The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§39.405, 39.419, and 39.602.

The amendment to §39.405 is adopted *without change* to the proposed text as published in the August 21, 2015, issue of the *Texas Register* (40 TexReg 5228) and will not be republished. Section 39.419 and §39.602 are adopted *with changes* to the proposed text and will be republished.

The amendments to §39.405(g)(3) and §39.419(e)(1) are adopted as revisions to the State Implementation Plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

Concurrently with this adoption, and published in this issue of the *Texas Register*, the commission is adopting revisions to implement Senate Bill (SB) 709 and SB 1267, passed by the 84th Texas Legislature (2015), in 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings. SB 709 is implemented by rules adopted in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9, is implemented by rules adopted in Chapters 1, 50, 55, 70, and 80.

SB 709

SB 709 was passed by the 84th Texas Legislature (2015), with an effective date of September 1, 2015. SB 709 makes several changes to the current contested case hearing (CCH) process for applications for air quality; water quality; municipal solid waste; industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public, or interested groups or associations, who request a CCH must make timely comments on the application to be considered as an affected person. For issues to be eligible for a CCH referred to the State Office of Administrative Hearings (SOAH), the issues must have been raised by the affected person in a comment made by that affected person. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB

709 apply to all applications filed on or after September 1, 2015; this is required until the the rules implementing SB 709 become effective December 31, 2015.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their CCH request has timely and specifically identified, by name and physical address, a member who would be affected in the member's own right. The issues submitted by the commission to SOAH for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named previously.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. SB 709 allows for extensions beyond 180 days based upon agreement of the parties with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For applications directly referred under 30 TAC §55.210, the preliminary hearing may not be held until the executive director has issued his response to public comments.

Section by Section Discussion

In addition to the amendments associated with this rulemaking, the adopted rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically

discussed in this preamble.

§39.405, General Notice Provisions

Subsection (k) is adopted to implement amended Texas Water Code (TWC), §5.115(d) in SB 709, Section 2, which requires the commission to adopt rules to provide for notice of administratively complete applications to be posted on the commission's website and Section 5(a)(1), which specifies that Section 2 applies to permit applications filed on or after the effective date of SB 709, September 1, 2015. In addition, the prior applicability text that referenced the effective date of the section in subsection (g)(3) is updated to provide the precise date of June 24, 2010.

§39.419, Notice of Application and Preliminary Decision

Adopted subsection (a) implements new TWC, §5.5553 in SB 709, Sections 4 and 5(a)(1). For applications filed on or after September 1, 2015, that are subject to a CCH under TWC, §5.556 or §5.557, written notification of the draft permit must be provided to the state senator and state representative of the area at least 30 days prior to the chief clerk's mailing of the executive director's preliminary decision and Notice of Application and Preliminary Decision. At adoption, the commission clarifies that the notification will be provided by the executive director to the elected officials for the area in which the facility is or will be located. In addition, the prior applicability text that referenced the effective date of the section in subsection (e)(1) is updated to provide the precise date of June 24,

2010.

§39.602, Mailed Notice

Subsection (c) is adopted to implement new TWC, §5.5553 in SB 709, Section 4 and Section 5(a)(1) for air quality permit applications. For applications filed on or after September 1, 2015, that are subject to a CCH under TWC, §5.556 or §5.557, written notification of the draft permit will be provided to the state senator and state representative of the area where the facility that is the subject of the application is or will be located at least 30 days prior to the chief clerk's mailing of the executive director's preliminary decision and Notice of Application and Preliminary Decision. At adoption, subsection (c) is revised to clarify that the executive director shall provide written notification, the representative is the state representative, and the notification will be to the elected officials for the area in which the facility is or will be located.

