

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: November 2, 2011

DATE OF REQUEST: October 14, 2011

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Charlotte Horn, (512) 239-0779

CAPTION: Docket No. 2011-1249-RUL. Consideration for publication of, and hearing on, proposed amendments to Section 50.139 in Chapter 50, Action on Applications and Other Authorizations; Sections 55.103, 55.201, 55.203, and 55.256 in Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Sections 80.17, 80.108, 80.109, 80.115, 80.117, 80.131, 80.151, 80.257, and 80.261 in Chapter 80, Contested Case Hearings, of 30 Texas Administrative Code.

The proposed rulemaking would implement House Bill 2694, Article 10, Contested Case Hearings, 82nd Legislature, 2011, Regular Session, which amends the Texas Water Code by adding new Section 5.315, amending Section 5.115(b) and Section 5.228(c) and (d), and by repealing Section 5.228(e), and revises the contested case hearings process. (Janis Hudson) (Rule Project No. 2011-030-080-LS)

Stephanie Bergeron Perdue
Deputy Director

Robert Martinez
Division Director

Charlotte Horn
Agenda Coordinator

Copy to CCC Secretary? NO X YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** October 14, 2011

Thru: Bridget Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Docket No.: 2011-1249-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 50, Action on Applications and Other Authorizations
Chapter 55, Requests for Reconsideration and Contested Case Hearings;
Public Comment;
Chapter 80, Contested Case Hearings
HB 2694 (Article 10): Contested Case Hearings
Rule Project No. 2011-030-080-LS

Background and reason(s) for the rulemaking:

The proposed rulemaking would implement House Bill (HB) 2694, Article 10, Contested Case Hearings, 82nd Legislature, 2011, Regular Session, which amends the Texas Water Code (TWC) by adding new §5.315, amending §5.115(b) and §5.228(c) and (d), and by repealing §5.228(e), which revise the contested case hearings (CCHs) process.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

First, the rule amendments will add the limitation of certain state agencies to contest applications for permits or licenses in the air quality, water, and waste programs. The limitation applies to requesting CCHs or reconsideration by the executive director, as well as appealing the issuance through the administrative process by filing a Motion to Overturn or a Motion for Rehearing. It should be noted that these state agencies, under the proposed rule, may be able to be a party to a CCH on an application at the State Office of Administrative Hearings (SOAH) but will be prohibited from contesting the issuance of the permit or license.

Second, the amendments would revise the role of the executive director in contested case permit hearings. The specific changes are: a) adding language that states the executive director will always be a party to a CCH; b) deleting language that states the executive director's participation is limited to the sole purpose of providing information and replacing it with language stating that the executive director's role is to support the position developed by the executive director in the underlying proceeding; c) repealing the rules which list applications on which the executive director is either a mandatory party or is prohibited from being a party and the factors for the executive director to consider when deciding whether to be a party on applications for which he has

Re: Docket No. 2011-1249-RUL

discretion; and d) omitting language that provides when the executive director can assist certain applicants with the burden of proof.

Third, the rulemaking will add a new deadline for discovery in CCHs in which prefiled testimony is used, except for hearings in which discovery was completed before September 1, 2011, and water and sewer ratemaking proceedings.

B.) Scope required by federal regulations or state statutes:

There is no applicable federal regulation that applies to the changes from HB 2694.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

The amendments are proposed under TWC §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in CCHs; §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to SOAH and §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and CCHs.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and HB 2694, Article 10.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and Article 10 of HB 2694.

Effect on the:

Regulated community: No new group of affected persons, and there will be no fiscal impact.

Re: Docket No. 2011-1249-RUL

Public: No new group of affected persons, and there will be no fiscal impact.

Other State Agencies: Some state agencies will no longer be allowed to contest issuance of a permit or license. No fiscal impact was identified for this change in the law.

Agency programs: Currently, the executive director is a party in most permit application CCHs, and therefore restoration of the requirement for the executive director to participate in all hearings would not affect the number of full-time employees needed for CCHs, or affect the work necessary to send and respond to discovery. This change will not significantly affect staff workload and the agency will use currently available resources to implement the rulemaking, and therefore no fiscal impact will be incurred.

Stakeholder meetings:

No stakeholder meetings were held.

Potential controversial concerns and legislative interest:

Because this rulemaking addresses language in the TCEQ sunset legislation, the agency's implementation will be of interest to the legislature, as well as to the Sunset Advisory Commission.

A potentially controversial issue will be the proposed interpretation of new TWC, §5.315, which states that for hearings that use prefiled written testimony, all discovery must be "completed before the deadline for the submission of that testimony." Although the letter submitted to TCEQ by Representatives Chisum and Smith was considered when developing the proposed changes to §80.151, there may be other interpretations, such as:

- 1) all discovery must be completed before the first party prefiles its testimony; or
- 2) all discovery has to be filed by the date the last party files its prefiled.

Will this rulemaking affect any current policies or require development of new policies?

No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

Rulemaking is necessary for certain rules relating to CCHs to be consistent with the statute, and therefore there are no alternatives to rulemaking to ensure compliance with the statutes.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: November 2, 2011

Anticipated *Texas Register* publication date: November 18, 2011

Public hearing date (if any): December 12, 2011

Commissioners
Page 4
October 14, 2011

Re: Docket No. 2011-1249-RUL

Public comment period: Ends December 19, 2011
Anticipated adoption date: April 11, 2012

Agency contacts:

Janis Hudson, Rule Project Manager and Staff Attorney, 239-0466,
Environmental Law Division
Charlotte Horn, Texas Register Coordinator, 239-0779

Attachments

HB 2694, Article 10 (82nd Legislature, Regular Session)

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Janis Hudson
Charlotte Horn

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §50.139.

Background and Summary of the Factual Basis for the Proposed Rule

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 10 includes changes to the contested case hearings process of the TCEQ.

HB 2694, §10.01 and §10.05(a): Limitations for State Agencies

HB 2694, §10.01 amends Texas Water Code (TWC), §5.115(b) by adding language that a state agency receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission. This section further adds that for the purposes of this subsection, "state agency" does not include a river authority. HB 2694, §10.05(a) provides instructive language regarding the effective date for applicability.

The change to TWC, §5.115(b) provides that state agencies receiving notice under this particular subsection may comment on, but not contest, the issuance of a permit or license issued by the commission. TWC, §5.115(b) lists the general powers and duties of the commission that apply to the commission's air, water, and waste permitting programs. TWC, §5.115(a) specifies that it applies to contested cases arising under the

commission's air, water, or waste programs. Because TWC, §5.115(b) is in Subchapter D and also follows and builds upon TWC, §5.115(a), it is reasonable to conclude that the changes to TWC, §5.115(b) are also intended to apply to contested cases for air quality, water quality, water rights, and waste applications.

HB 2694, §10.02 and §10.04: Executive Director Participation

HB 2694, §10.02 amends TWC, §5.228(c) and (d) to require the executive director to participate as a party in contested case hearings. That section also states that the executive director's role in the hearing is to provide information to complete the administrative record and support the executive director's position developed in the underlying proceeding, and deletes the limitation that the executive director may testify for the sole purpose of providing information to complete the administrative record.

HB 2694, §10.04 deletes TWC, §5.228(e), which prohibited the executive director from assisting a permit applicant in meeting its burden of proof in a hearing at the State Office of Administrative Hearings (SOAH) unless the permit applicant was in a category of permit applicants that the commission had designated as eligible to receive assistance.

HB 2694, §10.03: Discovery

HB 2694, §10.03 adds new TWC, §5.315 which provides that in a contested case hearing

held by SOAH that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony. Further, this section clarifies that water and sewer ratemaking proceedings are exempt from this requirement.

