The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §35.13 and §35.25.

**Background and Summary of the Factual Basis for the Proposed Rules**

The proposed rulemaking is intended to update some of the commission’s procedural rules and is not intended to impose any new procedural or substantive requirements.

In 1999, the 76th Texas Legislature enacted House Bill (HB) 801, which revised public participation in environmental permitting for certain permit applications declared administratively complete on or after September 1, 1999. The rulemaking to implement HB 801 (and other bills) consolidated the public participation rules across the agency which have subsequently been amended to implement legislation and policy decisions of the commission. The commission necessarily retained procedural rules applicable to certain permit applications declared administratively complete before September 1, 1999, and to other actions of the commission.

On June 12, 2019, the commission determined that the rules in 30 TAC Chapter 39, Subchapters A – E; Chapter 50, Subchapters A – C; Chapter 55, Subchapters A and B; and Chapter 80, §§80.3, 80.5, and 80.251 are obsolete and no longer needed because no applications that were declared administratively complete before September 1, 1999, and thus subject to these rules, remain pending with the commission (June 28,
2019, issue of the *Texas Register* (44 TexReg 3304)). As a result, the commission is proposing, in a concurrent rulemaking, to repeal obsolete rules in 30 TAC Chapters 39, 50, 55, and 80 (Rule Project Number 2019-119-039-LS) which then necessitates updating other rules, primarily to remove obsolete text and update cross-references.

As part of this rulemaking, the commission is concurrently proposing amendments in 30 TAC Chapters 33, 39, 55, 60, 70, 80, 90, 205, 285, 294, 305, 321, 330 - 332, 334, 335, and 350, and new sections in Chapter 39, to make necessary changes due to the proposed repeals. In addition, this rulemaking addresses public notice requirements for certain applications that are not subject to contested case hearing but are currently subject to rules in Chapter 39, Subchapters A and B, without regard to the specified date of administrative completeness. The public notice requirements for those applications would be relocated to proposed new Chapter 39, Subchapter P. Sections 35.13 and 33.25 are proposed to be amended by updating cross-references and removing obsolete text.

The commission is also concurrently proposing amendments to 30 TAC Chapters 39, 55, 101, and 116 to make necessary changes due to the proposed repeals for which revisions to the State Implementation Plan are also necessary (Rule Project Number 2019-120-039-LS).
The public's opportunity to participate in the permitting process will not change nor be affected in any way as a result of these rulemaking projects.

Section by Section Discussion

§35.13, Eligibility of Executive Director

The commission proposes to amend §35.13 by updating the cross-reference from §50.41 to §50.141 (Eligibility of Executive Director).

§35.25, Notice and Opportunity for Hearing

The commission proposes to amend §33.25 by updating the cross-reference from §39.7 to §39.407 (Mailing Lists) and by updating the cross-reference from §39.13 to §39.413 (Mailed Notice).

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rulemaking is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rulemaking.

This rulemaking, concurrently proposed with amendments in various other chapters, will update cross-references of rules related to public notice of certain types of permit
Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated will be improved readability and minimized confusion with regard to applicable rules. The rulemaking does not remove or add any current requirements regarding public notice and public participation in certain types of permit applications. The proposed amendments are not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is in effect.

Rural Community Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The rulemaking applies state-wide to all applicants for certain types of permit applications and the public and communities
interested in those applications. These changes will improve readability and minimize confusion with regard to applicable rules.

**Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rulemaking for the first five-year period the proposed rulemaking is in effect. This rulemaking addresses necessary changes in order to update cross-references and remove obsolete language in various procedural and permitting program rules.

**Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years the proposed rulemaking is in effect.

**Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement Assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation
of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does it increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rulemaking should not impact positively or negatively the state's economy.

**Draft 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 proposed amendments of §35.13 and §35.25 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, this rulemaking updates cross-references to ensure there is no confusion regarding the
applicable rules for public participation for certain permit applications.

Texas Government Code, §2001.0225, 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 proposed amendments of §35.13 and §35.25 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 Texas Government Code and the Texas Water Code 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).