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely

affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments to Chapter 39 are procedural in nature and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they 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, the adopted amendments implement changes made to the TWC in SB 709 by revising procedural rules regarding web-based and mailed notice of permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The adopted amendments to Chapter 39 do not exceed an express requirement of state law or a requirement of a delegation agreement, and were not developed solely under the general powers of the agency, but are authorized by specific sections of the TWC that are cited in the statutory authority

section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment on the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive any comments regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendments to Chapter 39 revise procedural rules regarding web-based and mailed notice of permit applications and are procedural in nature. The changes in procedure will not burden private real property. The adopted amendments do not affect private property in a manner that restricts or limits an owner's right to the property that otherwise exists in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Although the adopted rules do not directly prevent a nuisance or prevent an immediate threat to life or property, the adopted rules do partially fulfill a federal mandate under 42 United States Code, §7410. Consequently, the exemption that applies to these adopted rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will not constitute a taking

under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive any comments regarding the CMP.

Public Comment

The commission held a public hearing on September 15, 2015, at 2:00 p.m. in Austin, Texas, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on September 21, 2015. For the rulemaking project described earlier that amends six chapters of the commission’s rules, the commission received comments from the United States Environmental Protection Agency (EPA); Harris County Pollution Control Services Department (HCPCSD); TCEQ Office of Public Interest Counsel (OPIC); Public Citizen; Sierra Club (individually); Sierra Club, Texas Campaign for the

Environment, and Environmental Integrity Project (SC/TCE/EIP); Texas Association of Manufacturers (TAM); Texas Chemical Council (TCC); Texas Oil and Gas Association (TXOGA); Lone Star Chapter of the Solid Waste Association of North America (TXSWANA); and Water Environment Association of Texas (WEAT) and Texas Association of Clean Water Agencies (TACWA).

Response to Comments

General Comments

Comment

All commenters acknowledged that the rulemaking project was only to implement SB 709 and SB 1267 passed by the 84th Texas Legislature (2015). SC/TCE/EIP and Public Citizen stated that, in general, the proposed rules accurately reflect the legislation being implemented. TCC commends TCEQ's work on the proposed rules. TXOGA supports the implementation of SB 709 and SB 1267. Generally speaking, TAM commented the proposed rule tracks the legislation very closely and supports the rulemaking as proposed, with specific comments for review and consideration.

Response

The commission acknowledges the comments.

Comment

TCC requests TCEQ clarify that any delays in implementation of SB 709, including adoption of the rules, do not adversely impact permit applicants. For example, if online notice is not yet available on the commission website prior to finalization of the rules, this should not create any deficiencies to the applicant, as this is out of the applicant's control.

Response

SB 709 implementation was planned and largely achieved by September 1, 2015, to ensure timely compliance. For example, additional text for both Notice of Receipt of Application and Intent to Obtain Permit (commonly referred to as NORI) and Notice of Application and Preliminary Decision (commonly referred to as NAPD) were drafted and ready for use. The additional legislator notification text was developed, and the accompanying procedures were implemented. Internal procedures were established to track applications subject to SB 709 and to ensure that administratively complete applications are available on the commission's website. In addition, the TCEQ's *Public Participation in Environmental Permitting* webpage for applications filed prior to September 1, 2015, was updated, and a new version was created for applications filed on or after September 1, 2015. SB 709 requires the commission to adopt rules by January 1, 2016; these rules were adopted on December 9, 2015, and will become effective on

December 31, 2015. Therefore, the implementation is complete, and no adverse impacts have been identified nor are any expected.

Comment

HCPCSD is concerned the rulemaking will lessen the public's ability to oppose permitting actions that may negatively impact public health and safety, and the environment. In contrast to the notice and comment process which provides few protections, HCPCSD's experience has shown that the CCH process can be an important and valuable tool in the environmental permitting process. In many instances, more protective permit provisions, in the form of operational improvements, are negotiated during a CCH, and these added provisions minimize the nuisance potential from operations that are either located in an unsuitable location or have a high potential to create particulate or odor nuisances. The result is fewer citizen complaints, notices of violation, and enforcement actions.

