

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: December 7, 2011

DATE OF REQUEST: November 18, 2011

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Patricia Duron, (512) 239-6087

CAPTION: Docket No. 2011-1065-RUL. Consideration for publication of, and hearing on, proposed new Section 80.110 of 30 TAC Chapter 80, Contested Case Hearings.

The proposed rulemaking would implement House Bill 2694, Section 3.04, 82nd Legislature, 2011, Regular Session, relating to Texas Water Code, Section 5.276, Factors for Public Interest Representation. The proposed rule would establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding, including factors to determine the nature and extent of the public interest and factors to consider in prioritizing the workload of the office of public interest counsel. (Blas Coy, Kathy Humphreys) (Rule Project No. 2011-035-080-AD)

Patricia L. Duron

Agenda Coordinator

Blas J. Coy

Division Director

Copy to CCC Secretary? NO X YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** November 18, 2011

Thru: Bridget C. Bohac, Chief Clerk

From: Blas Coy, Director
Public Interest Counsel

Docket No.: 2011-1065-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 80, Contested Case Hearings
HB 2694 (3.04): Public Interest Factors
Rule Project No. 2011-035-080-AD

Background and reason(s) for the rulemaking:

House Bill (HB) 2694, §3.04 requires the commission by rule to establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do: The rulemaking would establish factors the public interest counsel must consider before deciding to represent the public interest in a commission proceeding. The rulemaking includes factors to determine the nature and extent of the public interest and factors to consider in prioritizing the workload of the office of public interest counsel (OPIC).

B.) Scope required by federal regulations or state statutes: This rule is not required by federal regulations; however, this rule is required by state statute. HB 2694, §3.04, amended the Texas Water Code (TWC), by adding TWC, §5.276. TWC, §5.276 requires the commission to establish by rule factors that the public interest counsel must consider before deciding to represent the public interest in a commission proceeding. Rules adopted under TWC, §5.276 must include factors to determine the nature and extent of the public interest and factors to consider in prioritizing the workload of the office of public interest counsel. Therefore, the scope of the rulemaking is required by HB 2694, §3.04.

C.) Additional staff recommendations that are not required by federal rule or state statute: There are no additional staff recommendations that are not within the scope of HB 2694, §3.04.

Statutory authority:

HB 2694, §3.04 and Texas Water Code, §5.276.

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Effect on the:

A.) Regulated community: The regulated community will have transparency to see the factors the public interest counsel has considered when deciding whether to participate in any particular case.

B.) Public: Likewise, members of the public will have transparency to see factors the public interest counsel has considered when deciding whether to participate in any particular case. Furthermore, as noted in the Texas Sunset Advisory Commission Final Report, the rulemaking process will allow the public to provide input on what the factors should be.

C.) Agency programs: There will be no direct effect on agency programs.

Stakeholder meetings:

None.

Potential controversial concerns and legislative interest:

Since this rule is required by §3.04 of the TCEQ sunset legislation, the agency's efforts to implement §3.04 by promulgating this rulemaking will be of interest to the Legislature, as well as the Texas Sunset Advisory Commission.

Historically, determining what constitutes the public interest in commission proceedings has been the subject of discussion and debate among the public and the regulated community. It is expected that this debate and discussion will continue during the development, comment period and implementation of the rule required by HB 2694 §3.04. Controversial issues may include the extent to which the public interest counsel may consider factors such as potential economic benefits, the need for a permitted facility, or parties' lack of legal representation in particular cases where these considerations may not be expressly discussed in statutes applicable to the action under consideration.

Controversy may also arise concerning how any stated factors are to be weighed in any particular case. In recommending this rulemaking, the Texas Sunset Advisory Commission Final Report stated: "Recognizing the need for flexibility and that the public interest may change depending on the facts of an individual case, this recommendation is not intended to specifically define the public interest, but rather to identify guidelines OPIC must use in determining what the public interest is on a case-by-case basis."

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

The rulemaking may require new internal policies and procedures for OPIC relating to the assignment of the office's workload.

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

If this rulemaking does not go forward, TCEQ's rules will be in conflict with HB 2694, §3.04. Therefore, there is no alternative to rulemaking because the rulemaking is statutorily required.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: December 7, 2011

Anticipated *Texas Register* publication date: December 23, 2011

Public hearing date (if any): January 24, 2012

Public comment period: December 23, 2011 - January 30, 2012

Anticipated adoption date: May 16, 2012

Agency contacts:

Blas Coy, Public Interest Counsel, Project Manager, 239-6363

Vic McWherter, OPIC, Program Lead, 239-0579

Elaine Lucas, OGC, 239-6215

Greg Merrell, OGC, 239-0669

Kathy Humphreys, ELD, 239-3417

Patricia Duron, Texas Register Coordinator, 239-6087

Attachments

HB 2694, Section 3.04

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Blas Coy
Vic McWherter
Patricia Duron

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §80.110.

