, and hearing of dispositive motions; and
- (10) other matters that may expedite or facilitate the hearing process.

**§80.109. Designation of Parties.**

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no other person will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed.

(b) Parties.

(1) The executive director and public interest counsel of the commission are parties to all commission proceedings.

(2) The applicant is a party in a hearing on its application.

(3) Affected persons shall be parties to hearings on applications, based upon the standards set forth in §55.203 and §55.256 of this title (relating to Determination of Affected Person).

(c) Alignment of participants. Participants (both party and non-party) may be aligned according to the nature of the proceeding and their relationship to it. The judge may require participants of an aligned class to select one or more persons to represent them in the proceeding. Unless otherwise ordered by the judge, each group of aligned participants shall be considered to be one party for the purposes of §80.115 of this title (relating to Rights of Parties) for all purposes except settlement.

(d) Effect of postponement. If a hearing is postponed for any reason, any person already designated as a party retains party status.

## **SUBCHAPTER C : HEARING PROCEDURES**

### **§§80.111**

#### **STATUTORY AUTHORITY**

The repeal is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to

provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

**§80.111. Persons Not Parties.**

## **SUBCHAPTER D : DISCOVERY**

### **§80.152**

#### **STATUTORY AUTHORITY**

The new section is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to

provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

**§80.152. Scope and Level of Discovery.**

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) The scope of permissible discovery in contested case hearings is limited to:

(1) any matter reasonably calculated to lead to the discovery of admissible evidence regarding any issue referred to the administrative law judge by the commission or that the administrative law judge has agreed to consider; and

(2) production of documents:

(A) reviewed or relied on in preparing application materials or selecting the site of the proposed facility; or

(B) relating to the ownership of the applicant or of the owner or operator of the facility or proposed facility.

(c) The level of discovery for all contested case hearings shall be Level 3 under Texas Rules of Civil Procedure (TRCP) 190.4. However, the administrative law judge shall set an appropriate limit on the time for depositions and the number of interrogatories, provided that the total time per side for oral depositions may not exceed 50 hours and the total number of written interrogatories that any party may serve on any other party may not exceed 25. If one side designates more than two experts, the opposing side may have an additional six hours of total deposition time for each additional expert designated.

## **SUBCHAPTER E : FREEZING THE PROCESS**

**§§80.201, 80.203, 80.205, 80.207, 80.209, 80.213, 80.215**

### **STATUTORY AUTHORITY**

The repeals are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to

provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

**§80.201. Applicability.**

**§80.203. Procedures for Executive Director and Public Interest Counsel.**

**§80.205. First Preliminary Hearing.**

**§80.207. Discovery.**

**§80.209. Freezing the Process.**

**§80.213. Limiting the Number of Witnesses.**

**§80.215. Additional Testimony.**

## **SUBCHAPTER F : POST HEARING PROCEDURES**

### **§§80.251, 80.252, 80.271, 80.272**

#### **STATUTORY AUTHORITY**

The amendments and new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establish the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.401, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establish the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for Federal Operating Permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to

provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and Texas Utilities Code, §39.264

**§80.251. Judge's Proposal for Decision.**

(a) Any application that is declared administratively complete before September 1, 1999 is subject to this section. Any application that is declared administratively complete on or after September 1, 1999 is subject to §80.252 of this title (relating to Judge's Proposal for Decision).

(b) Judge's proposal for decision. After closing the hearing record, the judge will file a written proposal for decision with the chief clerk within 30 working days and will send a copy by certified mail to each party. If the judge is unable to file the proposal within the 30 days, the judge shall request an extension from the commission by filing a request with the chief clerk. Neither the judge's failure to request an extension, the commission's failure to grant the requested extension, nor the judge's failure to file the proposal within the 30 day or extended period shall in any way affect the validity of the judge's

proposal for decision or the commission's jurisdiction, consideration, or action relative to the proposal for decision.

(c) Proposal for decision: adverse to a party. A proposal for decision shall be filed by the judge who conducted the hearing or by a substitute judge who has read the record. If the proposal for decision is adverse to a party to the proceeding, it shall contain a statement of the reasons for the proposal and, in underground injection control, Texas Pollutant Discharge Elimination System, and Resource Conservation and Recovery Act permitting cases for which the commission's permitting authority is authorized by the federal government, proposed changes to the draft permit recommended by the judge in response to public comment, as well as findings of fact and conclusions of law which support the proposal. If any party has filed proposed findings of fact upon the judge's request, the judge shall include with the proposal for decision recommended rulings on all findings of fact so proposed. Where more than one judge has been assigned to hear a particular proceeding, the presiding judge will issue the proposal for decision and the other assigned judge or judges may file comments.

(d) Proposal for decision: not adverse to any party. If the proposal for decision is not adverse to any party to the proceeding, the judge may informally dispose of the matter by proposing to the commission an order which need not contain findings of fact, conclusions of law, or reasons for the proposal. If the proposal for decision is not adverse to any party and a permit is to be issued, the judge need not propose an order to the commission.

**§80.252. Judge's Proposal for Decision.**

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) Judge's proposal for decision. After closing the hearing record, the judge shall file a written proposal for decision with the chief clerk no later than the end of the maximum expected duration set by the commission and shall send a copy by certified mail to each party.

(c) Proposal for decision: adverse to a party. A proposal for decision shall be filed by the judge who conducted the hearing or by a substitute judge who has read the record. If the proposal for decision is adverse to a party to the proceeding, it shall contain a statement of the reasons for the proposal as well as findings of fact and conclusions of law which support the proposal on any issue referred by the commission or added by the judge. If any party has filed proposed findings of fact upon the judge's request, the judge shall include with the proposal for decision recommended rulings on all findings of fact so proposed. Where more than one judge has been assigned to hear a particular proceeding, the presiding judge will issue the proposal for decision and the other assigned judge or judges may file comments.

(d) Proposal for decision: not adverse to any party. If the proposal for decision is not adverse to any party to the proceeding, the judge may informally dispose of the matter by proposing to the commission an order which need not contain findings of fact, conclusions of law, or reasons for the proposal. If the proposal for decision is not adverse to any party and a permit is to be issued, the judge need not propose an order to the commission.

**§80.271. Motion for Rehearing.**

(a) Any decision in an administrative hearing before the commission that occurs before September 1, 1999 is subject to this section.

(b) Filing motion. A motion for rehearing is a prerequisite to appeal. The motion shall be filed with the chief clerk within 20 days after the date the party or his attorney of record is notified of the decision or order. A party or attorney of record is presumed to have been notified on the third day after the date that the decision or order is mailed by first-class mail. On or before the date of filing of a motion for rehearing, a copy of the motion shall be mailed or delivered to all parties with certification of service furnished to the commission. The motion shall contain:

(1) the name and representative capacity of the person filing the motion;

(2) the style and official docket number assigned by SOAH, and official docket number assigned by the commission;

(3) the date of the decision or order; and

(4) a concise statement of each allegation of error.

(c) Reply to motion for rehearing. A reply to a motion for rehearing must be filed with the chief clerk within 30 days after the date a party or his attorney of record is notified of the decision or order. A party or attorney of record is presumed to have been notified on the date that the decision or order is mailed by first-class mail.

(d) Ruling on motion for rehearing.

(1) Upon the request of the general counsel or a commissioner, the motion for rehearing will be scheduled for consideration during a commission meeting. Unless the commission extends time or rules on the motion for rehearing within 45 days after the date the party or his attorney of record is notified of the decision or order, the motion is overruled by operation of law.

(2) A motion for rehearing may be granted in whole or in part. When a motion for rehearing is granted, the decision or order is nullified. The commission may reopen the hearing to the extent it deems necessary. Thereafter, the commission shall render a decision or order as required by this subchapter.

(e) Extension of time limits. With the agreement of the parties or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions for rehearing and replies and for taking action on the motions so long as the period for taking agency action is not extended beyond 90 days after the decision or order.

(f) Motion overruled. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date of the decision or order.

**§80.272. Motion for Rehearing.**

(a) Any decision in an administrative hearing before the commission that occurs on or after September 1, 1999 is subject to this section.

(b) Filing motion. A motion for rehearing is a prerequisite to appeal. The motion shall be filed with the chief clerk within 20 days after the date the party or his attorney of record is notified of the decision or order. A party or attorney of record is presumed to have been notified on the third day after the date that the decision or order is mailed by first-class mail. On or before the date of filing of a motion for rehearing, a copy of the motion shall be mailed or delivered to all parties with certification of service furnished to the commission. The motion shall contain:

(1) the name and representative capacity of the person filing the motion;

(2) the style and official docket number assigned by SOAH, and official docket number assigned by the commission;

(3) the date of the decision or order; and

(4) a concise statement of each allegation of error.

(c) Reply to motion for rehearing. A reply to a motion for rehearing must be filed with the chief clerk within 30 days after the date a party or his attorney of record is notified of the decision or order. A party or attorney of record is presumed to have been notified on the date that the decision or order is mailed by first-class mail.

(d) Ruling on motion for rehearing.

(1) Upon the request of the general counsel or a commissioner, the motion for rehearing will be scheduled for consideration during a commission meeting. Unless the commission extends time or rules on the motion for rehearing within 45 days after the date the party or his attorney of record is notified of the decision or order, the motion is overruled by operation of law.

(2) A motion for rehearing may be granted in whole or in part. When a motion for rehearing is granted, the decision or order is nullified. The commission may reopen the hearing to the extent it deems necessary. Thereafter, the commission shall render a decision or order as required by this subchapter.

(e) Extension of time limits. With the agreement of the parties or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions

for rehearing and replies and for taking action on the motions so long as the period for taking agency action is not extended beyond 90 days after the decision or order.

(f) Motion overruled. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date of the decision or order.

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §106.5, concerning Public Notice; and new §106.13, concerning Permits by Rule. Section 106.5 is adopted with changes to the proposed text as published in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5410). Section 106.13 is adopted without changes and will not be republished.