Response

No changes were made to the rules in response to this comment. The commission understands that there are benefits to the CCH process but does not agree that the rules compromise the public's ability to oppose permitting actions. The rules do not reduce the amount of public notice provided, nor the opportunity to comment on applications and draft

permits for the permitting programs that are subject to the requirements of SB 709. Public comments are considered in each permitting action.

Comment

HCPCSD requests TCEQ, after evaluating the consequences of this rulemaking, reconsider these rules with the goal of determining and incorporating rules that allow for more public inclusion in the permitting process and actual guaranteed consideration of the public's concerns by the regulated community and TCEQ.

Response

No changes were made to the rules in response to this comment. The adopted rules implement SB 709 and SB 1267, neither of which amends the requirements for the commission to provide notice to the public. Further, the rules do not reduce the amount of public notice provided, nor the opportunity to comment on applications and draft permits for the permitting programs that are subject to the requirements of SB 709. Submitted comments are considered in each permitting action.

SIP revisions

Comment

TCC and TXOGA commented that the CCH and the associated rules are creatures of state law, not federal law. Neither SB 709 nor SB 1267 implicates provisions in Chapter 39

incorporated into Texas' approved SIP. The only proposed revisions to Chapter 39 incorporated into Texas' SIP are entirely non-substantive revisions. TXOGA interprets these changes to be the stylistic, non-substantive changes referenced in TCEQ's preamble, since these changes are not further discussed in the preamble. Further, TCC and TXOGA note the only proposed revisions which would be substantive changes to the rules in Chapter 39 are to subsections of the rules which have never been SIP-approved or which would require SIP approval.

Thus, TCC and TXOGA commented that the proposed substantive revisions to Chapter 39 do not trigger SIP approval from EPA in this rulemaking. In addition, TCC and TXOGA stated there is no compelling reason for the commission to make stylistic and non-substantive changes to Chapter 39 if the commission would submit the changes to EPA for SIP approval. TCC and TXOGA also contend there is no reason to invite regulatory uncertainty from seeking a SIP review or revision of Texas' own process which is not required by federal law or within the purview of EPA.

TAM commented that no part of this rule package requires SIP approval or other federal approval from EPA.

Response

The commission's practice is to submit adopted amendments to existing

rules which are SIP-approved or have been submitted to EPA for SIP approval upon adoption to ensure that the SIP is up to date and to minimize the time of a "SIP gap," i.e., the time during which rules that are effective under state law but not yet acted upon by EPA for inclusion in the SIP. In this rulemaking, the purpose of the amendments to the parts of the rules that will be SIP revisions in §39.405(g)(3) and §39.419(e)(1) is to update the text of the rule, from "the effective date of the rule" to the actual previous effective date of June 24, 2010. Because §39.405 and §39.419 are open for amendment to implement legislation, the commission is acting consistently with its long-standing practice to make any other amendments needed to ensure that the entire section contains clear and accurate text, which is the nature of the amendments to §39.405(g)(3) and §39.419(e)(1). Without these amendments, the reader may not know the effective date of certain subsections of the rules, even if the rules have been in place for several years. The commission disagrees that these amendments invite regulatory uncertainty; on the contrary, they enhance regulatory certainty.

It is also the commission's practice to make stylistic, non-substantive changes in sections when open for proposed substantive changes, although detailed descriptions of these changes are usually not included in the rule preamble. In this rulemaking, the stylistic, non-substantive changes

concern punctuation (changing commas to semicolons) in §39.405(a); removal of the phrase "requirements of" due to redundancy in §39.419(e)(1); and revision of the phrase "Web site" to "website" for rule consistency in §39.419(e)(1).