HB 2694, §10.05(b)

HB 2694, §10.05(b) states that the changes in law made in HB 2694, Article 10 apply to proceedings before SOAH that are pending or filed on or after September 1, 2011.

Therefore, the changes in HB 2694, §§10.02 - 10.04 will apply to these contested case hearings.

Proposed Rule Amendments

Implementation of HB 2694, Article 10 includes changes to commission rules in 30 TAC Chapters 50, 55, and 80, and the changes to all chapters are concurrently proposed by the commission under Rule Project Number 2011-030-080-LS. HB 2694, §10.01 and §10.05(a) would be implemented through amendments concurrently proposed to §50.139, Motion to Overturn Executive Director's Decision; §55.103, Definitions; §55.201, Requests for Reconsideration or Contested Case Hearing; §55.203, Determination of Affected Person; §55.256, Determination of Affected Person; §80.109, Designation of Parties; and §80.115, Rights of Parties.

HB 2694, §§10.02, 10.04, and 10.05(b) would be implemented through amendments

concurrently proposed to §80.17, Burden of Proof; §80.108, Executive Director Party Status in Permit Hearings; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.131, Interlocutory Appeals and Certified Questions; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meeting.

HB 2694, §10.03 and §10.05(b) would be implemented through the amendment concurrently proposed to §80.151, Discovery.

Section Discussion

The commission proposes to amend §50.139, Motion to Overturn Executive Director's Decision, by adding language to subsection (a) that states a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 may not file a motion to overturn the executive director's action. As stated in §55.103, the term "state agency" does not include a river authority. This change is necessary to implement HB 2694, §10.01, which made changes to TWC, §5.115(b) by adding language that provides that state agencies, except river authorities, receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

HB 2694 requires the agency to amend its rules concerning the contested case hearing process. This proposed rule would amend Chapter 50 in conjunction with required amendments to Chapters 55 and 80 to implement the provisions of HB 2694. The fiscal impact of the amendments to Chapters 55 and 80 will be detailed in separate, but related fiscal notes. This fiscal note only pertains to the proposed amendment to Chapter 50 which would prohibit certain state agencies (as specified in the proposed the amendment to Chapter 55) from contesting the issuance of a permit or license by filing a motion to overturn the executive director's action.

It is generally uncommon for other state agencies to participate as parties in contested case hearings. Historically, the Texas Parks and Wildlife Department (TPWD) has been the only state agency that has participated as a protesting party in hearings on water right applications, and that participation has been limited to a small number of hearings. Therefore, the proposed amendment to Chapter 50 is not expected to have a significant fiscal impact on TPWD or other state agencies.

The proposed rule will not have a fiscal impact on units of local government since it does not apply to local governments.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law, specifically HB 2694.

The proposed amendment to Chapter 50 would not have a significant fiscal impact on individuals or businesses that apply for a license or permit since the rule only applies to certain state agencies. The historical instances of those agencies participating as protesting parties in a contested case hearing and filing a motion to overturn the executive director's action have been rare. Therefore, any cost reduction that an individual or business might experience as a result of the proposed prohibition is not expected to be significant.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule which prohibits certain state agencies from filing a motion to overturn the executive director's action when issuing a license or permit. A small business is

expected to experience the same fiscal impact as that experienced by individuals or large businesses under the proposed rule.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

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 to Chapter 50 is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendment is procedural in nature and no fiscal impact is expected if the amendment is adopted. Therefore, this rulemaking action does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As 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 powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendment to Chapter 50 is

developed to implement HB 2694. This proposed rulemaking action 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 was specifically authorized under the specific sections listed in the Statutory Authority sections listed elsewhere in this preamble.

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 amendments and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendment is procedural in nature, and therefore promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed amendment 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).

Consistency with the Coastal Management Program

The commission has reviewed this action and found that the action will not adversely affect any applicable coastal natural resource areas identified in the Texas Coastal Management Program. The proposed rule updates the commission's contested case hearing process and does not approve or authorize an action listed in 30 TAC §281.45, Actions Subject to Consistency With the Goals and Policies of the Texas Coastal Management Program.

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

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 12, 2011, at 10:00 a.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. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, 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: <http://www5.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 2011-030-080-LS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466, or Kathy Humphreys, Environmental Law Division, (512) 239-3417.

SUBCHAPTER G: ACTION BY THE EXECUTIVE DIRECTOR

§50.139

Statutory Authority

The amendment is proposed 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 establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

§50.139. Motion to Overturn Executive Director's Decision.

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion to overturn [of] the executive director's action on an application or water quality management plan (WQMP) update certification. A state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title (relating to Definitions), may not file a motion to overturn the executive director's action. Wherever other commission rules refer to a "motion for reconsideration["],_" that term should be considered interchangeable with the term "motion to overturn executive director's decision."

(b) A motion to overturn must be filed no later than 23 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director to the applicant and persons on any required mailing list for the action.

(c) A motion to overturn must be filed no later than 20 days after the date persons who timely commented on the WQMP update are notified of the response to comments and the certified WQMP update. A person is presumed to have been notified on the third day after the date the notice of the executive director's action is mailed by first class mail.

(d) An action by the executive director under this subchapter is not affected by a motion to overturn filed under this section unless expressly ordered by the commission.

(e) With the agreement of the parties or on their own motion, the commission of the general counsel may, by written order, extend the period of time for filing motions to overturn and for taking action on the motions so long as the period for taking action is not extended beyond 90 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.

(f) Disposition of motion.

(1) Unless an extension of time is granted, if a motion to overturn is not acted on by the commission within 45 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director, the motion is denied.

(2) In the event of an extension, the motion to overturn is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.

(g) When a motion to overturn is denied under subsection (f) of this section, a motion for rehearing does not need to be filed as a prerequisite for appeal. Section 80.272 of this title (relating to Motion for Rehearing) and Texas Government Code, §2001.146, regarding motions for rehearing in contested cases do not apply when a motion to overturn is denied. If applicable, the commission decision may be subject to judicial review under Texas Water Code, §5.351, or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§55.103, 55.201, 55.203, and 55.256.

Background and Summary of the Factual Basis for the Proposed Rules

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 10 includes changes to the contested case hearings process of the TCEQ.

HB 2694, §10.01 and §10.05(a): Limitations for State Agencies

HB 2694, §10.01 amends Texas Water Code (TWC), §5.115(b) by adding language that a state agency receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission. This section further adds that for the purposes of this subsection, "state agency" does not include a river authority. HB 2694, §10.05(a) provides instructive language regarding the effective date for applicability.

The change to TWC, §5.115(b) provides that state agencies receiving notice under this particular subsection may comment on, but not contest, the issuance of a permit or license issued by the commission. TWC, §5.115(b) lists the general powers and duties of the commission that apply to the commission's air, water, and waste permitting programs. TWC, §5.115(a) specifies that it applies to contested cases arising under the

commission's air, water, or waste programs. Because TWC, §5.115(b) is in Subchapter D and also follows and builds upon TWC, §5.115(a), it is reasonable to conclude that the changes to TWC, §5.115(b) are also intended to apply to contested cases for air quality, water quality, water rights, and waste applications.

HB 2694, §10.02 and §10.04: Executive Director Participation

HB 2694, §10.02 amends TWC, §5.228(c) and (d) to require the executive director to participate as a party in contested case hearings. That section also states that the executive director's role in the hearing is to provide information to complete the administrative record and support the executive director's position developed in the underlying proceeding, and deletes the limitation that the executive director may testify for the sole purpose of providing information to complete the administrative record.