## BACKGROUND

The primary purpose of the adopted amendments and new section is to implement House Bill (HB) 801, and Senate Bill (SB) 766, 76th Legislature, (1999). Certain portions of the adopted amendments and new section are adopted to clarify the applicability of existing notice provisions, to correct, clarify, and update certain public notice rules with regard to notices for air quality applications. Certain actions concerning a portion of the adoption will constitute a revision to the state implementation plan (SIP). The adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs. Notices relating to certain air quality permit and permit exemption public notification and public participation requirements, currently under Chapters 116 and 106, are now incorporated into Chapter 39 and will be incorporated into future amendments to Chapter 55 .

## OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising THSC, Texas Clean Air Act (TCAA), §382.056; and revising Texas Government Code (TGC), §2003.047. Except

for the changes required under TGC, §2003.047, the new and amended statutory provisions apply to applications under TWC, Chapters 26 and 27, and THSC, Chapters 361 and 382. The changes in law made by HB 801 only apply to permit applications declared administratively complete on or after September 1, 1999, and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment. It requires the commission to prescribe alternative cost-effective procedures for newspaper publication for small business stationary sources seeking air emissions authorization that will not have a significant effect on air quality. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted to Chapters 106, 116, 122, and 305. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs, as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this edition of the *Texas Register*. Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission.

#### OVERVIEW OF SB 766 AND IMPLEMENTATION

SB 766, enacted by the 76th Legislature, also amends TCAA, Chapter 382 by, among other things: (1) requiring the commission to establish procedures to authorize standard permits and permits by rule; (2) dividing the current category of exemptions from permitting into two categories: permits by rule for construction of new facilities with insignificant air emissions, and exemptions from permitting for changes to existing facilities with insignificant air emissions; and (3) creating a voluntary emission reduction permit for grandfathered facilities that must be applied for by September 1, 2001. Notice requirements for these changes are implemented in the changes to Chapter 39 because of the critical nature of the timing of the permit program. Public participation requirements applicable to permit applications under SB 766 are included in the chapters published in this edition of the *Texas Register*. Additional implementation of the requirements of SB 766 is expected to occur in future rulemaking proposals by the commission.

#### EXPLANATION OF ADOPTED RULES

New §106.5(a) states that registrations which are declared administratively complete on or after September 1, 1999 are subject to the current version of this chapter. Registrations which are declared administratively complete before September 1, 1999 are subject to the preceding version of Chapter 106 (i.e., the December 24, 1998 version). This provision is required by HB 801, §7(b).

Amended §106.5 (b) includes existing wording of §106.5 and adds new language which references the public notice requirements under Chapter 39. Correspondingly, §106.5(b)(1)-(2) have been deleted, because they are included in the commission's proposal to amend Chapter 39 relating to public notice. Public participation on those actions must follow the requirements in Chapter 55 relating to Requests for Reconsideration and Contested Case Hearing and Public Comment.

New §106.13, concerning permits by rule, states that exemptions from permitting in Chapter 106 are also permits by rule. This new section implements the statutory changes of SB 766, TCAA, §382.05196 effective September 1, 1999, and new requirements for authorization under TCAA, §382.057 and §382.058. These changes include authorization mechanisms for the construction of facilities using permits by rule and changes to existing facilities using exemptions from permitting under the adopted revised Chapter 106. Prior to these statutory changes, §382.057 authorized the commission to exempt changes within any facility and construction of certain types of facilities from certain permit requirements if the commission found that such changes or types of facilities will not make a significant contribution of air contaminants to the atmosphere. The commission has authorized these changes to facilities and types of facilities in rules codified in Chapter 106. SB 766 split this authorization by restricting authorization under §382.057 to only changes within facilities, and adding new §382.05196,

Permits by Rule, for authorization of construction of certain types of facilities that will not make a significant contribution of air contaminants. The commission anticipates that applicants will continue to seek authorization for new facilities that do not make a significant contribution of air contaminants. Without this rule, authorizations under Chapter 106 would be limited to changes to facilities. The commission finds that the changes to facilities and construction of certain types of facilities which will not make a significant contribution of air contaminants are those currently existing in Chapter 106, as previously determined by the commission, and therefore adopts this rule to clarify that the authorizations specified in that chapter are available for both categories of facilities.

#### FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule." Furthermore, 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. The rulemaking is not a major environmental rule because it is not adopted with the specific intent of protecting the environment or reducing risks to human health or the environment. The specific primary intent of the rule is procedural in nature and establishes procedures associated with exemptions from permitting and permits by rule.

The rule also provides that exemptions from permitting are also permits by rule. The adoption relates to procedures for providing public notice, in regard to exemptions from permitting. The rule does not concern an existing or new regulatory program that would 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. It prescribes public notice procedures to be followed for exemptions and permits by rule and establishes that exemptions are also permits by rule. The rule does not prescribe control requirements or any other requirements that would normally be associated with a commission environmental rulemaking.

In addition, this adopted rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law because there are no federal public notice rules in regard to exemptions from permitting of permits by rule. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; TCAA, §§382.057, 382.058, and 382.05196, as well as the other authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not 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 because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with Texas Water Code, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This adoption does not adopt a rule solely under the general powers of the agency, but rather

under a specific state law (i.e., TCAA, §382.056). Finally, this rulemaking is not being adopted or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the adopted amendment and new section is to revise the TNRCC rules to establish procedures for public notice in regard to exemptions from permitting and permits by rule and to provide that exemptions from permitting are also permits by rule. The adopted rules will substantially advance these stated purposes by 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 adopted language consists of amendments and new sections relating to the commission's procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The adopted actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505; 30 TAC, §§281.40, et seq.).

#### HEARING AND COMMENTERS

A public hearing on this proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. No comments on this chapter were received during the public meeting. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments on this chapter were received from Baker & Botts, L.L.P. (Baker & Botts) on behalf of the Texas Industry Project.

Baker & Botts commented that because the only registrations subject to Chapter 39 public notice requirements are concrete batch plants as listed in §39.403(b)(10), this rule should be amended to limit the applicability of §106.5 to these actions.

**As proposed, §106.5(b) stated that only permanently or temporarily located concrete batch plants are required to conduct public notice under Chapter 39. The commission believes no additional change is necessary to this rule to address this comment.**

#### STATUTORY AUTHORITY

The amendment and new section are adopted under THSC, §382.056, which establishes the commission's authority concerning notice and hearing procedures for authorizations under TCAA.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules, and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.05196, which establishes the commission's authority to adopt rules relating to permits by rule; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.061, which establishes delegation of authority to the executive director; and §382.062, which establishes the commission's authority to adopt rules for certain air authorizations.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

## **CHAPTER 106 - EXEMPTIONS FROM PERMITTING**

### **SUBCHAPTER A : GENERAL REQUIREMENTS**

#### **§106.5, §106.13**

##### **§106.5. Public Notice.**

(a) Any registration subject to this chapter that is declared administratively complete on or after September 1, 1999 is subject to the current version of this chapter. Any registration that is declared administratively complete before September 1, 1999 is subject to the December 24, 1998 version of this chapter, and that version of this chapter is continued in effect for this purpose.

(b) Facilities constructed under this chapter that consist of permanently or temporarily located concrete plants that accomplish wet batching, dry batching, or central mixing, or specialty wet batch, concrete, mortar, grout mixing, or pre-cast concrete products, shall conduct public notice of the proposed construction unless exempted from public notice requirements by TCAA, §382.058(b). In all cases, public notice shall comply with the requirements under Chapter 39 of this title (relating to Public Notice) and public participation shall be subject to Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearing; Public Comment).

##### **§106.13. Permits By Rule.**

Exemptions from permitting in this chapter are also permits by rule.

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§116.111, 116.114, 116.116, 116.183, 116.312, and 116.740; and the repeal of §116.124. Sections 116.111, 116.114, and 116.116 are adopted with changes to the proposed text as published in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5427). Sections 116.124, 116.183, 116.312, and 116.740 are adopted without changes to the proposed text and will not be republished.

## BACKGROUND

The primary purpose of the adopted amendments is to implement House Bill (HB) 801, and portions of Senate Bill (SB) 7 and SB 766 76th Legislature (1999). The adopted amendments and new sections are intended to establish and clarify the applicability of notice provision and provide avenues for public participation in the permitting process for water, waste, and air applications. These changes also update notice rules for air quality permit amendments. This proposal also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs. Certain rules will constitute a revision to the state implementation plan (SIP). Specifically, §§116.111, 116.114, 116.116, 116.183, 116.312, 116.740 as revised are being added to the SIP. In addition, existing §116.124 is being deleted from the SIP. Specific rules from Chapter 39 are also being adopted as SIP revisions.

## OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising Texas Clean Air

Act (TCAA), THSC §382.056; and revising Texas Government Code, §2003.047. The new and amended statutory provisions apply to applications under TWC, Chapters 26 and 27, and THSC, Chapters 361 and 382. The changes in law made by HB 801 only apply to permit applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment, and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment. It requires the commission to prescribe alternative cost-effective procedures for newspaper publication for small business stationary sources seeking air emissions authorization that will not have a significant effect on air quality. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are adopted to be implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted to Chapters 106, 116, and 122. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are published in this issue of the *Texas Register*. Changes to Chapter 321 were also proposed in the July 16, 1999 issue of the *Texas Register* but are not adopted at this time.

#### OVERVIEW OF SB 7 AND IMPLEMENTATION

Senate Bill (SB 7), enacted by the 76th Legislature, restructures electric utility service in Texas. Also, owners grandfathered utilities that generate electric energy for compensation are required to apply for electric generating facility permits from the commission by September 1, 2000. These permits are subject to notice under §382.056 of the THSC. SB 7 provides that initial issuance of these permits requires notice and comment proceedings. However, renewal of these permits requires notice, comment, and opportunity for contested case hearing.

The notice provisions for electric generating facility permits are implemented through changes to Chapter 39. Chapters 50 and 80 as amended also apply to these permits. Additional implementation of the requirements of SB 7 is expected to occur in future rulemaking by the commission.

#### OVERVIEW OF SB 766 AND IMPLEMENTATION

SB 766, enacted by the 76th Legislature, also amends TCAA, Chapter 382 by, among other things: (1) requiring the commission to establish procedures to authorize standard permits and permits by rule; (2)

dividing the current category of exemptions from permitting into two categories: permits by rule for construction of new facilities with insignificant air emissions, and exemptions from permitting for changes to existing facilities with insignificant air emissions; and (3) creating a voluntary emission reduction permit for grandfathered facilities that must be applied for by September 1, 2001. Notice requirements for these changes are implemented in the changes to Chapter 39 because of the critical nature of the timing of the permit program. Public participation requirements applicable to permit applications under SB 766 are included in these chapters. Additional implementation of the requirements of SB 766 is expected to occur in future rulemaking proposals by the commission.

#### EXPLANATION OF ADOPTED RULES

The primary purpose of the adopted amendments and repeals is to implement HB 801, 76th Legislature (1999). Revised §116.111 contains a new requirement that applications for which notice is required must comply with the provisions of Chapters 39, relating to public notice and public participation in the permitting process, in accordance with TCAA, §382.056 as amended by HB 801. In addition, the notice waiver for previously permitted facilities is added to new §116.111(b), which mirrors the waiver in existing §116.130(b). No substantive changes have been made by the movement of this section. Section 116.111(b) has been revised to include a savings clause as to what notice requirements are applicable to certain applications. This is necessary for applicants to know what the substantive notice requirements are to implement HB 801. The language includes language in the existing §116.111(b) as proposed and the savings clause in new §39.601 of this title (relating to Applicability). The rule has also been revised to include new subsections (1) and (2) for easier understanding.

The amendment to §116.114(a)(2) incorporates the dual notification requirements of HB 801 in TCAA, §382.056(f). This section refers to the executive director's preliminary determination to approve or disapprove applications after completing the technical review. This requirement, under current rules, is exclusive only to applications subject to Federal Clean Air Act (FCAA), Title I, Part C or D (Nonattainment Permits) and 40 Code of Federal Regulations (CFR) Part 51.165(b) (relating to Prevention of Significant Deterioration permits) under §116.131(a). TCAA, §382.056(f) requires a preliminary determination for all applications subject to notification. The revised section outlines the circumstances under which applicants must to publish notice of the executive director's preliminary decision and seek additional public comment. This section is reformatted to account for the notification triggers but maintains the existing review deadlines for the executive director to complete the technical review and forward his preliminary determination to the company and the chief clerk. Section 116.11(b) has been revised to include a savings clause as to what notice requirements are applicable to certain applications. This is necessary for applicants to know what the substantive notice requirements are to implement HB 801. The language includes language in the existing §116.111(b) as proposed and the savings clause in new §39.601 of this title (relating to Applicability). The rule has also been revised to include new subsections (1) and (2) for easier understanding.

The amendment to §116.114(c)(1)-(3) incorporates the applicant notification requirements also in §116.137. These provisions streamline the format and match the previous requirements listed in Chapter 116, effective date March 21, 1999, under §§116.114(a)(2), 116.160(b)(3), and 116.314. These timelines establish when the executive director should notify applicants. No substantive changes have been made by the creation of this subsection.

Section 116.116(b)(4) is adopted to be added in accordance with adopted §39.403(8)(c) requirements for notice for certain permit amendments, including applications for construction of any new facility under TCAA, §382.0518 and the clarification of the existing practice of requiring public notification for modifications to existing facilities with significant emission increases authorized under Chapter 116. Under these new requirements, any new facility construction will be required to comply with notice requirements in Chapter 39. The previous reference to public notification requirements for actions under Chapter 116, Subchapter C, has been incorporated in new §39.403(9), under this adoption.

Adopted amendments to §116.116(d)(1) and (2) include authorization mechanisms for the construction of facilities using a permit by rule, and changes to existing facilities using exemptions from permitting, both under the adopted revised Chapter 106. This change references the implementation of the statutory changes from SB 766 and new requirements for authorization of insignificant facilities under TCAA, §§382.05196, 382.057 and 382.058.

The public notification text requirement for availability of compliance history information is adopted to be moved to §39.411(b)(10)(D) and §116.124 is being repealed. No substantive changes have been made to this rule.

Subchapter B, Division 3 (relating to Notification and Comment Procedures) §§116.130-116.137 are not repealed as proposed. These sections are retained for applications that are administratively complete before September 1, 1999. As a continuation of the commission's effort to consolidate agency procedural rules, a new §116.111(b) requires applications that are administratively complete on or after

September 1, 1999 to comply with the requirements of Chapter 39 (relating to Public Notice). Revised §116.111 contains new requirements that applications for which notice is required must comply with the provisions of Chapters 39 and 55. These chapters deal with public notice and public participation in the permitting process in accordance TCAA §382.056 as amended by HB 801. Similar changes have been adopted under §116.114(b)(1) (relating to Voiding of Deficient Applications); Subchapter C, §116.183 (relating to Public Notification for Hazardous Air Pollutants) §116.312 (relating to public notification requirements for Permit Renewals); and Subchapter G, §116.740(a) and (c) (relating to public notification requirements for Flexible Permits).

The requirements of §116.130(a) and (c) (relating to Applicability) are adopted to be moved to §39.403(b)(8) and (9). The requirements of §116.130(b) (relating to notification for change of location of previously permitted facilities) are adopted to be included in the amendment to §116.111(b). In addition, the notice waiver for previously permitted facilities is added to new §116.111(b) which mirrors the waiver in existing §116.130(b).

The preliminary determination and notification requirements of §116.131(a) are adopted to be incorporated in the revisions to §116.114(2). The application availability requirements under §116.131(b) are adopted to be incorporated into §39.411(b)(8) and revised to reflect the new requirements under TCAA, §382.056(d) which requires the applicant to make a copy of the application available for review by the public in the county where the facility is or will be located, and revised to reflect that this is also in §39.411(c)(5).

The public notice format requirements previously under §116.132(a) (relating to Publication in public notice section of newspaper) are adopted to be moved to §39.603 (relating to Newspaper Notice) and §39.411 (relating to Text of Public Notice), and include requirements as specified in HB 801 and TCAA, §382.056. Consistent with TCAA, §382.056(a) the previous requirement to publish notice in two consecutive issues of a newspaper is reduced to one issue of a newspaper for each set of required notices. The requirements of §116.132(b) (relating to Publication Elsewhere in the Newspaper) are adopted to be moved to §39.603(c)(2) and have no substantive changes. The requirements under §116.132(c) and (d) (relating to Additional Alternate Language Public Notice) are adopted to be moved to §39.603(d). Changes have been made to streamline and reformat the existing requirements as well as to clarify that alternate language notice is required even if the applicable schools do not have students in resident programs at the time of public notice applicability under new §39.603(d)(i)(D). In accordance with existing TNRCC practice, new §39.603(d)(7) requires applicants to complete a certification and submit this certification under §39.603(3) if they waive out of alternate language public notice.

The sign posting requirements previously under §116.133 and §116.312(b) are adopted to be moved to new §39.604. There are two substantive changes to these requirements under the new section. First, the lettering sizes have been modified for simplicity and standardized to two inches in height. Second, the posting of signs along property lines at the existing or adopted facility are limited to only those areas which parallel a public street, road, or highway. Previous references to “thoroughfare” are adopted to be deleted in accordance to Air Rule Interpretation Memo Number R6-133.001. The requirement under §116.312(b) which is adopted to be moved to §39.604 is the requirement for the sign heading to read “PROPOSED RENEWAL OF AIR QUALITY PERMIT.”

Notification of Affected Agencies previously under §116.134 is adopted to be moved to §39.605. No substantive changes have been made to these rules. Section 39.605 refers to general notification requirements of §39.405(f) which requires applicants, regardless of commission program, to submit copies of notices and affidavits to the chief clerk of the agency.

Public comment procedures previously under §116.136 are adopted to be included in §39.409 (relating to Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing) in accordance with the new requirements under HB 801.

Notification of Final Action previously under §116.137 has been moved to §116.114(c)(1)-(3). No substantive changes are adopted to be made to these rules.

The commission has determined §§116.130-137 are necessary for the SIP with regard to applications that are declared administratively complete before September 1, 1999 and therefore is not repealing these sections as proposed.

Finally, certain rules in Chapters 39 and 116 will constitute a revision to the state implementation plan (SIP). Specifically, §§116.111, 116.114, 116.116, 116.183, 116.312, 116.740 as revised are adopted to be added to the SIP. In addition, §116.124 is being deleted from the SIP.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule." Furthermore, 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. The rulemaking is not a major environmental rule because it is procedural in nature and establishes procedures associated with air permits for new construction or modification, public notice, and public comment on permit applications, and it is not adopted with the specific intent of protecting the environment or reducing risks to human health or the environment. The specific primary intent of the rule is to establish procedures for public participation in certain permitting proceedings. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting public hearing. The rule would also consolidate already existing notice procedures for the air quality permitting program. In addition, the rule incorporates the reference to new permits by rule authorized by SB 766. The rule does not concern an existing or new regulatory program that would 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. Rather, it merely prescribes public participation procedures to be followed by the commission and applicants for certain commission authorizations. The rule does not prescribe control requirements or any other requirements that would normally be associated with a commission environmental rulemaking.