§39.405, General Notice Provisions

Comment

TCC commented that permit applicants should not be required to undergo an additional notice period if there is a discrepancy in the notice posted on the internet from the mailed notice, or if the commission's website is inaccessible for part of the time during the notice period. Permit applicants should not be harmed by any deficiencies in the notice provided online, as management of the TCEQ website is completely out of their control. Furthermore, members of the public that could be directly impacted by a permit application will continue to receive notice in other traditional forms (i.e., by mail, posted notice). Finally, TCC commented that it is consistent with legislative intent that substantial compliance with this rule be sufficient. Therefore, the commission should clarify that substantial compliance of website notice is sufficient, and the version of the notice used to determine sufficiency of notice is the traditional written notice.

Response

No changes were made to the rule in response to this comment. Adopted

§39.405(k) does not require applicants to provide any additional notice. Rather, the rule merely codifies a specific legislative directive for the commission regarding applications that are considered by the commission to be administratively complete. For the majority of applications for air quality; water quality; municipal solid waste; industrial and hazardous waste; and underground injection control permits, this requirement is satisfied by the posting of notices in the Commissioners' Integrated Database (CID).

Comment

SC/TCE/EIP and Public Citizen commented that the permitting framework set in place by SB 709 makes participation during the public comment period even more critical, since a person must have commented in order to be granted a CCH. In light of this emphasis, the commenters propose the commission remove current obstacles to public participation during the comment period because the current process makes it unnecessarily difficult for the public to even see the application and draft permit that they are expected to comment on. For permit applications, other than solid waste applications, the only means by which the public can inspect an application is by visiting the TCEQ offices or visiting a location in the area where the application is supposed to be available. The commenters stated that, in reality, the public has encountered significant difficulty in inspecting copies of the application either because it is simply not available

as the applicant claims, the personnel at the local repository do not know of the application's existence, or the local repository is not open at hours convenient for the public.

SC/TCE/EIP and Public Citizen contend that in 2015, it makes no sense to force the public to jump through such hurdles to inspect hard copies of information that could be easily made available via the internet. Commenters note that for several years now, applicants for municipal solid waste permits have been required by 30 TAC §330.57(i) to post copies of their applications online. There is no reason that applicants for other types of permits should not be required to take the same simple step. If the public is expected to comment on applications and draft permits, the public should be given a genuine opportunity to view and review the applications and draft permits. Commenters propose an additional subsection be added to §39.405 to require applicants to provide a complete copy of the application, including all revisions and supplements to the application, on a publicly accessible internet website and provide the commission with the web address link for the application materials. In addition, the rule should require the commission to post on its website the identity of all applicants filing such applications and the web address link of the publicly accessible internet website identified by the applicant noting these website postings would be for informational purposes only.

Response

No changes were made to §39.405 in response to this comment. The suggested text would add two requirements that are not directly related to SB 709, for which the commission did not provide an opportunity for comment. Further, the only existing requirement for providing a copy of an application (for municipal solid waste permit applications in §330.57(i)) was adopted in a notice and comment rulemaking, and the commission declines to expand that requirement to other permitting programs without a similar process.

The amendment to TWC, §5.115(d) in SB 709, Section 2, requires TCEQ to provide notice of administratively complete applications on its website. For most air quality; water quality; municipal solid waste; industrial and hazardous waste; and underground injection control permit applications, this is accomplished by the CID, which is searchable and includes the text of the notice of administratively complete applications.

§39.419, Notice of Application and Preliminary Decision, and §39.602, Mailed Notice Comment

TAM and TCC commented that the proposed amendments to §39.419 and §39.602 incorporate the provision of SB 709 in new TWC, §5.5553 which directs the executive director to provide written notice to the state senator and state representative of the area

in which the facility is located at least 30 days before the draft permit is issued. Because SB 709 was never intended to add more time to the existing permitting process at TCEQ, TAM wants to ensure that this notice provision in SB 709 is not interpreted as adding an additional 30 days to the current process. The notice required under SB 709 can be satisfied by the commission simply by informing the appropriate officials at least 30 days in advance of the date on which the draft permit will be issued. The commission should ensure that the mailing of such notices occur concurrent with the permitting process so that compliance with this notification requirement will not cause a delay in finalizing and issuing the draft permit. TAM believes the draft language accomplishes this goal, but registers this comment to ensure that the agency understands the legislative intent of SB 709.

TCC suggests clarifying the language in §39.602 to provide written notification of the draft permit be sent to the state senator and state representative who represent the area for consistency with the statute, TWC §5.5553, as well as in proposed §39.419.

TACWA, WEAT, and TXSWANA commented that SB 709 provides that TCEQ not issue the notice of the draft permit until 30 days after TCEQ provides notice to the state senator and representative of the area in which the facility will be located. Section 39.419 and §39.602 are intended to implement this requirement, but, unlike SB 709, do not specify that TCEQ will mail the notice, and thereby not fully implementing the

legislation. Further, there is no proposed rule specifying when TCEQ is to provide the notice to the state senator and representative. Without a deadline to provide this notice, TCEQ would effectively have no deadline to issue the notice of the draft permit, and therefore, this is contrary to the legislative intent of SB 709.

Response

Section 39.419 and §39.602 were changed from proposal in response to these comments to ensure consistency in the rulemaking and with the statute and the commission's established permitting process. In SB 709, Section 4, new TWC, §5.5553(b), specifies that the executive director must notify legislators and clarifies that notification will be provided to the state representative as well as the state senator. Although the statute requires written notification not later than the 30th day before the commission releases the draft permit, the notification is provided via electronic mail, in compliance with TWC, §5.128(a-2) and (a-3), added by the Texas Legislature in 2011, which requires the commission to utilize electronic means of transmission for any notice issued or sent by the commission to a state senator or representative, unless the senator or representative has requested to receive notice by mail, with an Internet link to an electronic map indicating the location of facility that is the subject of the notice. This notification began in September for applications filed on or after

September 1, 2015.

The commission interprets this new legislative notification as an additional step in the permitting process and intends to include the notification within the established timelines to issue permits. The timelines to process permit applications were established in rule to implement House Bill 5, 70th Texas Legislature (1987). The application review schedule for air quality permit applications is in 30 TAC §116.114. The review schedule for water quality, municipal solid waste, industrial and hazardous waste, and underground injection control permit applications is in Chapter 281, Subchapter A.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS
§39.405, §39.419

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; TWC, §5.128, concerning Electronic Reporting to Commission; Electronic Transmission of Information by Commission; Reduction of Duplicate Reporting; which requires the commission to utilize electronic means of transmission and reduce duplication in reporting; TWC, §5.1733, concerning Electronic Posting of Information, which authorizes the commission to post public information on its website; TWC, Chapter 5, Subchapter M, concerning Environmental Permitting Procedures, which requires the commission to provide notice, provide opportunity for comment and to request a public meeting or contested case hearing (CCH), respond to comments, and directly refer applications requesting a CCH; and TWC, §5.5553,

concerning Notice of Draft Permit, which requires the commission to provide notice of draft permit to certain state officials. The amendments are also adopted under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which authorizes the commission to provide notice of permit applications. Additional relevant sections are Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute of Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

In addition, the amendments to §39.405(g)(3) and §39.419(e) are also adopted under Federal Clean Air Act, 42 United States Code, §§7401, *et seq*., which requires states to

submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The adopted amendments implement TWC, §§5.115, 5.1733, and 5.5553; THSC, §382.012 and §382.056; and Senate Bill 709 (84th Texas Legislature, 2015).

§39.405. General Notice Provisions.

(a) Failure to publish notice. If the chief clerk prepares a newspaper notice that is required by Subchapters G - J, L, and M of this chapter (relating to Public Notice for Applications for Consolidated Permits;[,] Applicability and General Provisions;[,] Public Notice of Solid Waste Applications;[,] Public Notice of Water Quality Applications and Water Quality Management Plans;[,] Public Notice of Injection Well and Other Specific Applications;[,] and Public Notice for Radioactive Material Licenses) 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.