HB 2694, §10.04 repeals TWC, §5.228(e) which prohibited the executive director from assisting a permit applicant in meeting its burden of proof in a hearing at the State Office of Administrative Hearings (SOAH) unless the permit applicant was in a category of permit applicants that the commission had designated as eligible to receive assistance.

HB 2694, §10.03: Discovery

HB 2694, §10.03 adds new TWC, §5.315 which provides that in a contested case hearing

held by SOAH that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony. Further, this section clarifies that water and sewer ratemaking proceedings are exempt from this requirement.

HB 2694, §10.05(b)

HB 2694, §10.05(b) states that the changes in law made in HB 2694, Article 10 apply to proceedings before SOAH that are pending or filed on or after September 1, 2011. Therefore, the changes in HB 2694, §§10.02 - 10.04 will apply to these contested case hearings.

Proposed Rule Amendments

Implementation of HB 2694, Article 10 includes changes to commission rules in 30 TAC Chapters 50, 55, and 80, and the changes to all chapters are concurrently proposed by the commission under Rule Project Number 2011-030-080-LS. HB 2694, §10.01 and §10.05(a) would be implemented through amendments concurrently proposed to §50.139, Motion to Overturn Executive Director's Decision; §55.103, Definitions; §55.201, Requests for Reconsideration or Contested Case Hearing; §55.203, Determination of Affected Person; §55.256, Determination of Affected Person; §80.109, Designation of Parties; and §80.115, Rights of Parties.

HB 2694, §§10.02, 10.04, and 10.05(b) would be implemented through amendments concurrently proposed to §80.17, Burden of Proof; §80.108, Executive Director Party Status in Permit Hearings; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.131, Interlocutory Appeals and Certified Questions; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meeting.

HB 2694, §10.03 and §10.05(b) would be implemented through an amendment concurrently proposed to §80.151, Discovery.

Section by Section Discussion

The commission proposes amendments to §§55.103, 55.201, 55.203, and 55.256 to implement HB 2694, §10.01 and §10.05(a), which made changes to TWC, §5.115(b) by adding language that provides that state agencies, except river authorities, receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission.

The commission proposes to amend §55.103, Definitions, by adding text that limits the state agencies who may be affected persons. Specifically, the changes provide that state agencies, except river authorities, who may be affected persons and receive notice of applications for applications filed on or after September 1, 2011, are prohibited by law

from contesting the commission's issuance of a permit or license.

The commission proposes to amend §55.201, Requests for Reconsideration or Contested Case Hearing, by adding language to subsections (e) and (h) that would prohibit state agencies, except river authorities, from filing a request for reconsideration or motion for rehearing.

The commission proposes to amend §55.203(b), Determination of Affected Person, by adding language that provides that state agencies that may be affected persons are prohibited by law from contesting a permit or license as set forth in §55.103.

The commission proposes to amend §55.256(b), Determination of Affected Person, by adding language that provides that state agencies that may be affected persons are prohibited by law from contesting a permit or license as set forth in §55.103.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules.

HB 2694 requires the agency to amend its rules concerning the contested case hearing process. These proposed rules would amend Chapter 55 in conjunction with required amendments to Chapter 50 and Chapter 80 to implement the provisions of HB 2694. The fiscal impact of amendments to Chapters 50 and 80 will be detailed in separate, but related fiscal notes. This fiscal note only pertains to the proposed amendments to Chapter 55 which would add language to several sections to: provide that state agencies may not contest the issuance of a permit or license; exclude state agencies from filing a motion to overturn a request for reconsideration or a motion for a rehearing; and provide that state agencies that may be an affected person are prohibited by law from contesting a permit or license as set forth in TWC, §55.103. The proposed rules do not apply to river authorities per HB 2694.

It is generally uncommon for other state agencies to participate as parties in contested case hearings. Historically, the Texas Parks and Wildlife Department (TPWD) has been the only state agency that has participated as a protesting party in hearings on water right applications, and that participation has been limited to a small number of hearings. Therefore, the proposed amendments to Chapter 55 are not expected to have a significant fiscal impact on TPWD or other state agencies.

The proposed rules will not have a fiscal impact on units of local government since it does not apply to local governments.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law, specifically HB 2694.

The proposed amendments to Chapter 55 would not have a significant fiscal impact on individuals or businesses that apply for a license or permit since the rules only apply to state agencies. The historical instances of agencies participating as protesting parties in a contested case hearing and filing a motion to overturn the executive director's action have been rare. Therefore, any cost reduction that an individual or business might experience as a result of the proposed prohibition is not expected to be significant.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. A small business is expected to experience the same fiscal impact as that experienced by individuals or large businesses under the proposed rules.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are

required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

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 to Chapter 55 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the proposed rulemaking is to implement HB 2694, which made

changes to the commission's contested case hearings process. The proposed amendments are procedural in nature and no fiscal impact is expected if these amendments are adopted. Therefore, this rulemaking action does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As 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 powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to Chapter 55 were developed to implement HB 2694. This proposed rulemaking action 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 was specifically authorized under the specific sections listed in the Statutory Authority sections listed elsewhere in this preamble.

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 amendments and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendments are procedural in nature, and therefore promulgation and enforcement of the proposed rulemaking will not burden private real property. 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).

Consistency with the Coastal Management Program

The commission has reviewed this action and found that the action will not adversely affect any applicable coastal natural resource areas identified in the Texas Coastal Management Program. The proposed rules update the commission's contested case hearing process and do not approve or authorize an action listed in 30 TAC §281.45,

Actions Subject to Consistency With the Goals and Policies of the Texas Coastal
Management Program.

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

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 12,
2011, at 10:00 a.m. in Building B, 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. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, 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: <http://www5.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 2011-030-080-LS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466, or Kathy Humphreys, Environmental Law Division, (512) 239-3417.

SUBCHAPTER D: APPLICABILITY AND DEFINITIONS

§55.103

Statutory Authority

The amendment is proposed 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 establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC; §5.556, concerning Request for Reconsideration or

Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

§55.103. Definitions.

The following words and terms, when used in Subchapters D - G of this chapter (relating to Applicability and Definitions; Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications) shall have the following meanings. Affected person--A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An

interest common to members of the general public does not qualify as a personal justiciable interest. The determination of whether a person is affected shall be governed by §55.203 of this title (relating to Determination of Affected Person), or, if applicable under §55.256 of this title (relating to Determination of Affected Person). A state agency, except a river authority, who may be an affected person is prohibited by law from contesting applications for the issuance, amendment, extension, or renewal of a permit or license received by the commission on or after September 1, 2011.