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.
Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist 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). The proposed amendments do not directly prevent a nuisance or prevent an immediate threat to life or property. 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 proposed rulemaking and found that it is not a rulemaking identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will the proposed amendments affect any action or authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking is not subject to the Texas Coastal Management Program (CMP).

Written comments on the consistency of this rulemaking with the CMP goals and policies may be submitted to the contact person at the address listed under the
Submittal of Comments section of this preamble.

**Effect on Sites Subject to the Federal Operating Permits Program**

Sections 35.13 and 35.25 are not applicable requirements under 30 TAC Chapter 122 (Federal Operating Permits Program) and, therefore, no effect on sites subject to the Federal Operating Permits program is expected if the commission amends these rules.

**Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on December 10, 2019, at 2:00 p.m. in Building E, Room 201S, at the commission’s central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.
Submittal of Comments

Written comments may be submitted to Paige Bond, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: https://www6.tceq.texas.gov/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2019-121-033-LS. The comment period closes on December 16, 2019. Copies of the proposed rulemaking can be obtained from the commission’s website at https://www.tceq.texas.gov/rules/proposed_adopt.html. For further information, please contact Amy Browning, Environmental Law Division, at (512) 239-0891.
SUBCHAPTER B: AUTHORITY OF EXECUTIVE DIRECTOR

§35.13

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapters L and M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; TWC, §26.011, which authorizes the commission to maintain the quality of water in the state of Texas; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. The amended section is also proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste; THSC, §382.011, which authorizes the commission to control the quality of the state's air; and THSC, §382.017, which authorizes the commission to adopt any rules necessary to carry out its powers and
duties to control the quality of the state's air. In addition, the amendments are also proposed under Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules.

The rulemaking implements TWC, Chapter 5, Subchapters L and M; TWC, §§5.013, 5.102, 5.103, 5.122, 26.011, and 27.019; and THSC, §361.024 and §382.011.

§35.13. Eligibility of Executive Director.

Upon assumption of national pollutant discharge elimination system permit authority, the executive director, or the executive director's representative or representatives, may act under this chapter on Texas pollutant discharge elimination system (TPDES) permits or other TPDES-related approvals only if he or she meets the qualifications set out for the executive director in §50.141 [§50.41] of this title (relating to Eligibility of Executive Director).
SUBCHAPTER C: GENERAL PROVISIONS

§35.25

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapters L and M; TWC, §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director; TWC, §26.011, which authorizes the commission to maintain the quality of water in the state of Texas; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. The amended section is also proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission’s authority to manage solid waste; THSC, §361.017, which provides the commission’s authority to manage industrial solid waste and hazardous municipal waste; THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste; THSC, §382.011, which authorizes the commission to control the quality of the state’s air; and THSC, §382.017, which authorizes the commission to adopt any rules necessary to carry out its powers and duties to control the quality of the state’s air. In addition, the amendments are also
proposed under Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules.

The rulemaking implements TWC, Chapter 5, Subchapters L and M; TWC, §§5.013, 5.102, 5.103, 5.122, 26.011, and 27.019; and THSC, §361.024 and §382.011.

§35.25. Notice and Opportunity for Hearing.

(a) An emergency order under this chapter may be issued with notice and an opportunity for hearing, or without notice and an opportunity for hearing, as provided by this chapter.

(b) If an emergency order is issued under this chapter without a hearing, the order shall set a time and place for a hearing to affirm, modify, or set aside the order to be held before the commission or its designee as soon as practicable after the order is issued.

(c) Except as otherwise provided by this chapter, notice of a hearing to affirm, modify, or set aside an emergency order under this chapter shall be given not later than the tenth day before the date set for the hearing. This notice shall provide that an
affected person may request an evidentiary hearing on issuance of the emergency order.

(d) Temporary orders require a hearing before the issuance of the order. Notice of a hearing on a temporary order shall be given not later than the 20th day before the hearing on the order. This notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary order.

(e) In addition to the notice requirements provided elsewhere in these rules, notice shall be provided as follows.

(1) For water quality temporary orders, notice of a hearing that is held before issuance of the order shall be provided:

(A) by mail to persons requesting public notice of certain applications, in accordance with §39.407 [§39.7] of this title (relating to Mailing Lists) and to persons or agencies identified in §39.413 [§39.13] of this title (relating to Mailed Notice);

(B) by publication by the applicant in a 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 in which the facility is located or proposed to be located, the notice must be published in the newspaper of general circulation in the county in which the facility is located or proposed to be located. The applicant must file an affidavit with the chief clerk certifying facts that constitute compliance with the publication requirements. The deadline to file the affidavit is 15 days after publication of the notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice; and

(C) at least 20 days before the hearing.

(2) For water quality emergency orders, notice of the issuance of the order and the hearing to affirm, set aside, or modify if a hearing is held shall be provided in accordance with paragraph (1)(A) and (C) of this subsection.

(3) For nonhazardous underground injection control (UIC) emergency orders, notice shall be mailed and published at least 30 days before the hearing to affirm, modify, or set aside the emergency order, as is required by Chapter 39 of this title (relating to Public Notice) for notice of a hearing on an application for a UIC permit.
(4) For nonhazardous solid waste emergency orders, notice shall be mailed and published not later than the tenth day before the hearing to affirm, modify, or set aside the emergency order, as is required by Chapter 39 of this title for notice of a hearing on an application for a nonhazardous waste permit.

(5) For hazardous solid waste emergency orders, including UIC emergency orders, notice shall be mailed and published at least 30 days before the hearing to affirm, modify, or set aside the emergency order, as required by Chapter 39 of this title for notice of a hearing on an application for a hazardous waste permit. The commission must also give at least 45 days for public comment before issuing the order.

(6) For suspension of beneficial inflows under Texas Water Code, §11.148, notice shall be published in a newspaper or newspapers of general circulation in the affected area not later than the 15th day before the hearing to all affected persons.

(7) For water utility emergency orders for operation of a utility, notice shall be mailed or hand delivered to the utility not later than the tenth day before the hearing to affirm modify or set aside.
(8) For water utility temporary rate increase orders, notice shall be mailed or delivered to the affected ratepayers not later than the tenth day before the hearing to affirm, modify, or set aside.

(9) For air catastrophe emergency orders, notice shall be published in a newspaper of general circulation in the nearest municipality not later than the tenth day before the hearing.

(10) For generalized condition of air pollution emergency orders, the timing, method, and recipients of notice shall be as practicable under the circumstances.

(11) For radioactive substances emergency orders, notice shall be provided by personal service or certified mail to those named in the order not later than the tenth day before the hearing to affirm, modify, or set aside.

(12) For radioactive material impoundment, notice shall be provided by personal service or certified mail to those named in the order not later than the tenth day before the hearing to affirm, modify, or set aside.
(13) For petroleum storage tank emergency orders, notice shall be provided by certified mail, hand delivery, or if that fails, one time in the Texas Register or published once in the county newspaper not later than the tenth day before the hearing to affirm, modify, or set aside.

(14) For imminent and substantial endangerment emergency orders, notice shall be given by certified mail for hand delivery to the person named in the order, and if that fails, published once in the Texas Register and once in the newspaper of general circulation not later than the tenth day before the hearing to affirm, modify, or set aside.

(15) For on-site sewage and disposal system emergency orders, notice shall be mailed to those in the order not later than ten days before the hearing to affirm, modify, or set aside.

(f) Statutes or rules requiring notice of hearing or setting procedures for the issuance of permits do not apply to a hearing on an emergency order issued under this chapter unless they specifically require notice for an emergency order.

(g) If the commission acts on an application for a temporary order, or the commission or executive director acts on an application for an emergency order, the
chief clerk or the office designated by the executive director shall mail notice of the action to the applicant, the executive director, public interest counsel, and other persons who have filed hearing requests or public comment.