(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 will 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 G - L 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 G - J and L 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 ten 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 or, if the facility is located or proposed to be located in a municipality, the applicant shall publish notice in any newspaper of general circulation in the municipality;

(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 any 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; and

(3) air quality permit applications required by Subchapters H and K of this chapter (relating to Applicability and General Provisions and Public Notice of Air Quality Permit Applications, respectively) to publish notice shall comply with the requirements of §39.603 of this title (relating to Newspaper Notice).

(g) Copy of application. 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 shall indicate in the public file that there is additional information in a confidential file. The copy of the application must 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.

(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 State Office of Administrative Hearings; and

(3) where applicable, for air quality permit applications filed on or after June 24, 2010 [the effective date of this section], the applicant shall also make available the executive director's draft permit, preliminary determination summary and air quality analysis for review and copying beginning on the first day of newspaper publication required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) and remain available until the commission has taken action on the application or the commission refers issues to State Office of Administrative Hearings.

(h) Alternative language newspaper notice.

(1) Applicability. The following are subject to this subsection:

(A) Air quality permit applications [that are declared administratively complete by the executive director on or after September 1, 1999, are subject to this subsection]; and

(B) Permit applications other than air quality permit applications that are required to comply with §39.418 or §39.419 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit; and Notice of Application and Preliminary Decision) that are filed on or after November 30, 2005 [are subject to the requirements of this subsection].

(2) This subsection applies whenever notice is required to be published under §39.418 or §39.419 of this title, 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 has been granted an exception from the requirements to provide the program as provided for in 19 TAC §89.1207(a) (relating to Exceptions and Waivers).

(3) 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.

(4) The notice must 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.

(5) The newspaper or publication must be of general circulation in the county in which the facility is located or proposed to be located. If the facility is located or proposed to be located in a municipality, and there exists a newspaper or publication of general circulation in the municipality, the applicant shall publish notice only in the newspaper or publication in the municipality. This paragraph does not apply to notice required to be published for air quality permits under §39.603 of this title.

(6) For notice required to be published in a newspaper or publication under §39.603 of this title, relating to air quality permits, the newspaper or publication must be of general circulation in the municipality or county in which the facility is located or is proposed to be located, and the notice must be published as follows.

(A) One notice must be published in the public notice section of the newspaper and must comply with the applicable portions of §39.411 of this title (relating to Text of Public Notice).

(B) Another notice with a total size of at least six column inches, with a vertical dimension of at least three inches and a horizontal dimension of at least two column widths, or a size of at least 12 square inches, must be published in a prominent location elsewhere in the same issue of the newspaper. This notice must contain the following information:

(i) permit application number;

(ii) company name;

(iii) type of facility;

(iv) description of the location of the facility; and

(v) a note that additional information is in the public notice section of the same issue.

(7) Waste and water quality alternative language must be published in the public notice section of the alternative language newspaper and must comply with §39.411 of this title.

(8) 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.

(9) Notice under this subsection will only be required to be published within the United States.

(10) Each alternative language publication must follow the requirements of this chapter that are consistent with this subsection.

(11) If a waiver is received under this subsection on an air quality permit application, the applicant shall complete a verification and submit it as required under §39.605(3) of this title (relating to Notice to Affected Agencies). If a waiver is received under this subsection on a waste or water quality application, the applicant shall complete a verification and submit it to the chief clerk and the executive director.

(i) Failure to publish notice of air quality permit applications. If the chief clerk prepares a newspaper notice that is required by Subchapters H and K of this chapter for air quality permit applications 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 (j) 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.

(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 will be exempt from any application fee requirements.

(j) Notice and affidavit for air quality permit applications. When Subchapters H and K of this chapter require an applicant for an air quality permit action 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 ten 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 (i) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

(k) For applications filed on or after September 1, 2015, and subject to providing notice as prescribed by Texas Water Code, §5.115, the commission shall make available on the commission's website notice of administratively complete applications for a permit or license authorized under the Texas Water Code and the Texas Health and Safety Code.

§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) of this section. The chief clerk shall mail the preliminary decision concurrently with the Notice of Application and Preliminary Decision. For applications filed on or after September 1, 2015, this mailing will occur no earlier than 30 days after written notification of the draft permit is provided by the executive director to the state senator and state representative of the area in which the facility which is the subject of the application is or will be located. Then, when this chapter requires notice under this section, notice must 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. The applicant shall also publish the notice under §39.405(h) of this title (relating to General Notice Provisions), if applicable.

(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 (relating to Text of Public Notice).

(e) For air applications the following apply.

(1) Air quality permit applications that are filed on or after June 24, 2010 [the effective date of this section], are subject to this paragraph. Applications filed before June 24, 2010 [the effective date of this section] are governed by the rules as they existed immediately before June 24, 2010 [the effective date of this section], and those rules are continued in effect for that purpose. After technical review is complete for applications subject to the [requirements of] requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title (relating to New Source Review Permits), the executive director shall file the executive director's draft permit and preliminary decision, the preliminary determination summary and air quality analysis, as applicable, with the chief clerk and the chief clerk shall post these on the commission's website [Web site]. Notice of Application and Preliminary Decision must be published as specified in Subchapter K of this chapter (relating to Public Notice of Air Quality Permit Applications) and, as applicable, under §39.405(h) of this title, unless the application is for any renewal application of an air quality permit 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 the application

does not involve a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History).

(2) If notice under this section is required, the chief clerk shall mail notice according to §39.602 of this title (relating to Mailed Notice).

(3) If the applicant is seeking authorization by permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), any application submitted on or before January 1, 2018, shall be subject to the public notice and participation requirements in Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities).

SUBCHAPTER K: PUBLIC NOTICE OF AIR QUALITY PERMIT APPLICATIONS

§39.602

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; TWC, §5.128, concerning Electronic Reporting to Commission; Electronic Transmission of Information by Commission; Reduction of Duplicate Reporting; which requires the commission to utilize electronic means of transmission and reduce duplication in reporting; TWC, Chapter 5, Subchapter M, concerning Environmental Permitting Procedures, which requires the commission to provide notice, provide opportunity for comment and to request a public meeting or contested case hearing (CCH), respond to comments, and directly refer applications requesting a CCH; TWC, §5.5553, concerning Notice of Draft Permit, which requires the

commission to provide notice of draft permit to certain state officials; and TWC, §27.019 concerning Rules, Etc., which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act. The amendment is also adopted under Texas Health and Safety Code (THSC), §361.024, concerning Rules and Standards, which authorizes the commission to adopt rules consistent with THSC, Chapter 361 and establish minimum standards of operation for the management and control of solid waste under THSC, Chapter 361; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which authorizes the commission to provide notice of permit applications. Additional relevant sections are Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute of Rule, which authorizes state agencies to

adopt rules or take other administrative action that the agency deems necessary to implement legislation.

In addition, the amendment to §39.602(c) is also adopted under Federal Clean Air Act, 42 United States Code, §§7401, *et seq*., which requires states to submit State Implementation Plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The adopted amendment implements TWC, §5.5553, THSC, §382.012 and §382.056, and Senate Bill 709 (84th Texas Legislature, 2015).

§39.602. Mailed Notice.

(a) When this chapter requires notice for air quality permit applications, the chief clerk shall mail notice to:

(1) the applicant;

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

(3) persons who filed public comment or hearing requests on or before the deadline for filing public comment or hearing requests; and

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

(b) 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.

(c) For applications filed ~~received~~ on or after September 1, 2015, the executive director shall provide written notification of the draft permit ~~shall be sent~~ to the state senator and state representative who represent the area where the facility which is the subject of the application is or will be located at least 30 days prior to the chief clerk's mailing of the executive director's preliminary decision and Notice of Application and Preliminary Decision.