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR CONTESTED
CASE HEARING
§55.201, §55.203**

Statutory Authority

The amendments are proposed 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 establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or

Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, and may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime

telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

(e) Any person, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this chapter (relating to Definitions), may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk

shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, [and] the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this chapter, who was provided notice as required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program); or

(C) amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may hold a contested case hearing if the application involves a facility for which the applicant's

compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(a)(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant
public comment has been given; and

(E) the applicant's compliance history for the previous five years
raises no issues regarding the applicant's ability to comply with a material term of the
permit;

(6) an application for a Class I injection well permit used only for the
disposal of nonhazardous brine produced by a desalination operation or nonhazardous
drinking water treatment residuals under Texas Water Code, §27.021, concerning
Permit for Disposal of Brine From Desalination Operations or of Drinking Water
Treatment Residuals in Class I Injection Wells;

(7) the issuance, amendment, renewal, suspension, revocation, or
cancellation of a general permit, or the authorization for the use of an injection well
under a general permit under Texas Water Code, §27.023, concerning General Permit
Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from
Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

(8) an application for a pre-injection unit registration under §331.17 of this title (relating to Pre-Injection Units Registration);

(9) an application for a 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), if the application was submitted on or before January 1, 2018;

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(11) an application for a production area authorization that is submitted after September 1, 2007, unless the application for the production area authorization seeks:

(A) an amendment to a restoration table value in accordance with the requirements of §331.107(g) of this title (relating to [Amendment of] Restoration [Table Values]);

(B) the initial establishment of monitoring wells for any area covered by the authorization, including the location, number, depth, spacing, and design

of the monitoring wells, unless the executive director uses the recommendations of an independent third-party expert as provided in §331.108 of this title (relating to Independent Third-Party Experts); or

(C) an amendment to the type or amount of financial assurance required for aquifer restoration, or by Texas Water Code, §27.073, to assure that there are sufficient funds available to the state to utilize a third-party contractor for aquifer restoration or plugging of abandoned wells in the area. Adjustments solely associated with the annual inflation rate adjustment required under §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates), or for adjustments due to decrease in the cost estimate for plugging and abandonment of wells when plugging and abandonment has been approved by the executive director in accordance with §331.144 of this title (relating to Approval of Plugging and Abandonment) are not considered an amendment to the type or amount of financial assurance required for aquifer restoration or well plugging and abandonment.

§55.203. Determination of Affected Person.

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by

the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons. State agencies that may be affected persons are prohibited by law from contesting a permit or license as set forth in §55.103 of this chapter (relating to Definitions).

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

**SUBCHAPTER G: REQUESTS FOR CONTESTED CASE HEARING AND
PUBLIC COMMENT ON CERTAIN APPLICATIONS**

§55.256

Statutory Authority

The amendment is proposed 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 establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or

Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

§55.256. Determination of Affected Person.

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered

affected persons. State agencies that may be affected persons are prohibited by law from contesting a permit or license as set forth in §55.103 of this chapter (relating to Definitions).

(c) All relevant factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health, safety, and use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§80.17, 80.108, 80.109, 80.115, 80.117, 80.131, 80.151, 80.257 and 80.261.

Background and Summary of the Factual Basis for the Proposed Rules

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 10 includes changes to the contested case hearings process of the TCEQ.

HB 2694, § 10.01 and §10.05(a): Limitations for State Agencies

HB 2694, §10.01 amends Texas Water Code (TWC), §5.115(b) by adding language that a state agency receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission. This section further adds that for the purposes of this subsection, "state agency" does not include a river authority. HB 2694, §10.05(a) provides instructive language regarding the effective date for applicability.

The change to TWC, §5.115(b) provides that state agencies receiving notice under this particular subsection may comment on, but not contest, the issuance of a permit or license issued by the commission. TWC, §5.115(b) is part of Subchapter D, which lists the general powers and duties of the commission that apply to the commission's air,

water and waste permitting programs. TWC, §5.115(a) specifies that it applies to contested cases arising under the commission's air, water, or waste programs. Because TWC, §5.115(b) is in Subchapter D and also follows and builds upon TWC, §5.115(a), it is reasonable to conclude that the changes to TWC, §5.115(b) are also intended to apply to contested cases for air quality, water quality, water rights and waste applications.

HB 2694, §10.02 and §10.04: Executive Director Participation

HB 2694, §10.02 amends TWC, §5.228(c) and (d), to require the executive director to participate as a party in contested case hearings. That section also states that the executive director's role in the hearing is to provide information to complete the administrative record and support the executive director's position developed in the underlying proceeding, and deletes the limitation that the executive director may testify for the sole purpose of providing information to complete the administrative record.

HB 2694, §10.04 removes TWC, §5.228(e) which prohibited the executive director from assisting a permit applicant in meeting its burden of proof in a hearing at the State Office of Administrative Hearings (SOAH) unless the permit applicant was in a category of permit applicants that the commission had designated as eligible to receive assistance.

HB 2694, §10.03: Discovery

HB 2694, §10.03 adds new TWC, §5.315 which provides that in a contested case hearing held by SOAH that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony. Further, this section clarifies that water and sewer ratemaking proceedings are exempt from this requirement.

HB 2694, §10.05(b)

HB 2694, §10.05(b) states that the changes in law made in HB 2694, Article 10 apply to proceedings before SOAH that are pending or filed on or after September 1, 2011.

Therefore, the changes in HB 2694, §§10.02 - 10.04 will apply to these contested case hearings.

Proposed Rule Amendments

Implementation of HB 2694, §Article 10 includes changes to commission rules in 30 TAC Chapters 50, 55, and 80, and the changes to all chapters are concurrently proposed by the commission under Rule Project Number 2011-030-080-LS. HB 2694, §10.01 and §10.05(a) would be implemented through amendments concurrently proposed to §50.139, Motion to Overturn Executive Director's Decision; §55.103, Definitions; §55.201, Requests for Reconsideration or Contested Case Hearing; §55.203, Determination of Affected Person; §55.256, Determination of Affected Person; §80.109, Designation of Parties; and §80.115, Rights of Parties.

HB 2694, §§10.02, 10.04, and 10.05(b) would be implemented through amendments concurrently proposed to §80.17, Burden of Proof; §80.108, Executive Director Party Status in Permit Hearings; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.131, Interlocutory Appeals and Certified Questions; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meeting.

HB 2694, §10.03 and §10.05(b) would be implemented through amendments concurrently proposed to §80.151, Discovery.

Section by Section Discussion

§80.17, Burden of Proof

The commission proposes to amend §80.17 by deleting subsection (e), which requires the executive director to comply with §80.108, which is proposed for amendment as discussed elsewhere in this preamble. Specifically, this text is no longer necessary because the executive director will always be a party in contested case hearings. This change is necessary to implement HB 2694, §10.04.

§80.108, Executive Director Party Status in Permit Hearings

The commission proposes to amend §80.108 by deleting current subsections (a) - (c) and (e) - (m). Subsections (a) - (c) list the types of applications for which the executive

director is either a mandatory party or is prohibited from being a party and the factors for the executive director to consider when deciding whether to be a party on applications for which he has discretion. Subsection (e) provides that the executive director may not assist an applicant in meeting its burden of proof, unless the applicant is eligible to receive assistance. Subsections (f) - (m) concern the executive director's decisions regarding party participation and documentation of those decisions.

Existing subsection (d) would remain as the sole text of this section. In addition, the language is proposed to be amended by deleting text that states that the executive director's participation is limited to the sole purpose of providing information. New language is proposed to be added that states that the executive director is a party in all contested case hearings regarding permitting matters, and his role is to support the position developed by the executive director in the underlying proceeding. These changes are necessary to implement HB 2694, §10.02, 10.04 and §10.05(b).

§80.109, Designation of Parties

The commission proposes to amend §80.109 by removing language in subsection (a) that provides that the executive director can be named a party after parties are designated at the preliminary hearing. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party. TWC, §5.228(c) is also implemented through a proposed change

to subsection (b)(2).

The commission proposes to amend subsection (b)(5) by adding text that provides that state agencies that may be affected persons are prohibited by law from contesting a permit or license as set forth in §55.103. In addition, the commission proposes to amend subsection (b)(6) and (7) which provides that the Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status, and that the Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status, by adding language to both paragraphs that provides that these two agencies may not contest the issuance of an application or license. These changes are needed to implement HB 2694, §10.01 and §10.05(a) which amended TWC, §5.115(b), which provides that a state agency that receives notice under TWC, §5.115(b) may submit comments to the commission in response to the notice but may not contest the issuance of a permit or license by the commission.

§80.115, Rights of Parties

The commission proposes to amend §80.115(a) by adding text that would provide that §80.109, as proposed to be amended in this rulemaking, would limit certain parties' rights in a hearing. This change is needed to implement HB 2694, §10.01 and §10.05(a) which amended TWC §5.115(b), which provides that a state agency that receives notice

under TWC, §5.115(b) may submit comments to the commission in response to the notice but may not contest the issuance of a permit or license by the commission.

§80.117, Order of Presentation

The commission proposes to amend §80.117(b) by deleting a reference to the executive director if named as a party. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party.

§80.131, Interlocutory Appeals and Certified Questions

The commission proposes to amend §80.131(c) by deleting text regarding service to and responses from the executive director when the executive director does not participate as a party in a contested case hearing. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party.

§80.151, Discovery Generally

The commission proposes to amend §80.151 by designating existing text as subsection (a) and adding proposed subsections (b) and (c) which would establish requirements for discovery in contested case hearings using prefiled testimony. This change is necessary to implement HB 2694, §10.03 and §10.05(b).

Proposed subsection (b) would require that in hearings using prefiled testimony, except for hearings on water and sewer ratemaking, all discovery must be completed before the deadline to submit the prefiled testimony. Hearings in which prefiled testimony was used but in which discovery was completed before September 1, are also excluded from the new requirements of proposed subsection (b). When the deadline for prefiled testimony is the same date for all parties, the discovery deadline would be the same for all parties.

Proposed subsection (b) would not mandate that all prefiled deadlines must be on the same day for a particular party. If the date for submission of prefiled testimony varies by party the deadline for completing discovery must also vary by party, however, all parties are under the continuing duty to supplement their discovery responses as required by the Texas Rules of Civil Procedure 193.5 and 195.6. The proposed rule does not mandate how the schedule for prefiled testimony must be structured, provided it comports with §80.117. For example, upon agreement of the parties in a permitting matter, the schedule may allow for the applicant's prefiled testimony to be staggered by witness to accommodate the additional burden of concurrently responding to discovery and preparing prefiled testimony. The proposed rule is not intended to allow parties to circumvent full participation in the discovery process by submitting prefiled testimony prior to the date specified by the Administrative Law Judge, thereby limiting the time

available for depositions. Additionally, this rule does not mandate prefiled testimony in hearings, nor does it mandate a change to the discovery requirements in hearings that do not use prefiled testimony.

Furthermore, the proposed amendment to §80.151 does not prohibit parties from entering into Texas Rules of Civil Procedures, Rule 11 agreements regarding modifications to §80.151 for good cause or prohibit a party from requesting that the Administrative Law Judge require that an expert's factual observations, tests, supporting data, calculations, photographs, or opinions be reduced to a tangible form as allowed by the Texas Rules of Civil Procedure 195.5.

Representatives Wayne Smith and Warren Chisum sent a letter to TCEQ Executive Director Mark Vickery dated August 5, 2011, to express clarification and purposes of the legislative intent of HB 2694, §10.03 (new TWC, §5.315). The letter provides that in cases where all parties share the same deadline for prefiled testimony, there should be a single discovery deadline applicable to all parties in the cases. Further, the letter specifically states that the "underlying intent of this legislation is to establish that once a party submits prefiled testimony in a contested case before SOAH, that party is no longer subject to discovery from other parties in the case." The commission considered this information in proposing the changes to §80.151.

Proposed subsection (b)(1) would provide that this subsection is applicable to hearings on applications that are subject to the jurisdiction of SOAH on or after September 1, 2011, with three exceptions. Those exceptions are contested case hearings using prefiled testimony where all discovery was completed before September 1, 2011, water ratemaking proceedings, and sewer ratemaking proceedings.

Proposed subsection (b)(2) would provide that all discovery must be completed before the deadline to submit the prefiled testimony. Proposed subsection (b)(3) would require a single deadline for completion of discovery for all parties in cases where all parties share the same deadline for prefiled testimony.

Proposed subsection (b)(4) would provide that the deadline to complete discovery shall correspond to the final deadline for that party to submit all of its prefiled testimony in cases where parties have different deadlines for the submission of prefiled testimony. In cases where a party has staggered deadlines for prefiling its written testimony, then the deadline for that party is the last date for filing prefiled testimony. In addition, after the deadline for a party to submit all of its prefiled testimony in a contested case, that party would no longer be subject to discovery from other parties in the case.

Proposed subsection (b)(5) would state that the requirements of this subsection do not relieve a party's duty to supplement its discovery responses as required by Texas Rules

of Civil Procedure 193.5 and 195.6.

Proposed subsection (c) would provide that all other contested case hearings, including those for which discovery has been completed before September 1, 2011, are governed by §80.151 as it existed immediately before the effective date of this section and the rule is continued in effect for that purpose.

§80.257, Pleadings Following Proposal for Decision

The commission proposes to amend §80.257 by deleting the second sentence of subsection (a), which provides that the commission or general counsel may request that the executive director file briefs concerning legal or policy issues in contested cases in which the executive director has not participated as a party. This change is necessary to implement HB 2694, §10.02, which amended TWC, §5.228(c) and (d).

§80.261, Scheduling Commission Meetings

The commission proposes to amend §80.261(a) by deleting text regarding notification of commission meetings that applies when the executive director does not participate as a party in a contested case hearing. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules.

HB 2694 requires the agency to amend its rules concerning the contested case hearing process. These proposed rules would amend Chapter 80 in conjunction with required amendments to Chapters 50 and 55 to implement the provisions of HB 2694. The fiscal impact of amendments to Chapters 50 and 55 will be detailed in separate, but related fiscal notes. This fiscal note only pertains to the proposed amendments to Chapter 80 which would revise the role of the executive director in contested case hearings; would state that the executive director will always be a party to a contested case hearing; would repeal the executive director participation rules; and would repeal the rule that stipulates when the executive director could assist certain applicants with burden of proof. The proposed rules would also add a new deadline for discovery in contested case hearings where prefiled testimony is used. The new deadline for discovery would not apply to hearings for which discovery was completed by September 1, 2011 nor would it apply to water and sewer ratemaking proceedings. The proposed rules will also specify that state agencies that may be affected persons are prohibited by law from contesting a permit or license as set forth in §55.103.

The proposed requirements for executive director participation and for conducting discovery in contested case hearings are not expected to have a significant fiscal impact for the agency since the executive director is a party in most permit application hearings and since discovery rules only change the timeline for completion of discovery and do not expand or limit discovery. The agency and other parties will continue to have the same duty as they currently do under the Texas Rules of Civil Procedure to supplement their discovery responses as needed to accurately reflect the facts and provide pertinent data.

Since the scope of the proposed rules concerns the role of the executive director in contested case hearings and since they do not expand or limit rules concerning discovery, units of local government are not expected to experience any significant fiscal impact as a result of the proposed rules.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law, specifically HB 2694.

The proposed amendments to Chapter 80 would not have a significant fiscal impact on

individuals or businesses that apply for a license or permit since the scope of the rules concerns the role of the executive director in contested case hearings and since they do not expand or limit rules concerning discovery. Individuals and businesses would continue to have the same duty as they do currently under the Texas Rules of Civil Procedure to supplement their discovery responses in contested case hearings as needed. The proposed rules are not expected to change the practices of an individual or business when participating as a party in a contested case hearing.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. A small business is expected to experience the same fiscal impact as that experienced by individuals or large businesses under the proposed rules.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local

employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

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 to Chapter 80 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendments are procedural in nature and no fiscal impact is expected if these amendments are adopted. Therefore, this rulemaking action does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As 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 powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to Chapter 80 were developed to implement HB 2694. This proposed rulemaking action 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 was specifically authorized under the specific sections listed in the Statutory Authority sections listed elsewhere in this preamble.

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 amendments and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendments are procedural in nature, and therefore promulgation and enforcement of the proposed rulemaking will not burden private real property. 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).

Consistency with the Coastal Management Program

The commission has reviewed this action and found that the action will not adversely affect any applicable coastal natural resource areas identified in the Texas Coastal Management Program. The proposed rules update the commission's contested case hearing process and do not approve or authorize an action listed in 30 TAC §281.45, Actions Subject to Consistency With the Goals and Policies of the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the

contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 12, 2011, at 10:00 a.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. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, 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: <http://www5.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 2011-030-080-LS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466, or Kathy Humphreys, Environmental Law Division, (512) 239-3417.

SUBCHAPTER A: GENERAL RULES

§80.17

Statutory Authority

The amendment is proposed 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 establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

§80.17. Burden of Proof.

(a) The burden of proof is on the moving party by a preponderance of the evidence, except as provided in subsections (b) - (d) of this section.

(b) Section 291.12 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding involving a proposed change of water and sewer rates not governed by Chapter 291, Subchapter I of this title (relating to Wholesale Water or Sewer Service).

(c) Section 291.136 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding related to a petition to review rates changed pursuant to a written contract for the sale of water for resale filed under Texas Water Code, Chapter 11 or 12, and in an appeal under Texas Water Code, §13.043(f).

(d) In an enforcement case, the executive director has the burden of proving by a preponderance of the evidence the occurrence of any violation and the appropriateness of any proposed technical ordering provisions. The respondent has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. Any party submitting facts relevant to the factors prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty has the burden of proving those facts by a preponderance of the evidence.

[(e) In permitting matters, the executive director shall comply with the requirements of §80.108 of this title (relating to Executive Director Party Status in Permit Hearings).]

SUBCHAPTER C: HEARING PROCEDURES
§§80.108, 80.109, 80.115, 80.117, 80.131

Statutory Authority

The amendments are proposed 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 establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration

and contested case hearings.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

§80.108. Executive Director Party Status in Permit Hearings.

[(a) Except to the extent superseded by subsection (b) of this section, the executive director shall not participate as a party in the following contested case hearings concerning permitting matters:]

[(1) an application concerning municipal solid waste where land use is the sole issue at hearing, including hearings held for determination of land use compatibility under Texas Health and Safety Code (THSC), §361.069;]

[(2) an application for an air quality standard permit to authorize a concrete batch plant under THSC, §382.05195;]

[(3) an application for an air quality permit to authorize emissions from facilities which solely emit the types of emissions that do not require health and welfare effects review as specified on the Toxicology and Risk Assessment (TARA) Section Emissions Screening List;]

[(4) an application for a permit for a municipal solid waste transfer facility under §330.7 of this title (relating to Permit Required);]

[(5) an application for a permit for the processing of grit and grease trap waste under §330.7 of this title;]

[(6) an application for a permit for composting facilities under §332.3 of this title (relating to Applicability); and]

[(7) an application to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements for secondary treatment in Chapter 309 of this title (relating to Domestic Wastewater Effluent Limitation and Plant Siting).]

[(b) The executive director shall participate as a party in the following contested case hearings relating to permitting matters:]

[(1) an application concerning water rights;]

[(2) an application for which the executive director has recommended denial of the permit;]

[(3) an involuntary amendment; and]

[(4) an application for which the draft permit includes provisions opposed by the applicant.]

[(c) For permitting matters not included in subsections (a) or (b) of this section, the executive director shall, on a case-by-case basis, consider the following criteria in the manner specified in determining whether to participate as a party.]

[(1) The executive director shall, as a preliminary matter, determine whether there is any issue to be presented in the hearing that merits participation of the executive director, based on the existence of one or more of the following:]

[(A) one or more of the issues to be presented in the hearing are new, unique, or complex, including consideration of whether an issue relates to more than one medium, and whether it is likely that construction of prior agency policy or practice will be involved;]

[(B) it is likely that the decision on any of the issues to be presented in the hearing will have significant implications for other agency actions or policies;]

[(C) it is likely that changes to proposed permit conditions could adversely affect human health or the environment; or]

[(D) any issue to be considered is likely to affect federal program approval or authorization.]

[(2) If the executive director finds that there are issues weighing in favor of participation under paragraph (1) of this subsection, the executive director may elect to participate as a party or he may also consider the following factors in the manner described:]

[(A) whether there is a significant disparity in the experience and resources of the parties. A significant disparity weighs in favor of executive director participation. In evaluating whether there is a significant disparity, the executive director shall consider:]

[(i) the legal capacity of the parties, based on whether any party is not represented by counsel and the prior contested case hearing experience of the parties at the agency;]

[(ii) the financial capacity of the parties, including documentation or evidence of financial disparity if offered by any party, and including whether any party is:]

[(I) a qualifying local governmental entity;]

[(II) a non-profit entity; or]

[(III) a small business; and]

[(iii) the technical capacity of the parties, including an evaluation of:]

[I] the number and complexity of the administrative and technical notices of deficiency issued during the administrative and technical review of the application;]

[II] the number and complexity of the technical issues raised by parties to the hearing during the comment period or at the preliminary hearing; and]

[III] whether any of the parties does not have access to a technical expert; and]

[B] whether there are limitations on the availability of agency staff, including specialized staff expertise on the issues to be presented at hearing, which shall weigh against executive director participation; and]

[C] whether the draft permit contains any provision that has been included by the executive director to address an applicant's compliance history, which shall weigh in support of executive director participation.]

[(d)] The executive director is a party in all contested case hearings concerning permitting matters. The executive director's participation [as a party under subsection (b) or (c) of this section] shall be [for the sole purpose of providing information] to complete the administrative record and support the executive director's position developed in the underlying proceeding.

[(e) When the executive director participates as a party in a contested case hearing concerning a permitting matter before the commission or SOAH, the executive director may not assist an applicant in meeting its burden of proof unless the applicant is eligible to receive assistance because:]

[(1) the applicant is a qualifying local governmental entity; or]

[(2) the applicant is a non-profit entity; and]

[(3) there is a significant public need for the permitting action to avoid adverse impact to human health or the environment.]

[(f) The executive director may elect to participate as a party for the purpose of assisting an applicant in meeting its burden of proof in accordance with subsection (e) of this section notwithstanding the provisions of subsections (a) - (d) of this section.]

[(g) The executive director must notify all parties and the SOAH judge of his intention to participate as a party to a contested case hearing concerning a permitting matter in writing or on the record as soon as practicable, but not later than one week after the end of the preliminary hearing.]

[(h) The executive director's decision on participation as a party in contested case hearing concerning a permitting matter and the executive director's decision on whether an applicant is eligible to receive assistance in accordance with subsection (e) of this section are not subject to review by the commission or SOAH].

[(i) This section does not apply to matters in which the executive director is a party in accordance with §80.109(b)(1) of this title (relating to Designation of Parties).]

[(j) For purposes of this section:]

[(1) "qualifying local governmental entity" means a district, authority, county, or municipality that demonstrates that it lacks the technical, legal, and financial resources to support its application in the contested case hearing process; and]

[(2) "small business" means a small business as defined by §70.9(b)(1) and (2) of this title (relating to Installment Payment of Administrative Penalty).]

[(3) "non-profit entity" shall mean those entities which are defined in 26 United States Code, §501(c)(3) and (4).]

[(k) The executive director shall record his decision on party participation and the grounds for his decision under this section on a case-by-case basis.]

[(l) The executive director shall on an annual basis compile the records required by subsection (k) of this section and present this information to the commission in a written report.]

[(m) Notwithstanding the requirements of subsections (a) and (c) of this section regarding executive director party participation, the executive director shall participate as a party if directed to do so by the commission.]

§80.109. Designation of Parties.

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party,

a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no person [other than the executive director, as provided in §80.108 of this title (relating to Executive Director Party Status in Permit Hearings),] will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed.

(b) Parties.

(1) The executive director is a mandatory party to all commission proceedings concerning matters in which the executive director bears the burden of proof, and in the following commission proceedings:

(A) matters concerning Texas Water Code (TWC), §§11.036, 11.041, and 12.013; TWC, Chapters 13, 35, 36, and 49 - 66; and Texas Local Government Code, Chapters 375 and 395;

(B) matters arising under Texas Government Code, Chapter 2260 and Chapter 11, Subchapter D of this title (relating to Resolution of Contract Claims);
and

(C) matters under TWC, Chapter 26, Subchapter I, and Chapter 334, Subchapters H and L of this title (relating to Reimbursement Program and Overpayment Prevention).

(2) In addition to subsection (b)(1) of this section, the executive director is always [may also be] a party in contested case hearings concerning permitting matters, pursuant to, and in accordance with, the provisions of §80.108 of this title.

(3) The public interest counsel of the commission is a party to all commission proceedings.

(4) The applicant is a party in a hearing on its application.

(5) Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 and §55.203 of this title (relating to Determination of Affected Person). State agencies that may be affected persons are prohibited by law from contesting a permit or license as set forth in §55.103 of this chapter (relating to Definitions).

(6) The Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status, but may not contest the issuance of an application or license by the commission.

(7) The Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status, but may not contest the issuance of an application or license by the commission.

(8) The parties to a contested enforcement case include:

(A) the respondent(s);

(B) any other parties authorized by statute; and

(C) in proceedings alleging a violation of or failure to obtain an underground injection control or Texas Pollutant Discharge Elimination System permit, or a state permit for the same discharge covered by a National Pollutant Discharge Elimination System (NPDES) permit that has been assumed by the state under NPDES authorization, any other party granted permissive intervention by the judge. In exercising discretion whether to permit intervention, the judge shall consider whether

the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(9) The parties to a hearing upon a challenge to commission rules include the person(s) challenging the rule and any other parties authorized by statute.

(10) The parties to a permit revocation action initiated by a person other than the executive director shall include the respondent and the petitioner.

(11) The parties to a post-closure order contested case are limited to:

(A) the executive director;

(B) the applicant(s); and

(C) the Public Interest Counsel.

(c) Alignment of participants. Participants (both party and non-party) may be aligned according to the nature of the proceeding and their relationship to it. The judge may require participants of an aligned class to select one or more persons to represent them in the proceeding. Unless otherwise ordered by the judge, each group of aligned

participants shall be considered to be one party for the purposes of §80.115 of this title (relating to Rights of Parties) for all purposes except settlement.

(d) Effect of postponement. If a hearing is postponed for any reason, any person already designated as a party retains party status.

§80.115. Rights of Parties.

(a) Except as limited by §80.109 of this title (relating to Designation of Parties), a [A] party has the right to conduct discovery, present a direct case, cross-examine witnesses, make oral and written arguments, obtain copies of all pleadings, motions, replies, and other filed documents, receive copies of all notices issued by the commission concerning the proceeding to which the person is a party, and, as directed by the judge, otherwise fully participate as a party in the proceeding. In an enforcement proceeding, no party except the executive director may seek to amend or add to the violations alleged in the petition that initiated the case.

(b) Except in enforcement matters, a person may seek leave to withdraw his or her party status at any time upon written request to the judge or by request stated on the record during a hearing. Party status is not withdrawn unless and until the judge grants the request for leave to withdraw.

§80.117. Order of Presentation.

(a) In all proceedings, the moving party has the right to open and close. Where several matters have been consolidated, the judge will designate who will open and close. The judge will determine at what stage other parties will be permitted to offer evidence and argument. After all parties have completed the presentation of their evidence, the judge may call upon any party for further material or relevant evidence upon any issue.

(b) The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and[, if named as a party,] the executive director. In all cases, the applicant shall be allowed a rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.

(c) In all contested enforcement case hearings, the executive director has the right to open and close. In all such cases, the executive director shall be allowed to close with his rebuttal.

§80.131. Interlocutory Appeals and Certified Questions.

(a) No interlocutory appeals may be made to the commission by a party to a proceeding before a judge except that in an enforcement action a party may seek an interlocutory appeal to the commission on jurisdictional issues only.

(b) On a motion by a party or on the judge's own motion, the judge may certify a question to the commission. Certified questions may be made at any time during a proceeding, regarding commission policy, jurisdiction, or the imposition of any sanction by the judge which would substantially impair a party's ability to present its case. Policy questions for certification purposes include, but are not limited to:

(1) the commission's interpretation of its rules and applicable statutes;

(2) which rules or statutes are applicable to the proceeding; or

(3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(c) If a question is certified, the judge shall file a request to answer the certified question with the chief clerk and serve copies on the parties. [In a contested case hearing

concerning a permitting matter, the judge shall serve the executive director with a copy of the request.] Within five days after the request is filed, [the executive director and] all parties to the proceeding may file briefs or replies. [Copies of all briefs and replies shall be served on the executive director as provided in §1.11 of this title (relating to Service on Judge, Parties, and Interested Persons). The executive director shall be allowed to file briefs and replies within the prescribed time frames.] The chief clerk shall provide copies of the request and any briefs or replies to the general counsel and commission. Upon the request of the general counsel or a commissioner to the general counsel, the request will be scheduled for consideration during a commission meeting. The chief clerk shall give the judge[, the executive director,] and all parties notice of the meeting. The judge may abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed. If the chief clerk does not receive a request from the general counsel to set the question for consideration within 15 days after filing, the request is denied by operation of law.

SUBCHAPTER D: DISCOVERY

§80.151

Statutory Authority

The amendment is proposed 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 establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

§80.151. Discovery Generally.

(a) Discovery shall be conducted according to the Texas Rules of Civil Procedure, unless commission rules provide or the judge orders otherwise. The Rules of Civil Procedure shall be interpreted consistently with this chapter, the Texas Water Code, the Texas Health and Safety Code, and the APA. Drafts of prefiled testimony are not discoverable.

(b) Discovery in contested case hearings using prefiled testimony.

(1) This subsection is applicable to contested case hearings for applications which are subject to the jurisdiction of the State Office of Administrative Hearings (SOAH) under 1 TAC §155.151 (relating to Jurisdiction), except for

(A) contested case hearings using prefiled testimony where all discovery was completed before September 1, 2011;

(B) water ratemaking proceedings; and

(C) sewer ratemaking proceedings.

(2) All discovery on a party must be completed before the deadline for that party to submit its prefiled testimony.

(3) In cases where all parties share the same deadline for submission of prefiled testimony, a single deadline for completion of discovery shall apply to all parties.

(4) If parties have different deadlines for the submission of prefiled testimony, the deadline to complete discovery on a party shall be no later than the final deadline for that party to submit prefiled testimony. After a party's final deadline to

submit its prefiled testimony in a contested case, that party is no longer subject to discovery from other parties in the case.

(5) The requirements of this subsection do not relieve a party's duty to supplement its discovery responses as required by Texas Rules of Civil Procedure 193.5 and 195.6.

(c) All other contested case hearings are governed by §80.151 as it existed immediately before the effective date of this section and the rule is continued in effect for that purpose.

SUBCHAPTER F: POST HEARING PROCEDURES

§80.257, §80.261

Statutory Authority

The amendments are proposed 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 establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

§80.257. Pleadings Following Proposal for Decision.

(a) Pleadings. Unless right of review has been waived, any party may within 20 days after the date of issuance of the proposal for decision, file exceptions or briefs. [For permit hearings in which the executive director has not participated as a party, the commission or general counsel may request in writing that the executive director file briefs concerning legal or policy issues.] The request shall be served on the parties and the judge, shall specify the issues to be briefed and shall set reasonable deadlines for the executive director's response and the parties replies to that response, avoiding delay of the matter to the extent practicable. Proposed findings of fact may be filed when permitted or requested by the commission. Any replies to exceptions, briefs, or proposed

findings of fact shall be filed within 30 days after the date of issuance on the proposal of decision.

(b) Change of filing deadlines. On his own motion or at the request of a party, the general counsel may change the deadlines to file pleadings following the proposal for decision. A party requesting a change must file a written request with the chief clerk, and must serve a copy on the general counsel, the judge, and the other parties. The request must explain that the party requesting the change has contacted the other parties, and whether the request is opposed by any party. The request must include proposed dates (preferably a range of dates) and must indicate whether the judge and the parties agree on the proposed dates.

§80.261. Scheduling Commission Meetings.

(a) The chief clerk, in coordination with the judge, shall schedule motions by parties requiring commission action and the presentation of the proposal for decision. The judge, when transmitting the proposal for decision, shall notify the [executive director and the] parties of the date of the commission meeting and the deadlines for the filing of exceptions and replies. The general counsel, either by agreement of the parties and the judge, or on the general counsel's own motion, may reschedule the presentation of the proposal for decision. The chief clerk shall send notice of the rescheduled meeting

date to the parties[, and, if not also a party, to the executive director] no later than ten days before the rescheduled meeting.

(b) Consistent with notices required by law, the commission may consolidate related matters if the consolidation will not injure any party and may save time and expense or otherwise benefit the public interest and welfare.

(c) The commission may sever issues in a proceeding or hold special hearings on separate issues if doing so will not injure any party and may save time and expense or benefit the public interest and welfare.

AN ACT

relating to the continuation and functions of the Texas Commission on Environmental Quality and abolishing the On-site Wastewater Treatment Research Council.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. GENERAL PROVISIONS

SECTION 1.01. The heading to Chapter 5, Water Code, is amended to read as follows:

CHAPTER 5. TEXAS [~~NATURAL RESOURCE CONSERVATION~~] COMMISSION ON ENVIRONMENTAL QUALITY

SECTION 1.02. Section 5.014, Water Code, is amended to read as follows:

Sec. 5.014. SUNSET PROVISION. The Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality is subject to Chapter 325, Government Code (Texas Sunset Act). Unless continued in existence as provided by that chapter, the commission is abolished and this chapter expires September 1, 2023 [~~2011~~].

SECTION 1.03. Subchapter C, Chapter 5, Water Code, is amended by adding Section 5.061 to read as follows:

Sec. 5.061. PROHIBITION ON ACCEPTING CAMPAIGN CONTRIBUTIONS.
A member of the commission may not accept a contribution to a campaign for election to an elected office. If a member of the

(i) The governing body of a municipally owned utility or a political subdivision, within 60 [~~30~~] days after the date of a final decision on a rate change, shall provide individual written notice to each ratepayer eligible to appeal who resides outside the boundaries of the municipality or the political subdivision. The notice must include, at a minimum, the effective date of the new rates, the new rates, and the location where additional information on rates can be obtained. The governing body of a municipally owned utility or a political subdivision may provide the notice electronically if the utility or political subdivision has access to a ratepayer's e-mail address.

SECTION 9.02. Section 13.187(b), Water Code, is amended to read as follows:

(b) A copy of the statement of intent shall be mailed, sent by e-mail, or delivered to the appropriate offices of each affected municipality, and to any other affected persons as required by the regulatory authority's rules.

ARTICLE 10. CONTESTED CASE HEARINGS

SECTION 10.01. Section 5.115(b), Water Code, is amended to read as follows:

(b) At the time an application for a permit or license under this code is filed with the executive director and is administratively complete, the commission shall give notice of the

application to any person who may be affected by the granting of the permit or license. A state agency that receives notice under this subsection may submit comments to the commission in response to the notice but may not contest the issuance of a permit or license by the commission. For the purposes of this subsection, "state agency" does not include a river authority.

SECTION 10.02. Sections 5.228(c) and (d), Water Code, are amended to read as follows:

(c) The executive director shall [~~may~~] participate as a party in contested case permit hearings before the commission or the State Office of Administrative Hearings to:

(1) provide information [~~for the sole purpose of providing information~~] to complete the administrative record; and

(2) support the executive director's position developed in the underlying proceeding. [~~The commission by rule shall specify the factors the executive director must consider in determining, case by case, whether to participate as a party in a contested case permit hearing. In developing the rules under this subsection the commission shall consider, among other factors:~~

~~[(1) the technical, legal, and financial capacity of the parties to the proceeding;~~

~~[(2) whether the parties to the proceeding have participated in a previous contested case hearing;~~

~~[(3) the complexity of the issues presented; and~~

~~[(4) the available resources of commission staff.]~~

(d) In a contested case hearing relating to a permit application, the executive director or the executive director's designated representative may not rehabilitate the testimony of a witness unless the witness is a commission employee ~~[testifying for the sole purpose of providing information to complete the administrative record].~~

SECTION 10.03. Subchapter H, Chapter 5, Water Code, is amended by adding Section 5.315 to read as follows:

Sec. 5.315. DISCOVERY IN CASES USING PREFILED WRITTEN TESTIMONY. In a contested case hearing delegated by the commission to the State Office of Administrative Hearings that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony, except for water and sewer ratemaking proceedings.

SECTION 10.04. Section 5.228(e), Water Code, is repealed.

SECTION 10.05. (a) Section 5.115(b), Water Code, as amended by this article, applies only to an application for the issuance, amendment, extension, or renewal of a permit or license that is received by the Texas Commission on Environmental Quality on or after the effective date of this Act. An application that is received before that date is governed by the law in effect at the

time the application is received, and the former law is continued in effect for that purpose.

(b) The changes in law made by this article apply to a proceeding before the State Office of Administrative Hearings that is pending or filed on or after September 1, 2011.

ARTICLE 11. EFFECTIVE DATE

SECTION 11.01. This Act takes effect September 1, 2011.

President of the Senate

Speaker of the House

I certify that H.B. No. 2694 was passed by the House on April 20, 2011, by the following vote: Yeas 109, Nays 40, 1 present, not voting; that the House refused to concur in Senate amendments to H.B. No. 2694 on May 17, 2011, and requested the appointment of a conference committee to consider the differences between the two houses; and that the House adopted the conference committee report on H.B. No. 2694 on May 28, 2011, by the following vote: Yeas 147, Nays 0, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2694 was passed by the Senate, with amendments, on May 12, 2011, by the following vote: Yeas 31, Nays 0; at the request of the House, the Senate appointed a conference committee to consider the differences between the two houses; and that the Senate adopted the conference committee report on H.B. No. 2694 on May 28, 2011, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor