The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §335.21.

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

The proposed rulemaking is intended to update one 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 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, 35, 39, 50, 55, 60, 70, 80, 90, 205, 285, 294, 305, 321, 330 - 332, 334, 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. Section 335.21 is proposed to be amended by updating an obsolete cross-reference.

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 Discussion

§335.21, Procedures for Variances from Classification as a Solid Waste or To Be Classified as a Boiler or for Non-Waste Determinations

The commission proposes to amend §335.21(3) to update the cross-reference from §50.39, which is concurrently proposed for repeal, to §50.139 (Motion to Overturn Executive Director's Decision). Additionally, the commission proposes to amend §335.21(3) to improve readability.

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 rule.

This rulemaking, concurrently proposed with amendments in various other chapters to address necessary rule updates, will update a cross-reference.

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 participation for certain types of
permit applications. The proposed amendment is 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 rulemaking is 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. The change 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 rule is in effect. This rulemaking addresses the removal of an obsolete cross-reference.
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 rule 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 rule 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 amendment of §335.21 is procedural in nature and is
not specifically intended to protect the environment or reduce risks to human health
from environmental exposure, nor does it 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
a cross-reference 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 amendment of §335.21 does not exceed an
express requirement of state law or a requirement of a delegation agreement and was
not developed solely under the general powers of the agency but is 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 amendment of §335.21 does 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 amendment does 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 the proposal is a
rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(4) relating to rules subject to the Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking with 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**

Section 335.21 is not an applicable requirement 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 this rule.

**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/proposal_adopt.html. For further information, please contact Amy Browning, Environmental Law Division, at (512) 239-0891.
§335.21. Procedures for Variances from Classification as a Solid Waste or To Be
The executive director will use the following procedures in evaluating applications for variances from classification as a solid waste, applications to classify particular enclosed flame combustion devices as boilers, and applications for non-waste determinations:

(1) the owner or operator must apply to the executive director for the variance. The application must address the relevant criteria contained in §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste) or §335.20 of this title (relating to Variance To Be Classified as a Boiler);

(2) the owner or operator must apply to the executive director for the non-waste determination. The application must address the relevant criteria referenced in §335.32 of this title (relating to Standards and Criteria for Non-Waste Determinations);

(3) the executive director will evaluate the application and issue a draft notice tentatively granting or denying the application. Notification of this tentative decision will be provided by newspaper advertisement or radio broadcast in the locality where the recycler is located. The executive director will accept comment on the tentative decision for 30 days, and may also hold a public meeting upon request or
at his discretion. The executive director will issue a final decision after receipt of comments and after the public meeting (if any). Any person affected by a final decision of the executive director may file with the chief clerk a motion to overturn [for reconsideration], in accordance with §50.139 [§50.39] of this title (relating to Motion to Overturn Executive Director’s Decision [for Reconsideration]);

(4) in the event of a change in circumstances that affect how a hazardous secondary material meets the relevant criteria contained in §335.19 or §335.20 of this title or §335.32 of this title (relating to Standards and Criteria for Non-Waste Determinations), upon which a variance or non-waste determination has been based, the applicant must send a written description of the change in circumstances to the executive director. The executive director may issue a determination that the hazardous secondary material continues to meet the relevant criteria of the variance or non-waste determination or may require the facility to re-apply for the variance or non-waste determination;

(5) variances and non-waste determinations shall be effective for a fixed term not to exceed ten years. No later than six months prior to the end of this term, owners or operators of facilities must re-apply for a variance or non-waste determination. If an owner or operator of a facility re-applies for a variance or non-waste determination within six months, the owner or operator of the facility may
continue to operate under an expired variance or non-waste determination until receiving a decision on their re-application from the executive director; and

(6) owners or operators of facilities receiving a variance or non-waste determination must provide notification as required by §335.26 of this title (relating to Notification Requirements for Hazardous Secondary Materials).