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 and abolishing the On-site Wastewater Treatment Research Council. HB 2694, §3.04 amended Texas Water Code (TWC), Chapter 5, Subchapter G, by adding §5.276 which requires the commission to establish by rule factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding. Rules adopted pursuant to TWC, §5.276, must include factors to determine the nature and extent of the public interest and factors to consider in prioritizing the workload of the office of public interest counsel. In recommending that this rulemaking be required, the Texas Sunset Advisory Commission Final Report concerning the TCEQ recognized the need for flexibility because the public interest may change depending on the facts of an individual case (Issue 2; Recommendation 2.3). Consistent with the Texas Sunset Advisory Commission recommendation, this rule is not intended to define the public interest, but rather to identify guidelines the public interest counsel must use in determining the public interest on a case-by-case basis.

Section Discussion

The commission proposes new §80.110 to implement TWC, §5.276.

New §80.110(a) proposes factors the public interest counsel must consider in determining the nature and extent of the public interest before deciding to participate as a party to a commission proceeding. The proposed factors include the extent to which the action may impact human health, environmental quality, and the use and enjoyment of property. The proposed factors also include the extent to which the commission action under consideration may impact the general populace as a whole and the extent and significance of interest expressed to the agency in public comment. The proposed rule would further require consideration of whether the proposed agency action promotes the economic growth and interests of citizens in the affected area, whether the action promotes conservation or judicious use of the state's natural resources, and whether the action promotes commission regionalization policies.

The proposed factors are consistent with the commission's mission statement to protect the state's human and natural resources consistent with sustainable economic development. The proposed factors are also consistent with findings of the Texas Sunset Advisory Commission Final Report which noted that in any particular case the public interest could be a community's need for a facility, a community's need to limit environmental harm that may result from a facility's activities, or a community's need for jobs created by a facility.

New §80.110(b) proposes factors the public interest counsel must consider in prioritizing workload. These factors include the number and complexity of the issues to be considered in a contested case hearing; any discrepancy in the financial, technical or legal resources of the other parties; the need for public interest counsel participation in order to fully develop the evidentiary record; and resource limitations of the office of public interest counsel.

Fiscal Note: Costs to State and Local Government

Jeff Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the commission and no fiscal implications are anticipated for other units of state or local government as a result of administration or enforcement of the proposed rule. The proposed rulemaking implements certain provisions in HB 2694 which require the commission to establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding.

The proposed rulemaking would provide factors that the public interest counsel must consider before deciding to participate as a party to a commission proceeding. The proposed factors would include the extent to which the commission action may impact human health, environmental quality, and the use and enjoyment of property. The

proposed factors also include the extent to which the commission action may impact the general populace as a whole and the extent and significance of interest expressed to the agency through public comment. The proposed rule would further require consideration of whether the proposed agency action promotes the economic growth and interests of citizens in the affected area, whether the action promotes conservation or judicious use of the state's natural resources, and whether the action promotes commission regionalization policies.

The proposed rulemaking also proposes factors the public interest counsel must consider in prioritizing its workload. These factors include the number and complexity of the issues to be considered in any contested case hearing; any discrepancy in the financial, technical or legal resources of the other parties; the need for public interest counsel participation in order to fully develop the evidentiary record; and resource limitations of the office of public interest counsel.

The proposed rulemaking requires the commission to establish these factors in order to provide transparency regarding the decision-making functions of the public interest counsel. The proposed rule does not require any action that would result in fiscal implications for commission enforcement activities or public interest counsel administrative functions.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be transparency and public awareness of the factors the public interest counsel considers when deciding whether to participate in any particular case. Furthermore, as a result of this rulemaking process, the public will be able to provide input on what factors should be included in the public interest counsel decision-making functions.

No fiscal implications are anticipated for industry, businesses, or individuals as a result of the implementation or administration of the proposed rule. The proposed rule does not affect regulatory requirements on businesses or individuals.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the implementation of the proposed rule. The proposed rule does not increase or decrease regulatory requirements for small or micro-businesses.

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 rule does not adversely affect small or micro-businesses and is proposed in order to comply with the

legislative requirements of HB 2694.

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 proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rule does not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225(g), "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Furthermore, the proposed rule does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal

law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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 4) adopts a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking enumerates the factors the public interest must consider before deciding to represent the public interest as a party to a commission proceeding. The proposed rule is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, but rather its intent is to provide guidelines for the operations of the office of public interest counsel. Additionally, the proposed rule should not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because it reflects only a statement of policy and does not result in any new rights or regulations; therefore, this rulemaking is not a major environmental rule. The commission invites public comment regarding this draft regulatory impact analysis determination.

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's preliminary assessment indicates that Texas Government Code, Chapter 2007, does not apply to the proposed rulemaking because the proposed rulemaking is not a taking as defined in Chapter 2007, nor is it a constitutional taking of private real property. The purpose of the rule is to establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding.

Promulgation and enforcement of the proposed rule will not affect private real property, which is the subject of the rule, because the proposed rulemaking will neither restrict or limit the owner's right to the property, nor cause a reduction of 25% or more in the market value of the property. The proposed rule only applies to the participation of the public interest counsel in commission proceedings. Property values will not be decreased, because the proposed rulemaking will not limit the use of real property. Thus, the proposed rule will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it

affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking with the Coastal Management Program 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 January 24, 2012, at 10:00 a.m. in Room 201S, Building E at the commission's central office located at 12100 Park 35 Circle, Austin, Texas. 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 Patricia Duron, 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 2011-035-080-AD. The comment period closes January 30, 2012. 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 Vic McWherter, TCEQ Office of Public Interest Counsel, (512) 239-6363.

SUBCHAPTER C: HEARING PROCEDURES

§80.110

Statutory Authority

The rule is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of the commission, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.102, concerning the commission's General Powers, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules when amending any statement of general applicability that describes the procedure or practice requirements of an agency; TWC, §5.105, concerning General Policy, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.276 which requires the commission by rule to establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding.

The proposed rule implements TWC, §5.276.

§80.110. Public Interest Factors.

(a) In order to determine the nature and extent of the public interest, the public

interest counsel must consider the following factors before deciding to represent the public interest as a party to a commission proceeding on a proposed agency action:

(1) the extent to which the action may impact human health;

(2) the extent to which the action may impact environmental quality;

(3) the extent to which the action may impact the use and enjoyment of property;

(4) the extent to which the action may impact the general populace as a whole, rather than impact an individual private interest;

(5) the extent and significance of interest expressed in public comment received by the commission regarding the action;

(6) the extent to which the action promotes economic growth and the interests of citizens in the vicinity most likely to be affected by the action;

(7) the extent to which the action promotes the conservation or judicious use of the state's natural resources; and

(8) the extent to which the action serves commission policies regarding regionalization or other relevant considerations regarding the need for facilities or services to be authorized by the action.

(b) In prioritizing the public interest counsel's workload, the public interest counsel must consider the following factors:

(1) the number and complexity of the issues to be considered in any contested case hearing on the action;

(2) the extent to which there is a known disparity in the financial, legal, and technical resources of the potential parties to the action, including consideration of whether the parties are represented by counsel;

(3) the extent to which the public interest counsel's participation will further the development of the evidentiary record on relevant environmental or consumer-related issues to be considered by the commission; and

(4) staffing and other resource limitations of the office of public interest counsel.

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

office.

SECTION 3.04. Subchapter G, Chapter 5, Water Code, is amended by adding Section 5.276 to read as follows:

Sec. 5.276. FACTORS FOR PUBLIC INTEREST REPRESENTATION. (a)

The commission by rule, after consideration of recommendations from the office of public interest counsel, shall establish factors the public interest counsel must consider before the public interest counsel decides to represent the public interest as a party to a commission proceeding.

(b) Rules adopted under this section must include:

(1) factors to determine the nature and extent of the public interest; and

(2) factors to consider in prioritizing the workload of the office of public interest counsel.

ARTICLE 4. COMPLIANCE AND ENFORCEMENT

SECTION 4.01. Section 5.751, Water Code, is amended to read as follows:

Sec. 5.751. APPLICABILITY. This subchapter applies to programs under the jurisdiction of the commission under Chapters 26, ~~and~~ 27, and 32 of this code and Chapters 361, 375, 382, and 401, Health and Safety Code. It does not apply to occupational licensing programs under the jurisdiction of the commission.

SECTION 4.02. Section 5.752(1), Water Code, is amended to

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