In addition, this adopted rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This proposal does not impose any significant additional requirements not already required by federal law, because the main purpose of this proposal is to adopt state rules to provide for additional notice, opportunity for public comment, or opportunity for hearing which also satisfies federal program authorization requirements. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice, and Texas Clean Air Act (TCAA), §382.05196 and §382.056; as well as the other authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not 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 because the rule is consistent with, and does not significantly exceed, federal requirements, and is in accordance with Texas Water Code, §5.551 and TCAA, §382.017, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TCAA, §382.05196 and §382.056 and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the adopted amendments and repeals is to revise the TNRCC rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting public hearing. The rule would also consolidate already existing notice procedures for the air quality permitting program; correct, clarify, and update the air quality permit amendment process; clarify requirements relating to bilingual education notices; and consolidate commission procedural rules. The adopted rules will substantially advance these stated purposes by 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 adopted language consists of amendments and new sections relating to the commission's procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The adopted actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505; 30 TAC §§281.40, et seq.).

COMMENTS REQUESTED

The commission solicited comments regarding the requirements in §39.603(a)(2) (Air Quality Permit applications) on the size of newspaper notice. The commission recognizes that the measurements in the rules do not necessarily reflect the measurements that newspapers use for advertisements. During the comment period, the Texas Press Association forwarded information to the TNRCC on how most advertising space is sold. The notice size was adjusted to match the size of Standard Advertising Units and still provide an effective notice to interested persons of the general public and meet statutory requirements (if applicable). This change will hopefully reduce the occurrence of errors and republication time and money.

#### HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. No oral comments were given regarding this chapter. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P., on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce (TABCC), and Texas Oil and Gas Association; Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Henry, Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center for Policy Studies, and Texas Committee on Natural Resources; and the United States Environmental Protection Agency Region 6 Office (EPA).

*§116.111*

Henry, Lowerre commented that the limitation proposed in the sentence beginning with “upon written request” in 116.111(b) should be deleted on the basis that while this wording may be in existing law, HB 801 clearly requires better notice and public input than this section allows. The commenter states that the existing rules are a reflection of what he perceives to be past TNRCC biases against public participation. The commenter stated that TNRCC will not likely know of all impacts of such relocation until it has heard from the public and that the issues do not just involve the overall ambient condition of air pollution. The example given by the commenter is that at a large site, one side is in a very rural setting, the other side may in be an urban area with residences. He stated that there must be notice of the proposal to moving a boiler, an industrial waste landfill, or other facility from the rural side to the urban side, even if the overall pollution conditions are not changed because site specific conditions may change and property line violations may occur. He commented that those are issues on which the public has a right to comment or seek a hearing and it is not sufficient that the ED has reviewed the applicant’s modeling and agrees that there are no problems. He stated that the public may have data, including information on closer receptors, that the applicant did not provide and that is why state and federal laws require public input to such decisions.

**The commission has made no change in response to this comment. HB 801 specifically provides that it does not expand or restrict the types of commission actions for which notice, an opportunity for public comment, or opportunity for public hearing are provided. The expansion in public notice procedures was not included in the proposal for this rule and the commission does not believe that it would be appropriate to include such a provision at adoption without opportunity to**

**comment. The jurisdiction given to the commission by the TCAA with regard to air permit applications is whether the application meets the intent of the TCAA, including evaluation of ambient air quality. The executive director includes as part of technical review of these applications, an evaluation to determine whether these facilities will meet all state and federal property line standards and will protect human health, welfare and property (impacts evaluation). All facility relocation reviews include an updated best available control technology (BACT) analysis as well as the impacts review of the proposed change. The information used in the impacts evaluation, such as receptor locations may be represented the applicant, but all off-property receptor locations are confirmed by timely site reviews performed by the regional office and local air pollution control programs. All air quality impact reviews are performed with consideration given to the type of receptor which may be impacted by potential emissions from the relocated facility. State and federal laws do not provide for public participation solely on the assumption that applicants may present incomplete information. Because the commission has retained the ability to send these actions to notice under the requirements listed in §39.403(b)(8)(C)(i)-(iv), public participation goals are met. In addition, just as with all applications reviewed by the executive director, these permit authorizations are subject to the motion to overturn process, which provides for an avenue of public participation.**

EPA asked if §116.111(b) should also reference Chapter 55 as public comments processing are referenced in that chapter.

**The commission agrees that the change is necessary, and the rule has been revised to reference Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment).**

Brown McCarroll commented that §116.111(b) is not a complete sentence and it is not clear by the wording that the TNRCC intended that notice requirements be met before obtaining a permit.

**The commission agrees and has revised this subsection to clarify that notice is required before a permit can be obtained.**

Brown McCarroll comments that Chapter 39 notice requirements are not self-executing so that it is impossible to comply with §116.111(b). The commenter noted that Chapter 39 does not state that notice is required for air quality applications. The commenter also noted that the rules are circular when referring to one another with no definitive statement of what is required where and when.

**The commission agrees with this comment and has revised §39.603 (a) and (b), which specifies when air applications must publish notice.**

Brown McCarroll commented that §116.111(b) seems to require that an applicant for any permit or amendment must publish notice, noting that this would be incorrect in the case of permits by rule, exemptions, and standard permits. The commenter stated that none of these authorizations require an application, nor are the applications subject to public comment.

**The commission has made no change in response to this comment. The commission does not believe it is necessary to list which actions are required to publish notice in this section. This structure is consistent with other programs where Chapter 39 is referred to for determination of whether a given action is or is not subject to public notice, comment and hearing. Actions authorized by Chapters 106 and 116, including permits by rule and exemptions, must refer to §39.403(b) and (c) which specifically address the different types of actions for which notice is required and is specifically exempt. For example, only concrete batch plants under Chapter 106 must publish notice, as explained in §39.403(c). Standard permits are also specifically excluded from notice requirements under §39.403(c). In addition, the term application as used in these rules is defined in 30 TAC §3.1 is broad and therefore includes registrations and other authorizations not commonly referred to as “permits.” It is appropriate to use the term “application” because there are certain types of registrations and authorizations that may be subject to public notice.**

Brown McCarroll commented that §116.111(b) should be deleted as unnecessary.

**The commission disagrees with this comment. Notice and opportunity for comment is required under TCAA, §382.056 and a reference is needed in §116.111 is needed to inform applicants of this requirement to obtain a permit.**

Brown McCarroll commented that the repeal of §116.130 will eliminate the executive director’s discretion when requiring notice for air amendments, stating that this repeal unnecessarily removes this discretionary provision.

To comply with the commission's goal to consolidate all notice requirements in Chapter 39, the requirements in this section are now in that chapter. New requirements listed under §39.403(b)(8) - (12) include those necessary to reflect that notice requirements for air applications are now contained in Chapter 39, rather than Chapter 116, and to incorporate some of the changes resulting from SB 7 and SB 766. Those types of applications, which would be newly subject to the provisions in the additions to Chapter 39, include: (1) applications for air quality permits under §382.0518 and §382.055 of the Texas Health and Safety Code, unless otherwise specified in this section; (2) 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 CFR Part 63)), whether for construction or reconstruction; (3) concrete batch plants (CBP) registered under 30 TAC Chapter 106 (relating to Exemptions from Permitting) unless the facility is to be located in, or contiguous to, the right-of-way of a public works project; (4) applications for voluntary emission reduction permits under §382.0519 of the Texas Health and Safety Code; (5) applications for permits for electric generating facilities under §39.264 of the Utilities Code; (6) applications subject to the requirements of Chapter 116, Subchapter G of this title (relating to Flexible Permits); and (7) permit amendments under §116.116(b) of Chapter 116 initial issuance of flexible permits under Chapter 116, Subchapter G, or amendments to flexible permits under §116.710 of Chapter 116 when an action involves: (A) construction of any new facility, (B) modification of an existing facility which results in a significant increase in allowable emissions of any air contaminant, or (c) other changes when required by the executive director. These actions are required to undergo notice in accordance with Chapter 39 and have public participation under Chapter 55 as required by TCAA, §382.056.

**Specifically, §39.403(b)(8)(A) and (B) clarifies that applications to amend existing permits for the purpose of authorizing new construction must comply with the notice requirements in 30 TAC Chapter 39, Subchapters H and K. This is required by the TCAA, §382.056(a), but was not codified in existing notice rules in 30 TAC Chapter 116, which will apply to applications that are administratively complete before September 1, 1999. This subsection is consistent with the requirement that all applications for new permits which would authorize new construction must comply with the notice requirements, and clarifies that there is no basis for different notice requirements for applications who are choosing to amend an existing permit versus obtaining a new permit. It also clarifies that applications for construction of new facilities with emissions of less than or equal to 25 tons per year must comply with notice requirements. Section 39.403(b)(8)(B) clarifies which applications for modification of existing facilities must comply with the notice requirements of Subchapters H and K of Chapter 39. Section 39.403(b)(8)(B) clarifies which applications for modification of existing facilities must comply with the same notice requirements by specifying that modifications for insignificant increases are not required to comply with these notice requirements. The references are existing determinations by the commission of what sources are exempt from permitting requirements, and permit amendments which do not meet the statutory definition of modification which have been exempt from compliance with notice requirements, as changed by SB 1125 and SB 1126, 74th Legislature, 1995, retain that exempt status.**

Henry, Lowerre commented that the proposed change to §116.114(a) to set deadlines on decisions must be deleted because it is not required or suggested by HB 801 or SB 766, and such a limit is not reasonable in many cases, especially when it is the applicant that has caused delays.

**The commission has not revised this subsection in response to these comments. The requirements in §116.114(a) are not new requirements, but are existing ones which only have been reorganized and renumbered and are readopted under authority of TCAA, §382.051. In addition, deadlines are established to inform all interested persons (applicants and the general public) of the expected duration of any given action. These deadlines ensure timely resolution of any application and ensure that applicants do not unnecessarily delay the review of a project. If an applicant does not comply in a timely manner to requests for information or other review requirements, the review of the application is suspended as provided in §116.114.**

EPA asks what safeguards are in place in §116.114(a)(2) to prevent a preliminary decision from being made before close of the comment period which could ultimately become the final decision, effectively depriving the public of meaningful opportunity to comment

**Under §55.156, the commission is required to reply to comments after a preliminary decision is made and give opportunity to any interested person to request a hearing or request reconsideration of the executive director's decision. Specifically, nonattainment permits (FCAA, Title I, Part C or D) and Prevention of Significant Deterioration permits (40 CFR Part 51.165(b) and FCAA, §112(g) actions have more extensive newspaper notice requirements under §39.419 so that the federally**

**required information can be presented to the public in the notice. The commission also revised §116.114(a)(2) to specifically reference §55.156.**

Baker & Botts commented that §116.114(a)(2)(B) seems to contain typographical error. Since this section addresses application review schedule, the correct reference in (a)(2) should be “150 days *from* receipt of application”

**The commission agrees and has revised §116.114 in accordance with this comment.**

Henry, Lowerre commented that §116.114(c) needs to recognize that the deadlines for requests can be extended and the definition for “timely” requests to allow for this change.

**The commission has made no change in response to this comment. The commission notes that HB 801 and rules implementing it in Chapters 39 and 50 of this title encourage early public participation in the environmental permitting process and are intended to streamline the contested case hearing process. For example, an applicant is required to publish newspaper notice of intent to obtain a permit and notice of the executive director’s preliminary decision on the application. The applicant must also place a copy of the application and the executive director’s preliminary decision at a public place in the county and the executive director is authorized to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment received in response to the notices or at public meetings, and file the responses with the chief clerk. All these are examples of provisions which allow earlier public participation.**

**The commission further notes that HB 801 is clear that public meetings may be held during the public comment period. Section 55.152(b) provides that the public comment period shall automatically be extended to the close of any public meeting. The commission declines to revise this rule to provide for extension. The existing public comment periods are sufficient for a person to submit comments, particularly since there is opportunity for a public meeting which could extend the process.**

Henry, Lowerre commented that the alternative provision for notice in §116.114(c) if there is a large number of people who request notice needs to be deleted as there are no criteria for when notice would be “impracticable” and HB 801 does not permit the approach.

**HB 801 does not prohibit this limitation which is allowed by TCAA, §382.0517. The commission has changed the term “parties” in the proposed rule to “persons” to have parallel construction of the language in the rule.**

The commission has revised §116.114(c)(2) to clarify this subsection for voluntary emission reduction permit (VERP) and electric generating facility (EGF) requirements under SB 766 and 7.

#### STATUTORY AUTHORITY

The amendments are adopted under THSC, §382.056, which establishes the commission’s authority concerning notice and hearing procedures for authorizations under TCAA

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.0517, which establishes the requirements for determinations of administrative completeness and notice of same; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

**CHAPTER 116 - CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION  
OR MODIFICATION**

**SUBCHAPTER B : NEW SOURCE REVIEW PERMITS**

**DIVISION 1 : PERMIT APPLICATION**

**§§116.111, 116.114, 116.116**

**§116.111. General Application.**

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that all of the following are met.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and physical property of the people.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the “Texas Natural Resource Conservation Commission (TNRCC) Sampling Procedures Manual.”

(C) Best available control technology (BACT). The proposed facility will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility.

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed under Title 40 Code of Federal Regulations (CFR) Part 60, promulgated by the EPA under FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, §112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, 40 CFR 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification.

(K) Hazardous air pollutants. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures) (effective March 21, 1999).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

**§116.114. Application Review Schedule.**

(a) Review schedule. The executive director shall review permit applications in accordance with the following.

(1) Notice of completion or deficiency. The executive director shall mail written notification informing the applicant that the application is complete or that it is deficient within 90 days of receipt of the application for a new permit, or amendment to a permit or special permit.

(A) If the application is deficient, the notification must state:

(i) the additional information required; and

(ii) the intent of the executive director to void the application if information for a complete application is not submitted.

(B) Additional information may be requested within 60 days of receipt of the information provided in response to the deficiency notification.

(2) Preliminary decision to approve or disapprove the application. The executive director shall conduct a technical review and send written notice to the applicant of the preliminary decision to approve or not approve the application within 180 days from receipt of a completed permit application or 150 days from receipt of a completed permit amendment. If the applicant has provided Notice of Receipt of Application and Intent to Obtain Permit public notification as required by the

executive director under Chapter 39 of this title (relating to Public Notice), one of the following shall apply:

(A) if comments are received on the proposed facility and replied to by the executive director in accordance with §39.420 of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision) and §55.156 of this title (relating to Public Comment Processing); and

(B) if no requests for public hearing or public meeting on the proposed facility have been received or the application is otherwise exempt under §39.419(e) of this title (relating to Notice of Application and Preliminary Decision), the executive director shall send a copy of the Preliminary Decision to the applicant; or

(C) if Notice of Application and Preliminary Decision is required under §39.419(d) of this title (relating to Notice of Application and Preliminary Decision), the executive director shall authorize this notice and send copies to the applicant and all other persons are required under §39.602 of this title (relating to Mailed Notice).

(3) Refund of permit fee.

(A) If the time limits provided in this section to process an application are exceeded, the applicant may appeal in writing to the executive director for a refund of the permit fee.

(B) The permit fee shall be reimbursed if it is determined by the executive director that the specified period was exceeded without good cause, as provided in Texas Civil Statutes, Article 6252-13b.1, §3.

(b) Voiding of deficient application.

(1) An applicant shall make a good faith effort to submit, in a timely manner, adequate information which demonstrates that the requirements for obtaining a permit or permit amendment are met in response to any deficiency notification issued by the executive director under the provisions of this section, or Chapter 39 of this title (relating to Public Notice).

(2) If an applicant fails to make such good faith effort, the executive director shall void the application and notify the applicant. If the application is resubmitted within six months of the voidance, it shall be exempt from the requirements of §116.140 of this title (relating to Applicability).

(c) Notification of executive director's decision.

(1) Notification to Applicant. The executive director or the chief clerk shall send to the applicant the decision to approve or not approve the application if:

(A) no timely requests for reconsideration, contested case hearing, or public meeting on the proposed facility have been received; or

(B) if hearing requests have been received and withdrawn before the executive director's Preliminary Decision; or

(C) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted; and

(D) the applicant has satisfied all public notification requirements of Chapter 39 of this title.

(2) Notification to commenters. Except for initial issuance of voluntary emission reduction permits and electric generating facility permits, persons submitting written comments under Chapter 39 of this title shall be sent the executive director's final action and given an explanation of the opportunity to file a motion under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) at the same time that the applicant is notified. If the number of interested persons who have requested notification makes it impracticable for the commission to notify those persons by mail, the commission shall notify those persons by publication using the method prescribed by §382.031(a) of the Texas Health and Safety Code.

(3) Time Limits. The executive director shall send notification of final action within:

(A) one year after receipt of a complete PSD or nonattainment permit application, or a complete permit application for an action under Subchapter C of this chapter;

(B) 180 days of receipt of a completed permit or permit renewal application; or

(C) 150 days of receipt of a permit amendment or special permit amendment application.

**§116.116. Changes to Facilities.**

(a) Representations and conditions. The following are the conditions upon which a permit, special permit, or special exemption are issued:

(1) representations with regard to construction plans and operation procedures in an application for a permit, special permit, or special exemption; and

(2) any general and special conditions attached to the permit, special permit, or special exemption itself.

(b) Permit amendments.

(1) Except as provided in subsection (e) of this section, the permit holder shall not vary from any representation or permit condition without obtaining a permit amendment if the change will cause:

(A) a change in the method of control of emissions;

(B) a change in the character of the emissions; or

(C) an increase in the emission rate of any air contaminant.

(2) Any person who requests permit amendments must receive prior approval by the executive director or the commission. Applications must be submitted with a completed Form PI-1 and are subject to the requirements of §116.111 of this title (relating to General Application).

(3) Any person who applies for an amendment to a permit to construct or reconstruct an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

(4) Any person who applies for an amendment to a permit to construct a new facility or modify an existing facility shall comply with the provisions in Chapter 39 of this title.

(c) Permit alteration.

(1) A permit alteration is:

(A) a decrease in allowable emissions; or

(B) any change from a representation in an application, general condition, or special condition in a permit that does not cause:

(i) a change in the method of control of emissions;

(ii) a change in the character of emissions; or

(iii) an increase in the emission rate of any air contaminant.

(2) Requests for permit alterations that must receive prior approval by the executive director are those that:

(A) result in an increase in off-property concentrations of air contaminants;

(B) involve a change in permit conditions; or

(C) affect facility or control equipment performance.

(3) The executive director shall be notified in writing of all other permit alterations not specified in paragraph (2) of this subsection.

(4) A request for permit alteration shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.111(3) of this title.

(5) Permit alterations are not subject to the requirements §116.111(3) of this title.

(d) Permits by rule and exemptions from permitting under Chapter 106 of this title (relating to Exemptions from Permitting) in lieu of permit amendment or alteration.

(1) A permit amendment or alteration is not required if the changes to the permitted facility qualify for an exemption from permitting or permit by rule under Chapter 106 of this title unless prohibited by permit condition as provided in §116.115 of this title (relating to General and Special Conditions).

(2) All exempted changes to, and permits by rule associated with, a permitted facility shall be incorporated into that facility's permit when the permit is amended or renewed.

(e) Changes to qualified facilities.

(1) Notwithstanding any other subsection of this section, a physical or operational change may be made to a qualified facility if it can be determined that the change does not result in:

(A) a net increase in allowable emissions of any air contaminant; and

(B) the emission of any air contaminant not previously emitted.

(2) In making the determination in paragraph (1) of this subsection, the effect on emissions of the following shall be considered:

(A) any air pollution control method applied to the qualified facility;

(B) any decreases in allowable emissions from other qualified facilities at the same commission air quality account number that have received a preconstruction permit or permit amendment no earlier than 120 months before the change will occur; and

(C) any decrease in actual emissions from other qualified facilities at the same commission air quality account number that are not included in subparagraph (B) of this paragraph.

(3) The determination in paragraph (1) of this subsection shall be based on the allowable emissions for air contaminant categories and any allowable emissions for individual compounds. If a physical or operational change would result in emissions of a air contaminant category or compound above the allowable emissions for that air contaminant category or compound, the amount above the allowable emissions must be offset by an equivalent decrease in emissions at the same facility or a different facility. In making this offset, the following applies.

(A) The offset shall be based on the same time periods (e.g., hourly and annual rates) as the allowable emissions for the facility at which the change will occur.

(B) Emissions of different compounds within the same air contaminant category may be interchanged.

(C) For allowable emissions for individual compounds, any interchange shall adjust the emission rates for the different compounds in accordance with the ratio of the effects screening levels of the compounds.

(D) For allowable emissions for air contaminant categories, interchanges shall use the unadjusted emission rates for the different compounds.

(E) The effects screening level shall be determined by the executive director.

(F) An air contaminant category is a group of related compounds, such as volatile organic compounds, particulate matter, nitrogen oxides, and sulfur compounds.

(4) Persons making changes to qualified facilities under this subsection shall comply with the applicable requirements of §116.117 of this title (relating to Documentation and Notification of Changes to Qualified Facilities) and §116.118 of this title (relating to Pre-change Qualification).

(5) As used in this subsection, the term "physical and operational change" does not include:

(A) construction of a new facility; or

(B) changes to procedures regarding monitoring, determination of emissions and recordkeeping that are required by a permit.

(6) Additional air pollution control methods may be implemented for the purpose of making a facility a qualified facility. The implementation of any additional control methods to qualify a facility shall be subject to the requirements of this chapter. The owner or operator shall:

(A) utilize additional control methods that are as effective as best available control technology (BACT) required at the time the additional control methods are implemented; or

(B) demonstrate that the additional control methods, although not as effective as BACT, were implemented to comply with a law, rule, order, permit, or implemented to resolve a documented citizen complaint.

(7) For purposes of this subsection and §116.117 of this title, the following subparagraphs apply.

(A) Intraplant trading means the consideration of decreases in allowable and actual emissions from other qualified facilities in accordance with paragraph (2) of this subsection.

(B) The allowable emissions from facilities that were never constructed shall not be used in intraplant trading.

(C) The decreases in allowable and actual emissions shall be based on emission rates for the same time periods (e.g., hourly and annual rates) as the allowable emissions for the facility at which the change will occur and for which an intraplant trade is desired.

(D) Actual emissions shall be based on data that is representative of the emissions actually achieved from a facility during the relevant time period (e.g., hourly or annual rate).

(8) The existing level of control may not be lessened for a qualified facility.

(f) Use of credits. Notwithstanding any other subsection of this section, discrete emission reduction credits may be used to exceed permit allowables as described in §101.29(d)(4)(v) of this title (relating to Emission Credit Banking and Trading) if all applicable conditions of §101.29 of this title are met. This subsection does not authorize any physical changes to a facility.

**SUBCHAPTER B : NEW SOURCE REVIEW PERMITS**

**DIVISION 2 : COMPLIANCE HISTORY**

**§116.124**

**STATUTORY AUTHORITY**

The repeal is adopted under THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules, and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05196, which establishes the commission's authority to adopt

rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

**§116.124. Public Notice of Compliance History.**

**SUBCHAPTER C : HAZARDOUS AIR POLLUTANTS: REGULATIONS GOVERNING**

**CONSTRUCTED OR RECONSTRUCTED MAJOR SOURCES**

**(FCAA, §112(g), 40 CFR PART 63)**

**§116.183**

**STATUTORY AUTHORITY**

The amendment is adopted under THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative

regarding air permit applications; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

**§116.183. Public Notice Requirements.**

Proposed affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) shall comply with the public notice requirements contained in Chapter 39 of this title (relating to Public Notice).

## **SUBCHAPTER D : PERMIT RENEWALS**

### **§116.312**

#### **STATUTORY AUTHORITY**

The amendment is adopted under THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and

renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

**§116.312. Public Notification and Comment Procedures.**

The executive director shall mail a written notice to the permit holder within 30 days after receipt of a complete application. The notice will confirm receipt of the application and shall require the applicant to provide public notice of the application for permit renewal in accordance with Chapter 39 of this title (relating to Public Notice).

## **SUBCHAPTER G : FLEXIBLE PERMITS**

### **§116.740**

#### **STATUTORY AUTHORITY**

The amendment is adopted under THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules and §5.105, which establishes the commission's authority to set policy by rule.

Additionally, relevant sections of the THSC include: §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the commission's authority to adopt rules concerning permit conditions for air permits; §381.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and

renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; and §382.061, which establishes delegation of authority to the executive director.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

**§116.740. Public Notice and Comment.**

(a) Any person who applies for a flexible permit or an amendment to a flexible permit shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

(b) Any person who applies for an amendment to a flexible permit regarding an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the provisions in Chapter 39 of this title (relating to Public Notice).

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §122.320, concerning Public Notice. Section 122.320 is adopted with changes to the proposed text as published in the July 16, 1999, issue of the *Texas Register* (24 TexReg 5449).

## BACKGROUND

The primary purpose of the adopted amendments is to implement House Bill (HB) 801. The adopted amendments are intended to update public notice rules for federal operating permits. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

## OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code (THSC), Solid Waste Disposal Act, §361.088; revising THSC, Texas Clean Air Act (TCAA), §382.056; and revising Texas Government Code (TGC), §2003.047. Except for the changes required under TGC, §2003.047, the new and amended statutory provisions expressly apply to applications under TWC, Chapters 26 and 27, and THSC, Chapters 361 and 382. The changes in law made by HB 801 only apply to permit applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. For example, it requires an applicant to publish newspaper notice of the executive director's preliminary decision on the application. For a federal operating permit (FOP) application, the notice of the executive director's preliminary decision is equivalent to the 40 Code of Federal Regulations (CFR) Part 70 requirement to provide notice of a draft permit. HB 801 also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county and authorizes the executive director to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment. In addition, for an FOP application, the commission is required to prepare responses to all timely public comment, as required under 40 CFR Part 70. It requires the commission to prescribe alternative cost-effective procedures for newspaper publication for small business stationary sources seeking air emissions authorization that will not have a significant effect on air quality. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are being implemented in Chapters 39, 50, and 80.

Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters are

published in this edition of the *Texas Register*. Changes to Chapters 55 and 321 also proposed on July 16, 1999 are not adopted at this time, but will be subject to future consideration by the commission.

#### EXPLANATION OF ADOPTED RULE

The primary purpose of the adopted amendments is to implement HB 801, 76th Legislature (1999). HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice and opportunity for public comment. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment, or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements. More specifically, HB 801 revises the public participation in environmental permitting procedures of the commission by adding new statutory provisions to TWC, Chapter 5, Subchapter M; revisions to THSC, §382.056; and revisions to TGC, §2003.047. Certain changes made by HB 801, other than the changes made to TGC, §2003.047, apply to federal operating permits. These changes are implemented in Chapter 122. In addition, revisions to Chapters 39, 50, 80, 106, 116, and 305 as required by HB 801 are also published in this edition of the *Texas Register*. Concurrently with this rulemaking the commission is adopting the review of and readoption of 30 TAC Chapters 39, 50, and 80 in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997.

More specifically, HB 801 revises public participation in federal operating permit procedures of the commission by adding new statutory provisions to the TCAA under THSC, §382.056. As discussed below in detail, the changes adopted in 30 TAC §122.320, relating to public notice requirements for the

federal operating permit program, incorporate the revised statutory requirements contained in §5 of HB 801.

The adopted amendment to §122.320(b) incorporates the requirement that the applicant shall make a copy of the application and draft permit available for review and copying at a public place in the county in which the site is located or proposed to be located.

The adopted amendment to §122.320(b)(2) specifies that the newspaper notice shall include an applicant telephone number and a description of the manner in which a person may contact the applicant or permit holder for further information.

The adopted amendments to §122.320(b)(7) and (8) are proposed to be revised to specify incorporate the requirements that certain statements in the newspaper notice shall be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice.

As adopted, the requirements in the original §122.320(b)(9) are moved to §122.320(b)(11). The newly adopted 122.320(b)(9) adds a new requirement that the newspaper notice include a statement describing the procedure by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit.

New §122.320(b)(10) is adopted to add a requirement that a newspaper notice shall include a statement for the time and location of any public meeting to be held, if applicable.

New §122.320(m) is adopted to specify that the applicant, in cooperation with the executive director, may hold a public meeting in the county in which the site is located or proposed to be located. This new subsection also proposes that any such meeting shall be provided in the notice required by subsection (b) of this section.

Section 5 of HB 801 specifies that the executive director shall conduct a technical review of and issue a preliminary decision on the application. All applications under Chapter 122 of this title (relating to Federal Operating Permits) undergo a technical review and executive director preliminary decision. Title 40 CFR Part 70 requires the development of a draft permit for public review and comment. This draft permit is equivalent to the HB 801 requirement for the executive director to issue a preliminary decision. The language in §122.320 continues to reflect the 40 CFR Part 70 reference to draft permit but adds the HB 801 language relating to preliminary decision. Also, when the executive director issues a draft permit and requires the applicant to publish notice, he is fulfilling the HB 801 requirement to issue an executive director preliminary decision and its notice.

#### FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of TGC, §2001.0225, and has 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 the act. Furthermore, 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, productivity,

competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Because the specific intent of the rulemaking is procedural in nature and establishes procedures associated with public comment on permit applications and requests for contested case hearing, the rulemaking does not meet the definition of a “major environmental rule.”

In addition, even if the rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and Texas Water Code, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not 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 because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with TWC, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TWC, Chapter 5, Subchapter M and TGC, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to TGC, §2007.043. The following is a summary of that assessment. The specific primary purpose of the adopted amendments is to revise federal operating permit public notice procedures and opportunity for public comment. The adopted rules will substantially advance these stated purposes by 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 rule language consists of amendments relating to the commission's procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The adopted actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC, Chapter 505; 30 TAC, §§281.40, et seq.).

#### HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. No oral comments were received at this hearing related to the proposed revisions to Chapter 122. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. No written comments were submitted related to the proposed revisions to Chapter 122.

The commission did not receive any general or specific comments regarding Chapter 122; therefore, the changes have been adopted as proposed. The following sections are adopted to incorporate specific requirements of HB 801.

#### STATUTORY AUTHORITY

The amendment is adopted under THSC, §382.056 which establishes the commission's authority concerning notice and hearing procedures for authorizations under TCAA.

In addition, relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules, and §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases.

Additionally, relevant sections of the THSC include: §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; and §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits.

An additional relevant section is TGC, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

**CHAPTER 122 - FEDERAL OPERATING PERMITS**

**SUBCHAPTER D : PUBLIC ANNOUNCEMENT, PUBLIC NOTICE, AFFECTED STATE  
REVIEW, NOTICE AND COMMENT HEARING, NOTICE OF PROPOSED FINAL ACTION,  
EPA REVIEW, AND PUBLIC PETITION**

**DIVISION 2 : PUBLIC NOTICE**

**§122.320**

**§122.320. Public Notice.**

(a) Public notice requirements apply to initial issuances, significant permit revisions, reopenings, and renewals.

(b) The executive director shall direct the applicant to publish a notice of draft permit and preliminary decision, at the applicant's expense, 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 executive director shall direct the applicant to make a copy of the application and draft permit available for review and copying at a public place in the county in which the site is located or proposed to be located. The notice shall contain the following information:

- (1) the permit application number;

(2) the applicant's or permit holder's name, address, and telephone number and a description of the manner in which a person may contact the applicant or permit holder for further information;

(3) a description of the location of the site or proposed location of the site;

(4) a description of the activity or activities involved in the permit application;

(5) for significant permit revisions, the air pollutants with emission changes;

(6) the location and availability of the following:

(A) the complete permit application;

(B) the draft permit;

(C) all other relevant supporting materials in the public files of the agency;

(7) a description of the comment procedures, including the duration of the public notice comment period and procedures to request a hearing printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(8) a statement that a person who may be affected by the emission of air pollutants from the site is entitled to request a notice and comment hearing printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice; and

(9) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit;

(10) if applicable, the time and location of any public meeting; and

(11) the name, address, and phone number of the commission office to be contacted for further information.

(c) One notice may be published for multiple permits at a site with the approval of the executive director.

(d) The applicant shall submit a copy of the public notice and date of publication to the executive director and all local air pollution control agencies with jurisdiction in the county in which the site is located.

(e) The applicant shall submit a statement to the executive director, with a certification in accordance with §122.165 of this title (relating to Certification by a Responsible Official), that the sign

required by subsection (h) of this section has been posted consistent with the provisions of that subsection.

(f) The executive director shall make a copy of the permit application, the draft permit, and any required notices accessible to the EPA.

(g) The executive director shall make available for public inspection the draft permit and the complete application throughout the comment period during business hours at the commission's central office and at the commission's regional office where the site is located.

(h) At the applicant's expense, a sign shall be placed at the site declaring the filing of an application for a permit and stating the manner in which the executive director may be contacted for further information.

(1) The sign shall meet the following requirements.

(A) The sign shall consist of dark lettering on a white background and shall be not smaller than 18 inches by 28 inches.

(B) The sign shall be headed by the words "APPLICATION FOR FEDERAL OPERATING PERMIT" in no less than two-inch boldface block printed capital lettering.

(C) The sign shall include the words "APPLICATION NO." and the number of the permit application in no less than one-inch boldface block printed capital lettering.

(D) The sign shall include the words "for further information contact" in no less than 1/2-inch lettering.

(E) The sign shall include the words "TEXAS NATURAL RESOURCE CONSERVATION COMMISSION," and the address of the appropriate commission office in no less than one-inch boldface capital lettering and 3/4-inch boldface lower case lettering.

(F) The sign shall include the phone number of the appropriate commission office in no less than two-inch boldface numbers.

(2) The sign shall be in place by the date of publication of the newspaper notice and shall remain in place and legible throughout the period of public comment.

(3) The sign placed at the site shall be located at or near the site main entrance, provided that the sign is legible from the public street. If the sign would not be legible from the public street, then the sign shall be placed within ten feet of a property line paralleling a public street.

(A) The executive director may approve variations if the applicant has demonstrated that it is not practical to comply with the specific sign-posting requirements.

(B) Alternative sign-posting plans proposed by the applicant must be at least as effective in providing notice to the public.

(C) The executive director must approve the variations before signs are posted.

(4) One sign may be posted for multiple permits at a site with the approval of the executive director.

(i) The executive director shall receive public comment for 30 days after the notice of the public comment period is published. During the comment period, any person may submit written comments on the draft permit.

(j) During the 30-day public notice comment period, any person who may be affected by emissions from a site regulated under this chapter may request in writing a notice and comment hearing on the draft permit.

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

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

(m) The applicant, in cooperation with the executive director, may hold a public meeting in the county in which the site is located or proposed to be located. Notice of this public meeting shall be provided in the notice required by subsection (b) of this section.

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §305.63, and new §305.65, concerning public notice of permit renewals. The proposed amendment and new section are adopted without changes to the proposed text as published in the July 16, 1999 edition of the *Texas Register* (24 TexReg 5303).

#### BACKGROUND

The primary purpose of the adopted amendments and new sections is to implement House Bill (HB) 801. HB 801 establishes new procedures for public participation in environmental permitting proceedings. It establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing for certain actions. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment or opportunity for hearing as necessary to satisfy air quality federal program authorization requirements. These changes are implemented in Chapters 39, 50, and 80. Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122, and 305; changes for all of these chapters are published in this edition of the *Texas Register*. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

#### EXPLANATION OF ADOPTED RULES

The primary purpose of the adopted amendments and new section is to implement HB 801, 76th Legislature (1999).

Adopted amendments to §305.63 contain new language relating to applicability, stating that this section is applicable to any permit renewal application that is declared administratively complete before September 1, 1999. The adopted amendments also reformat the section to account for the addition of the applicability statement. This amendment leaves existing procedures in place for hazardous waste management facilities not affected by HB 801 changes.

Generally, adopted new §305.65, with some renumbering, mirrors existing §305.63 with certain significant exceptions. First, new §305.65(a) includes a provision reflecting applicability of this section to applications filed on or after September 1, 1999. Second, new §305.65(a)(8) would authorize the commission to renew permits without providing an opportunity for a contested case hearing if certain conditions are met, which are as follows: after complying with all applicable rules in Chapters 39, 50, and 55 of this title, the commission, without providing an opportunity for a contested case hearing, may act on an application to renew a permit for storage of hazardous waste in containers, tanks, or other closed vessels if the waste was generated on-site and does not include waste generated from other waste transported to the site. Similarly, the commission may act on an application, without providing an opportunity for a contested case hearing, to renew a permit for the processing of hazardous waste if the waste was generated on-site; the waste does not include waste generated from other waste transported to the site; and the processing does not include thermal processing. Third, under new §305.65(a)(9), if the commission determines that an applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit, the commission shall provide an opportunity to request a contested case hearing. These changes are consistent with and

implement requirements in HB 801 relating to permit processing requirements for certain hazardous waste management facilities.

#### FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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 the act.

Furthermore, 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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and establishes procedures for providing public notice, an opportunity for public comment, and an opportunity for public hearing as well as consolidate existing notice procedures for some air permitting programs, the rulemaking does not meet the definition of a “major environmental rule.”

In addition, even if the adopted rule is a major environmental rule, a regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopts a rule solely under the general powers of the agency. This adoption is expressly authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and Texas Water

Code, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the Statutory Authority section of this preamble. This adoption does not 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 because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with Texas Water Code, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This action does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., Texas Water Code, Chapter 5, Subchapter M and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the amendments and new sections is to revise the TNRCC rules to establish procedures for public participation in certain permitting proceedings as required by HB 801, and other legislation. The adoption relates to procedures for providing public notice, providing opportunity for public comment, and providing opportunity for requesting contested case hearings as well as specific procedures for hearings. The adopted rules will substantially advance these stated purposes by 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 language consists of amendments and new sections relating to the commission's procedural rules rather than substantive requirements.

## COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The actions concern only the procedural rules of the commission and general agency operations, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Chapter 505, 30 TAC §§281.40, et seq.).

## HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. Oral comments were provided by an individual and Locke, Liddell and Sapp, L.L.P.. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P., on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce (TABCC), and Texas Oil and Gas Association; Brown, Potts & Reilly, L.L.P., on behalf of Merco Joint Venture, L.L.C.; City Public Service (CPS) of San Antonio, Texas; Dow Chemical Company (Dow); Eastman Chemical Company, Texas Eastman Division (Eastman); Exxon Chemical Company's Baytown Chemical Plant, Baytown Olefins Plant and Mont Belvieu Plastics Plant (Exxon Chemical); Exxon Company, U.S.A., Baytown Refinery (Exxon); Henry, Lowerre, Johnson, Hess & Frederick, Attorneys at Law (Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center

for Policy Studies, and Texas Committee on Natural Resources; Jackson Walker L.L.P.; Jenkins & Gilchrist, P.C.; Public Interest Counsel, Texas Natural Resource Conservation Commission (PIC); Roller and Allensworth, L.L.P., on behalf of the Greenbelt Municipal and Industrial Water Authority; Small Business Compliance Advisory Panel (CAP); Texas Association of Business & Chambers of Commerce (TABCC); Texas Cattle Feeders Association (TCFA); Texas Cotton Ginners' Association; Texas Instruments Incorporated (TI); Thompson & Knight, L.L.P.; and the United States Environmental Protection Agency Region 6 Office (EPA).

#### ANALYSIS OF COMMENTS AND ADOPTED RULES

##### *Subchapter D, §305.63. Renewal*

This section, pertaining to the renewal of permits, was amended to be applicable only to applications declared administratively complete before September 1, 1999, pursuant to HB 801. Renewal applications declared administratively complete on or after September 1, 1999 are covered under new §305.65. No public comments were received on §305.63, and it was adopted without change from the proposal.

##### *Subchapter D, §305.65. Renewal*

Adopted new §305.65, pertaining to the renewal of permits, was proposed as a parallel section to §305.63, and lays out the permit renewal procedures for applications declared administratively complete on or after September 1, 1999. The purpose of this section is to help distinguish, and assist in the processing of, applications for permit renewals that fall under HB 801. In addition, §305.65(8)

implements Section 4 of HB 801, which allows the commission to act, without providing an opportunity for a contested case hearing, on renewal applications for certain permits to store or process hazardous waste, if the wastes were generated on-site and do not include any off-site wastes. The language in §305.65(8) mirrors the statutory language of HB 801 and is added to the commission's rules as a matter of clarification and practicality. No public comments were received on proposed new §305.65, and it was adopted without change from the proposal.

*Subchapter D, §305.69. Solid Waste Permit Modification at the Request of the Permittee*

Although this section was not opened in the proposal published in the July 16, 1999 Texas Register, two comments were received requesting clarification of notice requirements for Class 3 modifications, particularly concerning the number of public notices, the calculation of publication dates, and the harmonization of HB 801 with the existing notice provisions in §305.69(d)(2). Although comments were received on §305.69, no changes were made to it since the section was not open and available for public comment during the proposal period.

Jenkins & Gilchrist commented that, under the proposed rules, a person requesting a Class 3 modification of a solid waste permit would be forced to publish two separate notices for the same purpose, within 45 days after filing a request for a Class 3 modification. Section 305.69(d)(2) of the current rules requires notice to be published within seven days before or after the date of submission of the modification request to the commission. By comparison, HB 801 requires that a *Notice of Receipt and Intent to Obtain Permit* must be published no later than 30 days after the date the application is determined to be administratively complete. The commenter was concerned that this would effectively

require: (1) two separate but similar notices, and (2) two comment periods, since it is unlikely, given the time frames involved, that an application would ever be deemed to be administratively complete within the period allowed for publication of the notice of modification. The commenter recommended that the commission amend §305.69 to make it consistent with the requirements proposed by §39.418.

**The commission has made no changes to Chapter 305 in response to this comment. The commission agrees that it is possible to construe HB 801 notice provisions in such a way as to mandate two new notices in addition to the one currently required for Class 3 modifications. This would then require the publication of three notices for Class 3 Modifications, whereas only two would be required for new solid waste permits. However, after considering HB 801 and federal notice requirements, the commission has determined that the initial HB 801 notice, *Notice of Receipt and Intent to Obtain Permit*, satisfies the notice of modification in §305.69(d)(2). Therefore, the new *Notice of Receipt and Intent to Obtain Permit*, under §39.418, will now supersede the notice in §305.69(d)(2). Under new §39.418, the chief clerk will now mail the notice, rather than the applicant, as was the prior practice under §305.69(d)(2).**

**Applicants for Class 3 modifications, whose applications are declared administratively complete on or after September 1, 1999, should publish the new *Notice of Receipt of Application and Intent to Obtain Permit* in lieu of the notice of modification currently required by §305.69(d)(2). In order to make this substitution clear, and to avoid the possibility of having duplicative notices, the commission has revised §39.509 to clarify that the *Notice of Receipt of Application and Intent to Obtain Permit* should be given instead of the notice of modification in §305.69(d)(2).**

**The commission notes that the second new notice, *Notice of Application and Preliminary Decision* (30 TAC §39.419), adds an extra layer of public participation to that which is currently required. Under this notice, interested persons are informed of the executive director's preliminary decision (draft permit) on the application. As with the earlier notice of receipt, directions on how to obtain additional information, including a copy of the draft permit, are included. Under HB 801, commenters are provided responses to public comments, and are offered an opportunity to request a contested case hearing.**

**Although the commission understands the reasoning behind the commenter's request to modify the language of §305.69(d)(2), to make it consistent with new §39.418, the commission is unable to do so at this time because Texas Register procedures prohibit the modification of rule sections that were not open during the original rule proposal period. The commission will propose any needed changes to § 305.69(d)(2) in subsequent rulemakings as necessary.**

*Subchapter D, §305.69(d). Class 3 modifications of solid waste permits*

Jenkins & Gilchrist commented that §305.69(d)(2) refers to §305.103(b) as containing a list of persons who must receive notice by mail of a Class 1, Class 2, or Class 3 modification request. Currently, there is no §305.103 in the TNRCC's rules. Existing §39.13, and proposed §39.413, do contain lists of persons who must receive notice by mail. The commenter proposed changes to the language of this section in order to correct the mailing list citations and to clarify that the notice of modification should be mailed and published no later than 30 days after administrative completeness so as to conform to the *Notice of Receipt and Intent to Obtain Permit* time frame in HB 801.

**The commission agrees with the commenter and, coincidentally, has already corrected this citation in a recent rulemaking package. Section 305.69(d)(2) now cites to §39.13 instead of §305.103(b). For applications declared administratively complete before September 1, 1999, the correct mailing list citation is §39.13. For applications declared administratively complete on or after September 1, 1999, the correct mailing list citation is §39.413.**

**The commission notes that for Class 3 modifications declared administratively complete after September 1, 1999, the provisions of §305.69(d)(2), pertaining to the publication of a notice of modification for Class 3 modifications, are now superseded by the provisions of §39.418. For those applications, only the *Notice of Receipt of Application and Intent to Obtain Permit* (§39.418), and *Notice of Application and Preliminary Decision* (§39.419) will now be required.**

#### STATUTORY AUTHORITY

The amendment and new section are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and HSC, §382.056 and §382.088.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; and §26.011, which establishes the commission's authority over water quality in the state.

Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; and §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits.

An additional relevant section is Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

**CHAPTER 305 - CONSOLIDATED PERMITS**

**SUBCHAPTER D : AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS,  
REVOCATION, AND SUSPENSION OF PERMITS**

**§305.63, §305.65**

**§305.63. Renewal.**

(a) Any permit renewal application that is declared administratively complete before September 1, 1999 is subject to this section. The permittee or the executive director may file an application for renewal of a permit. The application shall be filed with the executive director before the permit expiration date. Any permittee with an effective permit shall submit a new application at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the executive director. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.

(1) An application for renewal may be in the same form as that required for the original permit application.

(2) An application for renewal shall request continuation of the same requirements and conditions of the expiring permit.

(3) If an application for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment or modification shall also be filed before further action is taken. For applications filed under the Texas Water Code, Chapter 26, if an application for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment shall be filed in place of an application for renewal.

(4) If renewal procedures have been initiated before the permit expiration date, the existing permit will remain in full force and effect and will not expire until commission action on the application for renewal is final.

(5) The commission may deny an application for renewal for the grounds set forth in § 305.66 of this title (relating to Revocation and Suspension).

(6) During the renewal process, the executive director may make any changes or additions to permits authorized by § 305.65 of this title (relating to Corrections of Permits), or § 305.62(d) of this title (relating to Amendment) provided the requirements of § 305.62(f) of this title (relating to Amendment) and § 305.96 of this title (relating to Action on Application for Amendment) are satisfied.

(7) The executive director may grant permission for permittees of non-publicly owned treatment works to submit the information required by 40 Code of Federal Regulations § 122.21(g)(10) after the permit expiration date.

(b) This section does not apply to applications for renewal of radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules).

**§305.65. Renewal.**

(a) Any permit renewal application that is declared administratively complete on or after September 1, 1999 is subject to this section. The permittee or the executive director may file an application for renewal of a permit. The application shall be filed with the executive director before the permit expiration date. Any permittee with an effective permit shall submit a new application at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the executive director. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.

(1) An application for renewal may be in the same form as that required for the original permit application.

(2) An application for renewal shall request continuation of the same requirements and conditions of the expiring permit.

(3) If an application for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment or modification shall also be filed before further action is taken. For applications filed under the Texas Water Code, Chapter 26, if an application

for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment shall be filed in place of an application for renewal.

(4) If renewal procedures have been initiated before the permit expiration date, the existing permit will remain in full force and effect and will not expire until commission action on the application for renewal is final.

(5) The commission may deny an application for renewal for the grounds set forth in §305.66 of this title (relating to Revocation and Suspension).

(6) During the renewal process, the executive director may make any changes or additions to permits authorized by §50.145 of this title (relating to Corrections of Permits), or §305.62(d) of this title (relating to Amendment) provided the requirements of §305.62(f) of this title and §305.96 of this title (relating to Action on Application for Amendment) are satisfied.

(7) The executive director may grant permission for permittees of non-publicly owned treatment works to submit the information required by 40 Code of Federal Regulations §122.21(g)(10) after the permit expiration date.

(8) After complying with all applicable rules in Chapters 39, 50 and 55 of this title, the commission, without providing an opportunity for a contested case hearing, may act on an application to renew a permit for:

(A) storage of hazardous waste in containers, tanks, or other closed vessels if  
the waste:

(i) was generated on-site; and

(ii) does not include waste generated from other waste transported to the  
site; or

(B) processing of hazardous waste if:

(i) the waste was generated on-site;

(ii) the waste does not include waste generated from other waste  
transported to the site; and

(iii) the processing does not include thermal processing.

(9) If the commission determines that an applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit, the commission shall provide an opportunity to request a contested case hearing.

(b) This section does not apply to applications for renewal of radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules).