

Docket No. 2009-1562-MIS
September 18, 2009 WORK SESSION (Item No. 2)

In the Matter of § BEFORE THE COMMISSION
Discussion and Consideration of Statutes, §
Rules, and Agency Policies and § ON
Procedures Relating to the Effective §
Date of Orders § ENVIRONMENTAL QUALITY

2009 OCT 16 PM 4: 07
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S BRIEF ON STATUTES, RULES, AND AGENCY POLICIES AND PROCEDURES RELATING TO THE EFFECTIVE DATE OF ORDERS OF THE COMMISSION AND EXECUTIVE DIRECTOR

Introduction

In order to obtain judicial review of a Texas Commission on Environmental Quality (TCEQ or Agency) action, a party must file a petition with the Travis County district court within a certain number of days of the Agency taking action, the Agency action becoming effective, or the Agency action becoming final and appealable. Generally, parties are required to exhaust their administrative remedies prior to seeking judicial review of an Agency action. Because the timeframe for appealing an Agency action through administrative processes—such as a Motion to Overturn (MTO) or a Motion for Rehearing (MFR)—sometimes extends beyond the deadline for filing a petition for judicial review of an Agency action, many parties end up filing two separate petitions in order to preserve their right to judicial review: (1) first, a petition to meet the deadline for judicial review based on the effective date of the initial Agency action or the date the initial action was taken, and (2) a second petition, by the deadline for judicial review based on the date the MTO or MFR is denied or overruled by operation of law, to demonstrate exhaustion of administrative remedies.¹

¹ The following cases are examples of situations where two separate petitions were filed to contest an Agency action: *Neighbors for Neighbors and Public Citizen, Inc. v. TCEQ*; Cause Nos. D-1-GN-08-002283 and D-1-GN-08-003497 (challenging the ED's issuance of an alteration to an Air Quality permit); *Daniel Gustafson as a Representative of Lloyd Funk, et al. v. TCEQ*; Cause Nos. D-1-GN-08-004628 (challenging the ED's determination that a party is not exempt from watermaster assessments); *Sierra Club v. TCEQ*; Cause Nos. D-1-GN-08-002299 and D-1-GN-08-003021 (challenging both the Commission's denial of requests for a contested case hearing and the Commission's issuance of a new radioactive material license); and *Sierra Club v. TCEQ*; Cause Nos. D-1-GN-09-000894 and D-1-GN-09-000660 (challenging both the Commission's denial of hearing requests and granting of an application for a new radioactive material license).

I. Appealing Actions of the Executive Director²

Actions taken by the ED are effective on the date the ED signs the permit or other approval, unless otherwise indicated.³ In order to obtain judicial review of an ED action, an affected person must file a petition for review with the Travis County district court within 30 days of the effective date of the ED's ruling, decision or order, or within 30 days of the date the ED performed an appealable act.⁴ MTOs to overturn the ED's decision (and to exhaust administrative remedies), however, are due no later than 23 days after the Agency mails notice of the ED's action.⁵ Commission action on the MTO is not final until the Commission denies the MTO, or, if the Commission does not act on the MTO, until 45 days have passed and the MTO is overruled by operation of law.⁶ If an extension is granted, the resolution of the MTO might not be final for up to 90 days after the Agency mails notice of the ED's action.⁷ Accordingly, unless the Commission acts on a party's MTO in fewer than 30 days, an appealing party may be required to file a petition in district court prior to resolution of their MTO in order to preserve their right to judicial review. Once this first petition is filed, it is somewhat unclear if a party must then file a second petition, after resolution of their MTO, in order to show exhaustion of administrative remedies. Due to this lack of clarity, some parties may file a second petition out of an abundance of caution.

a. Recent Case Law Regarding Appeals of ED Actions

The Third Court of Appeals in Austin has recently issued two rulings relating to the appropriate procedure and timeline for obtaining judicial review of a decision of the TCEQ's Executive Director (ED). See *West v. TCEQ*, 260 S.W. 3d 256 (Tex. App.—Austin July 31, 2008) and *Texas Commission on Environmental Quality v. Kelsoe*, 286 S.W.3d 91 (Tex. App.—Austin April 30, 2009). As is illustrated by both of these cases, there are numerous statutes and rules that provide avenues for judicial review of ED decisions. The Supreme Court of Texas held in *Texas Natural Resource Conservation Commission v. Sierra Club*⁸ that “[a]n agency’s enabling legislation determines the proper procedures for obtaining judicial review of an agency decision,” and the Third Court of Appeals has made it clear in these two recent cases that Section 5.351 of the Texas Water Code governs the deadline for submitting petitions for judicial review of ED actions. Pursuant to these two decisions, in order to obtain judicial review of ED actions, petitions for judicial review must be filed with the district court within 30 days of the effective date of the ED's ruling order or decision, or within 30 days of the ED's action. These opinions do not, however, provide consistent guidance regarding the requirement

² As is noted in the Memorandum of Agreement Between the Texas Natural Resource Conservation Commission and the U.S. Environmental Protection Agency, Region 6 Concerning the National Pollutant Discharge Elimination System (September 14, 1998), Title 30 Chapter 50 of the Texas Administrative Code, “prescribes the procedures and permit actions that may be taken by the executive director and the procedures for invoking commission review of the Executive Director’s actions.” (1)(IV)(G).

³ 30 TAC § 50.135.

⁴ Tex. Water Code §§ 5.351 & 5.354, Tex. Health & Safety Code §§ 361.321, 382.032, or § 401.240.

⁵ 30 TAC § 50.139(b).

⁶ 30 TAC § 50.139(f).

⁷ *Id.*

⁸ 70 S.W.3d 809, 811 (Tex. 2002).

to exhaust administrative remedies prior to seeking judicial review of Agency action or the effect of filing a MTO.

(1) *The West Case*

In *West v. TCEQ*,⁹ several parties requested a contested case hearing on a permit application. The Commission considered all the requests, granted the hearing request from Jo Atkinson, and denied the requests from West and the Sierra Club. After the Commission referred the case to the State Office of Administrative Hearings (SOAH) for a contested case hearing, Ms. Atkinson withdrew her hearing request, and the application was subsequently remanded to the ED for further proceedings. Once the application was remanded to the ED, it was deemed to be an uncontested matter pursuant to Agency rules, and the ED granted the uncontested permit application as authorized by law. The ED signed the permit on December 9, 2005, and his decision was effective the same day. Both West and the Sierra Club filed petitions for judicial review of this action. West filed one petition on January 18, 2006 and a second jointly with the Sierra Club on February 17, 2006. The district court dismissed both petitions as untimely and the petitioners appealed.

On review, the Court of Appeals noted that “an agency’s enabling legislation determines the proper procedures for obtaining judicial review of an agency decision,” and stated that “Section 5.351 of the water code establishe[d] the proper procedure for judicial review of the Commission’s decision in this case.” The Court observed that Section 5.351 “requires a person affected by the Commission’s decision to file a petition for judicial review within 30 days after the effective date of the decision,” and that accordingly, the petitions for review were due no later than January 8, 2006.

In looking at whether the petitions were timely filed, the Court noted that the notice of ED’s decision that was sent to the petitioners contained instructions for filing a MTO requesting the Commission to review the ED’s decision. The Court further noted, however, that the notice did not say that filing a MTO would not affect the ED’s approval, nor did it explain that in order to obtain judicial appeal of the ED’s decision, a petition must be filed in district court within 30 days of the effective date of the ED’s decision, as required by the water code. However, based on the water code, the Court concluded that neither petition was timely filed because neither was filed within the 30-day deadline. Notably, the court indicated that, according to *Heat Energy Advanced Tech. v. West Dallas Coalition for Env’tl. Justice*,¹⁰ had the petitioner filed a petition within 30 days of the ED’s action, prior to resolution of their motion to overturn, that the petition would properly invoke the district court’s jurisdiction, even if exhaustion of administrative remedies (such as filing an MTO) was required. The Court also clarified that the filing of an MTO does not extend the deadline for filing petitions for judicial review, which is based on the effective date of the Agency action.

⁹ 260 S.W. 3d 256 (Tex. App.—Austin July 31, 2008).

¹⁰ 962 S.W.2d 288, 293 (Tex. App.—Austin 1998, pet. denied).

In response to this case, the notices sent out to inform parties of the ED's decision have been modified to clarify the options available and the relevant deadlines for appealing the ED's decision. For example, the notice of ED approval of uncontested applications for water quality permits explains that affected parties, "may file a **motion to overturn...** [which] is a request for the commission to review the TCEQ ED's approval of the application..." and explains that a MTO, "must be received by the chief clerk within 23 days of the date of this letter." The notice also explains that affected parties "may request **judicial review** of the ED's approval," and that "[a]ccording to Texas Water Code Section 5.351 a person affected by the ED's approval must file a petition appealing the ED's approval in Travis County district court within 30 days after the effective date of the approval," and explains that "[e]ven if [the affected party] request[s] judicial review, [they] must still exhaust [their] administrative remedies, which includes filing a motion to overturn..."

(2) The *Kelsoe* Case

In *Texas Commission on Environmental Quality v. Kelsoe*,¹¹ Kelsoe applied for a solid-waste landfill permit. On December 9, 2005, TCEQ determined the application was incomplete and returned it. Kelsoe filed a motion to overturn the decision to return the application on January 3, 2006, and that motion was overruled by operation of law on January 23, 2006. Kelsoe then filed a petition for judicial review on March 2, 2006. The district court reversed TCEQ's determination that the application was incomplete and remanded the application to TCEQ. TCEQ appealed, arguing that Kelsoe's petition was untimely filed. The Court of Appeals agreed.

The Court of Appeals explained that, pursuant to Texas Health and Safety Code Section 361.321(a), (c), Kelsoe needed to file a petition for judicial review no later than 30 days after the Agency's action. The Court of Appeals noted that neither the water code nor the health and safety code specifically addressed an appeal from the ED's decision of administrative completeness, but determined that such a decision was a final reviewable decision subject to Section 5.351 of the Water Code and Section 361.321 of the Health and Safety Code, which require that a petition be filed within 30 days of Agency action.

Kelsoe had also argued that his petition was timely because he had filed an MTO, which he suggested meant that his deadline for filing a petition in district court did not begin to run until after TCEQ's notice of decision on his MTO. Although the Court did not believe Kelsoe's MTO tolled the 30-day deadline to file an appeal under Section 361.321, it discussed the situation hypothetically, and said that since the motion was denied by operation of law on January 23, 2006 (45 days after the application was returned), the latest date that Kelsoe could have filed a petition for judicial review was February 22, 2006, 30 days after the motion was overruled by law, and thus, the petition filed on March 2, 2006 was untimely.

¹¹ 286 S.W.3d 91 (Tex. App.—Austin April 30, 2009).

II. Appealing Actions of the Commission

Determining the date a petition for judicial review of a Commission action is due is somewhat different than determining the deadline for appealing an ED action. Actions by the Commission become final and appealable under several different scenarios. Commission actions become final upon the expiration of the period for filing a MFR, if no MFR is filed.¹² Actions become final and appealable when, if an MFR is filed, upon the date of the order overruling the MFR or on the date the motion is overruled by operation of law.¹³ MFRs are due 20 days after the date an affected party is notified in writing of the Commission's final decision or order on an application (assumed to be the 3rd day after mailing).¹⁴ Thus, Commission actions are final and appealable:

- (1) when the Commission denies the MFR under 30 TAC §§ 80.272 and 80.273, making the decision appealable under Tex. Water Code § 5.351 or Tex. Health and Safety Code §§ 361.321, 382.032 or 401.341;¹⁵
- (2) if the Commission does not act on the MFR, 45 days after the affected party is notified in writing of the decision or order, when the MFR is overruled by operation of law, unless an extension is granted;¹⁶ or
- (3) if an extension is granted, up to 90 days after the affected party is notified of the decision or order.¹⁷

Petitions for judicial review of Commission actions must generally be filed within 30 days of the Commission's decision becoming final and appealable. *See e.g.*, 30 TAC § 80.275 ("Petition for judicial review must be filed within 30 days after the decision is final and appealable."); Tex. Water Code § 7.064 ("Judicial review of an order or decision of the commission assessing a penalty is covered under Subchapter G, Chapter 2001, Tex. Gov't Code.");¹⁸ Tex. Gov't Code § 2001.176(a)-(b) ("The petition must be filed in a Travis County district court no later than the 30th day after the date on which the decision is final and appealable.").

¹² 30 TAC § 80.273.

¹³ *Id.*

¹⁴ 30 TAC § 50.119(b); 30 TAC § 80.272(b).

¹⁵ 30 TAC § 50.119(b).

¹⁶ 30 TAC § 80.272(d).

¹⁷ 30 TAC § 80.272(e)-(f).

¹⁸ Note that Section 7.061 of the Water Code requires a person charged with a penalty to:

- (1) pay the penalty in full;
- (2) pay the first installment penalty payment in full;
- (3) pay the penalty and file a petition for judicial review, contesting either the amount of the penalty or the fact of the violation or contesting both the fact of the violation and the amount of the penalty; or
- (4) without paying the penalty, file a petition for judicial review contesting the occurrence of the violation and the amount of the penalty;

within the 30-day period immediately following the date on which the Commission's order is final.

Similar to appeals of decisions of the ED, the 30-day deadline for filing a petition pursuant to Texas Water Code Section 5.351 must also be met.¹⁹ The water code sets the deadline for appeal based on the effective date of the action rather than the date the action becomes final and appealable:

A person affected by a ruling, order, decision, or other act of the commission must file his petition for review in a Travis County district court within 30 days after the effective date of the ruling, order, or decision. A person affected by an act other than a ruling, order, or decision must file his petition within 30 days after the date the commission performed the act.²⁰

If the water code does apply, unless the Commission acts on a party's MFR in less than 30 days, affected parties may be required to file a petition in district court prior to resolution of their MFR in order to preserve their right to judicial review. Notably, there are separate provisions providing the deadline for appealing certain specific Commission actions, which, like the Texas Water Code, have effective date-based or date of action-based appeal deadlines. *See, e.g.* Texas Solid Waste Disposal Act, Tex. Health & Safety Code § 361.321(a) & (c) ("The petition must be filed in Travis County district court not later than the 30th day after the date of the ruling, order, decision or other act."); Texas Clean Air Act, Tex Health & Safety Code § 382.032(a) & (b) ("The petition must be filed within 30 days after the date of the commission's action or, in the case of a ruling, order, or decision, within 30 days after the effective date of the ruling, order, or decision."); Radioactive Materials, Tex. Health & Safety Code §401.240 ("[A] person affected by an action of the commission under this subchapter may file a petition for judicial review of the action only after the commission takes final action on a license application under Section 401.239(d). A petition must be filed not later than the 30th day after the date of the final action.").

These overlapping deadlines have likewise resulted in some petitioners, out of an abundance of caution, filing two separate petitions, one to meet the deadline under the effective date-based or date of action-based requirement in the water code or other regulation, and a second to meet the deadline for appealing Commission decisions that have become final and appealable contingent on the filing of a motion for rehearing.

¹⁹ Because 30 TAC 50.119(b) states that if a MTO is denied "the Commission's decision is final and appealable under Texas Water Code § 5.351 or Texas Health and Safety Code §§ 361.321, 382.032, or 401.341," it suggests that an affected person would not need to file a petition within 30 days of the Commission action but could wait to file a petition until they had exhausted their administrative remedies by filing a MTO and having it denied. It should also be noted that the Memorandum of Agreement Between the Texas Natural Resource Conservation Commission and the U.S. Environmental Protection Agency, Region 6 Concerning the National Pollutant Discharge Elimination System (September 14, 1998) specifically states that appeals of final Commission decisions on permits are governed "by Section 5.351 of the Texas Water Code" and by "Chapters 39, 50, 55 and 80 of Title 30 of the Texas Administrative Code and Chapters 2001, 2003 and 551 of the Texas Government Code." (1)(IV)(F).

²⁰ Tex. Water Code §5.351.

a. Appealing Contested Case Hearings

The Texas Administrative Procedures Act (APA)²¹ provides a clearer picture of the process for judicial review of the Agency's final decision in a contested case hearing (CCH).²² The APA states that, "[a] person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter."²³ In order to challenge a final decision, an appealing party must first exhaust its administrative remedies by filing a MFR.²⁴ MFR are due within 20 days after an affected party is notified of the Agency's decision or order (presumed to be on the third day after notice is mailed).²⁵ Unless the Agency acts on a MFR, the MFR is overruled by operation of law 45 days after the date of notification, unless an extension is granted.²⁶ If an extension is granted, the MFR will be overruled by operation of law on either the date set in the order granting the extension, or if there is no fixed date, 90 days after the party is notified of the Agency's decision or order.²⁷ Once an MFR is overruled, an appealing party has 30 days from the date it is overruled to file a petition for judicial review of the agency's decision in district court.²⁸

b. Effective Dates Applicable to Certain Commission Orders

Adding additional complexity to determining the procedure for appealing Commission actions is the fact that not all orders issued by the Commission have the same effective dates or appeal requirements.

i. Agreed Orders

Agreed orders are effective on the date on which service of notice of the order is achieved under Section 2001.142 of the APA (assumed to be the third day after the date on which the notice is mailed).²⁹ Notably, this regulatory provision is reflected in the body of the Agreed Order, which reads: "Under 30 Tex. Admin. Code § 70.10(b) and Tex. Gov't Code § 2001.142, the effective date of this Agreed Order is the date of hand-delivery of the Agreed Order...or three days after the date on which the Commission mails notice of this Agreed Order...whichever is earlier."

²¹ Tex. Gov't Code § 2001, et seq.

²² Note that if a request for a contested case hearing on an application is granted, the denial of any other request for a contested case hearing on the application is an interlocutory decision, and thus not appealable. A person whose hearing request is denied may still seek to be admitted as a party under 30 TAC §80.109. 30 TAC §§ 55.211 & 55.255.

²³ Tex. Gov't Code Ann. § 2001.171.

²⁴ Tex. Gov't Code Ann. § 2001.145; 30 TAC §80.272(b). The filing of a MFR is a prerequisite to a judicial appeal in a CCH except for decisions or orders rendered final under Tex. Gov't Code §§2001.144(a)(3) or (a)(4), which make orders issued pursuant to a finding of imminent peril or orders effective on a date agreed to by all parties final and appealable. *Id.*

²⁵ Tex. Gov't Code Ann. §§ 2001.142 and 2001.146.

²⁶ Tex. Gov't Code Ann. §§ 2001.142 and 2001.146(c).

²⁷ *Id.*

²⁸ Tex. Gov't Code Ann. §§ 2001.144 and 2001.176; 30 TAC §80.275.

²⁹ 30 TAC § 70.10(b).

ii. Default Orders

Default orders are generally effective on the date that the order is final under 30 TAC Section 80.273—in the absence of a timely MFR, on the expiration of the period for filing a MFR and, if a MFR is filed, on the date of the order overruling the motion for rehearing or on the date the motion is overruled by operation of law—and Texas APA Section 2001.144, which provides that a decision is final and appealable: (1) if a MFR is not filed on time, on the expiration of the period for filing a motion for rehearing; (2) if a motion for rehearing is filed on time, on the date: (A) the order overruling the motion for rehearing is rendered; or (B) the motion is overruled by operation of law; (3) if a state agency finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a decision or order, on the date the decision is rendered; or (4) on the date specified in the order for a case in which all parties agree to the specified date in writing or on the record, if the specified date is not before the date the order is signed or later than the 20th day after the date the order was rendered.³⁰ The text of Default Orders specifically states that, “[b]y law, the effective date of this Order shall be the date the Order is final, as provided by 30 Tex. Admin. Code § 70.106(d) and Tex. Gov’t Code § 2001.144.”³¹

iii. Remediation-Superfund Orders

For Superfund orders (issued under Tex. Health & Safety Code § 361.188 and § 361.272), the administrative order internally specifies that the order shall be effective 10 days after the issue date, which is the date it is signed by the Chairman. Orders issued under Tex. Health & Safety Code § 361.188 and § 361.272 must be appealed within the 46th day after the date of receipt, hand delivery, or publication of service of the order.³²

³⁰ 30 TAC §70.106; Tex. Gov’t Code § 2001.144.

³¹ The different effective dates for agreed orders and default orders makes intuitive sense, given that the subject of an agreed order has apparently agreed to the order’s terms and conditions whereas the subject of a default order clearly has not, and may wish to challenge the order.

³² Tex. Health & Safety Code § 361.188 (b) (making the provisions of Subchapters I and K applicable to orders issued under § 361.188), § 361.272 (c) (specifying the manner of delivery incumbent on the Commission to trigger the beginning of the statute of limitations for a responsible party’s appeal), and § 361.322 (a) (providing the time in which an appeal must be filed by a responsible party).

Respectfully submitted,

Texas Commission on Environmental Quality

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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

October 16, 2009

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

2009 OCT 16 PM 2:51
CHIEF CLERK'S OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

RE: TCEQ DOCKET NO. 2009-1562-MIS

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Brief Regarding the Effective Date of Commission Orders in the above-referenced matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Vic McWherter".

Vic McWherter, Senior Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. BOX 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087 Austin, Texas 78711-3087 512-239-1000 Internet address: www.tceq.state.tx.us

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

TCEQ DOCKET NO. 2009-1562-MIS

2009 OCT 16 PM 2: 51
BEFORE THE TEXAS

RESPONSE TO §
COMMISSION'S §
REQUEST FOR §
BRIEFING §
CONCERNING THE §
EFFECTIVE DATE OF §
COMMISSION ORDERS §

CHIEF CLERKS OFFICE
COMMISSION ON

ENVIRONMENTAL

QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
BRIEF REGARDING THE EFFECTIVE DATE OF COMMISSION ORDERS**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this brief in response to the Commission's request made at the September 18, 2009 work session.

INTRODUCTION

Item 2 on the Commission's September 18, 2009 work session agenda was listed as follows:

Discussion and consideration of statutes, rules, and agency policies and procedures, relating to the effective date of orders of the Commission and Executive Director. The Commission may consider taking other action to address issues relating to effective date of orders.

Following the September 18, 2009 work session, the Chief Clerk posted the following notice:

The Commission is requesting briefs from any interested person relating to the effective date of an act, order, or decision issued by the Commission or executive director.

The issue of determining the “effective date” of any given Commission action for purposes of judicial appeal has historically created confusion because the answer varies depending on: (1) whether the action has been taken by the Commissioners through the contested case hearing process governed by the Texas Administrative Procedure Act (APA); and (2) whether for any particular action taken, the “effective date” of that action for purposes of Texas Water Code Section 5.351(b) is the date the action is “final and appealable” under the APA.

The issue of the “effective date” has also created confusion because of the Commission’s discretion, as recognized by Texas courts, to provide that Commission actions are “effective” in authorizing a facility to commence regulated activities before all avenues of challenge by members of the public and review by the Commission have been exhausted.¹ As discussed below, the Commission has the ability to eliminate most of the confusion surrounding “effective date” issues by harmonizing agency rules, practices and procedures in a way that defines the “effective date” for each type of agency “action” as the date following the exhaustion of all avenues of Commission review of any action, regardless of whether such action was taken by the vote of the three Commissioners or by the Executive Director (ED) through his delegated authority. OPIC recommends the rule changes discussed in the conclusion below to effect such a solution.

¹ See *Heat Energy Advanced Technology, Inc. v West Dallas Coalition for Environmental Justice*, 962 S.W. 2d 288, 292 (TexApp-Austin 1998, pet denied) (“There is no hard and fast rule on when agency orders become effective. Subject to statutory and constitutional limitations, agencies have the discretion to set effective dates for their decisions and orders. . . . there is no general prohibition on making an order effective before it is final and appealable.”)

II. DISCUSSION

A. “Effective” under the Texas Water Code versus “final and appealable” under the APA

For purposes of determining when a Commission action should be appealed to district court, the criteria of an order being “final and appealable” frequently and confusingly is used interchangeably with the criteria of the order being “effective.” The terms are not used consistently as terms of art in applicable statutes and rules. Only in those circumstances where the agency’s enabling legislation can be harmonized with the requirements of the APA should the terms “effective” and “final and appealable” be considered synonymous. The starting point should always be the agency’s enabling statutes. For the issue presented, Texas Water Code Section 5.351(b) controls. With respect to judicial review, it provides that: “[a] person affected by a ruling, order, or decision of the commission must file his petition within 30 days after the **“effective date”** of the ruling, order, or decision. (emphasis added.)

In contrast, under the APA, Texas Government Code Section. 2001.176 (a) states that “[a] person initiates judicial review in a contested case by filing a petition not later than the 30th day after the date on which the decision that is the subject of complaint is **“final and appealable.”** (emphasis added.)

1. Action by the Commission on a contested matter subject to APA contested case hearing procedures is effective on the same date such action is final and appealable

If a permit application or other authorization is contested and ultimately presented to the three Commissioners for a decision following a contested case hearing, Commission rule 50.119 provides that the Chief Clerk shall mail out notice of Commission action on an application. A motion for rehearing is required to exhaust administrative remedies. Any

motion for rehearing must be filed within 20 days after the person is given notice. Persons are presumed notified 3 days after notice is mailed. Commission rule 80.272 (b) is in harmony with rule 50.119 in laying out the same timeframe for the filing of a motion for rehearing.

If the Commission fails to act on any filed motion for rehearing within 45 days after persons are notified, or fails to extend the time period to act for another 45 days, then the motion is overruled by operation of law. If the time period for Commission action is extended, it may be extended no later than 90 days after the date that persons are notified of the Commission action. If the deadline is extended and the Commission fails to take action on the motion by the date fixed in the extension, or in the absence of a fixed date, 90 days after the person is notified of the Commission's order, the motion is denied by operation of law.

For these contested cases, the clear and unequivocal intent of the agency's rules is to equate the "effective date" of the Commission's action with the date the Commission action is "final and appealable" under rule 80.273. Commission rule 30 TAC Section 80.273 states that "a decision or order of the Commission is final and appealable on the date of the order overruling the motion for rehearing, or on the date the motion is denied by operation of law." Commission rule 30 TAC Section 80.275 then provides that a person affected by a final decision or order may petition for judicial review within 30 days after the decision is "final and appealable." Furthermore, rule 50.119(b) provides that if the motion for rehearing is denied, the Commission's decision is "final and appealable" under Texas Water Code Section 5.351.

When an application is contested, the entity's regulated activities under the permit are not authorized until the time has run for the filing of any motion for rehearing and the Commission has disposed of any timely filed motion. Under Texas Government Code Section 2001.144, a decision in a contested case is "final": (1) if a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing; (2) if a motion for rehearing is filed on time, on the date: (A) the order overruling the motion for rehearing is rendered; or (B) the motion is overruled by operation of law. Moreover, Commission orders issued following contested case proceedings have included language expressly stating that the "effective date" of the order is the date the order is "final", as provided by Texas Government Code Section 2001.144 and Commission rule 80.273. (*See* Ordering provision No. 4, Lerin Hills Order issued on July 7, 2009.) Furthermore, the cover letter transmitting such Commission orders states that the permit is not "issued" until motion for rehearing procedures have been exhausted. (*See* cover letter dated July 9, 2009 transmitting the Lerin Hills order stating "If the Commission does not receive a motion for rehearing, the permit will be issued and forwarded to appropriate parties.")

2. Action by the Executive Director on an *uncontested* matter which is *not* subject to APA contested case hearing procedures may be effective *before* such action is final and appealable

Texas Water Code Section 5.122 provides that the Commission may delegate authority to the ED to take action on authorizations meeting the criteria specified in Section 5.122, including most uncontested applications. Most authorizations issued by the ED under this delegated authority are subject to Commission review through the motion to overturn process. *See* Texas Water Code Section 5.122(b) and 30 TAC Section 50.139. Any motion to overturn must be filed within 23 days after the chief clerk mails notice of

the ED's action. The Commission must either take action on the motion or extend the time to act within 45 days after notice of the order is mailed; otherwise the motion is denied by operation of law. 30 TAC Sections 50.139(f). If an extension is granted beyond the initial 45 day period, the commission must take action on the motion no later than 90 days after notice of the order was mailed or else the motion is denied by operation of law. 30 TAC Section 50.139(f). If the motion is denied, the movant need not file a motion for rehearing as a prerequisite to judicial appeal and the action would be deemed "final and appealable" as of the date the motion to overturn is denied. 30 TAC 50.139 (g).

However, keep in mind that Texas Water Code Section 5.351(b) requires a petition for judicial appeal to be filed within 30 days of the "effective date." Significantly, the current version of Commission rule 30 TAC Section 50.135 provides that the permit is "effective" when signed by the executive director, unless the permit specifies otherwise. Moreover, the Commission's rules spell out that the mere filing of a motion to overturn does not affect the validity of the ED's action. 30 TAC Section 50.139(d). Therefore, under the Commission's current rules, policies and practices, an uncontested permit is effective when signed by the ED and a regulated entity is authorized to act under the subject permit pending any subsequent review by the Commission upon the filing of a motion to overturn.

Given the provisions of Texas Water Code Section 5.351(b) and current Commission rules 50.135 and 50.139, the Texas Court of Appeals has held that a petition for judicial review must be filed within 30 days after an uncontested permit is signed by the ED, or else such a petition is untimely and will be denied on those grounds.² In the *West*

² *West vs. TCEQ*, 260 S.W. 3d 256 (Tex.App --Austin 2008)

case,³ the Court criticized the Commission for failing to advise interested persons that the filing of a motion to overturn did not affect the approval of the application and for failing to advise interested persons of the need to file a petition for judicial review within 30 days of the ED's signing and issuance of a permit.⁴ Since that decision, the Commission has changed its standard notice of the executive director's final action to inform interested persons that they may file a motion to overturn and they may also request judicial review. The letter goes on to state that even if they file a petition for judicial review within 30 days of the approval's effective date, they still must follow motion to overturn procedures.⁵ As a result, under current statutes, rules, policies and procedures, an interested person wishing to exercise fully all procedural rights is required to pursue two avenues of appeal simultaneously — one avenue through the Texas courts and one avenue through the Commission.

III. RECOMMENDATION AND CONCLUSION

Revisions could be made to Commission rules which would harmonize the effective date of Commission-issued orders and the effective date of ED-issued orders, thereby removing the anomalous burden currently imposed on persons challenging ED-issued actions – the requirement that such persons pursue judicial and administrative remedies simultaneously. The Commission could revise 30 TAC Section 50.135 to provide that ED-approved actions are effective only *after* the motion to overturn process has been exhausted. To effect this solution, the Commission would also need to revise 30 TAC Section 50.139 by deleting current subsection (d) which states that “[a]n action by the

³ *Id.*

⁴ *Id.* at 263, note 7.

executive director under this subchapter is not affected by a motion to overturn filed under this section unless expressly ordered by the Commission.”

The result of these rule changes would be that the ED-issued actions, as well as Commission-issued actions, would be “effective” under Texas Water Code Section 5.351(b) only after all administrative remedies have been exhausted. The procedural roadmap for the public would be clear. The public would know that the time to seek judicial appeal is after all avenues of appeal directly to the Commission have been exhausted. There would be no need to “double file,” by filing two petitions for judicial review at two separate points in time.

OPIC realizes that such a harmonization likely would not be welcomed by the regulated community. As discussed in the preceding paragraphs, a harmonization could only be achieved by changing commission rules, policies, and procedures so that authorizations issued by the executive director would not be “effective” for purposes of allowing the regulated activity to commence until the Chapter 50 motion to overturn process had been exhausted. Certain authorization holders could be delayed by 23-90 days in starting construction, operations, or other business activities.

Therefore, the Commission is faced with the task of balancing procedural clarity and consistency with the perceived impact to business of being delayed in starting authorized activities under ED-issued authorizations. OPIC would support changing Commission rules and policies to provide more certainty regarding the effective date of Commission actions and deadlines for seeking judicial appeal. OPIC concludes the benefits for public participation and procedural clarity would outweigh burdens of delaying the effective dates of certain authorizations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Brief Regarding the Effective date of Commission orders were filed with the Chief Clerk of the TCEQ

Vic McWherter
Vic McWherter

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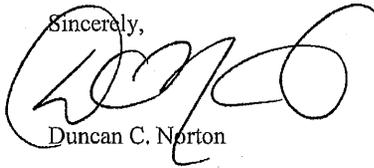
October 16, 2009

Ms. LaDonna Castañuela
Office of Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Docket Number 2009-1562-MIS

Dear Ms. Castañuela

Enclosed for filing is a Brief Regarding Effective Date of Texas Commission on Environmental Quality Actions, as requested by the Commission at its September 18th work session. We hope you find it helpful.

Sincerely,

Duncan C. Norton

DCN/ry

Enclosure

cc: w/encl.
Elaine Lucas
Les Trobman

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 OCT 16 PM 4:55
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COMMISSION
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QUALITY

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CHIEF CLERKS OFFICE

DOCKET NO. 2009-1562-MIS

IN RE THE EFFECTIVENESS § TEXAS COMMISSION ON
 §
OF COMMISSION ACTIONS § ENVIRONMENTAL QUALITY

**BRIEF REGARDING EFFECTIVE DATE
OF TEXAS COMMISSION ON ENVIRONMENTAL QUALITY ACTIONS**

COMES NOW the Law Firm of Lloyd Gosselink Rochelle & Townsend ("Lloyd Gosselink") and files this brief in response to the Texas Commission on Environmental Quality ("TCEQ" or "Commission") solicitation for briefs regarding the "effective date" of various actions of the agency. Lloyd Gosselink appreciates the opportunity and hereby submits the following:

CONTESTED CASES AND OTHER COMMISSION ACTIONS

The effective date of Commission actions, unlike E.D. actions, is not defined by any TCEQ regulation. Pursuant to the Texas Open Meetings Act (Tex. Govt. Code § 551.001 et seq.) Commission actions are typically required to be made in an open meeting. (Texas Administrative Procedure Act ("APA"), Texas Government Code Ch. 2001.141 (a).) A decision or order that may become final in a contested case "must be in writing or stated in the record." id. The Commission, as a matter of regular practice, will vote on a contested case matter in an open meeting and then several days later one Commissioner will sign the order implementing that decision. Such orders typically include an "issue date" on the signature page of the order. This includes both interim orders and orders which may become final Commission actions on a contested matter. Often practitioners refer to "effective date", "issued date", "final and appealable" either interchangeably, or certainly ways that confuse the differences between those three phrases. The "issue date" of an agency order is the date on the signature page of a typical

Commission order. That is clear. The date an order arising from a contested matter is “final and appealable” is also clear because it is controlled by the APA provisions and is tied to the denial of a motion for rehearing either by Commission action or operation of law (§ 2001.144).¹

In *Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice*, 962 SW 2nd 288 (Tex.App.-Austin 1998) the Third Court of Appeals grappled with the distinctions between effectiveness and finality in a contested case matter. In that case the Texas Natural Resource Conservation Commission (“TNRCC”) Commissioners issued an order following a contested case hearing, which concluded that the *West Dallas Coalition for Environmental Justice* (“Coalition”) did not have associational standing to be a party in a contested case hearing on the HEAT Air Quality Permit application. The Commission had referred the issue of the Coalition’s standing to an Administrative Law Judge who filed a Proposal for Decision recommending that the Coalition had established associational standing through one of its members. The Commissioners rejected that position and issued an order stating that the Coalition did not have associational standing, and issuing the HEAT permit. The Coalition timely filed a motion for rehearing with the TNRCC, while at the same time filing a Tex. Water Code § 5.351 challenge in District Court within that statute’s required 30 day deadline. In deciding that the Coalition lawsuit properly invoked the court’s jurisdiction, the Court of Appeals discussed the issue of the effective date of the Commission’s order. The Court stated:

¹ The effective date of an emergency order or decision is “on the date the decision is rendered; or... on the date specified in the order for a case in which all parties agree to the specified date...” so long as that date is not more than 20 days after the date the order is rendered and so long as there is an appropriate finding made in the written order. In that case the order is “final and effective on the date rendered” (See Tex. Govt. Code § 2001.144)

“to determine the effective date of the Commission’s order in this case, we look to the Commission’s intent, manifested through its actions, as well as the statutes and rules applicable to this proceeding. None of those indicate the effective date of the Commission’s order. The Commission takes no position on this issue in this appeal and nothing in the record reveals when the Commission intended its order to become effective.”

There was an “issue date” on the order but no stated “effective date.” The Court then said: “the Commission’s rules define the “effective date” of an act of the Commission’s Executive Director.... Curiously, however, they do not define the effective date of an action taken by the Commission. Neither do any of the Commission’s enabling statutes.” In conclusion the Court said ... “under these circumstances, it was entirely reasonable for the Coalition to conclude that the order might become effective before the date it became final and appealable.... The Coalition was consequently in the difficult position of having to file its petition to preserve its right to judicial review before it had received a ruling from the Commission on the motion for rehearing.” The court then goes on to hold that “... the Coalition’s premature petition properly invoked the district court’s jurisdiction. We overrule HEAT’S first point of error” (at p. 293).

Though not specifically or clearly elucidated, the court seems to imply that the effective date of the Commission order was either the date the order was “issued” or when the Coalition was mailed notice of that order (which was one day later). The HEAT case also states that “there is no hard and fast rule on when Agency orders become effective. Subject to statutory and constitutional limitations, agencies have discretion to set effective dates for their decisions and orders. (See *Young Trucking, Inc. v. Railroad Commission of Texas*, 781 S.W. 2nd 719, 721

Tex.App.–Austin 1989, no writ). Contrary to HEAT’s argument, there is no general prohibition on making an order effective before it is final and appealable. (Citing *Texaltel v. Public Utility Commission of Texas* 798 S.W. 2nd 875 at 885 Tex.App.–Austin 1990, writ denied). Consequently, we conclude that the effective date of an Agency order does not necessarily depend on the date of its issuance or finality but primarily on the legislature’s and agency’s intent” (at p. 292).

Based on the logic of the HEAT opinion, we suggest to the Commission that it: a) has the authority to establish when the effective date of its action is, even in contested cases; and b) absent a clear statement as to what that date is, parties will be able to utilize the date of the order or at least the date that it mailed as the “effective date” for purposes for Texas Water Code § 5.351 challenges. We further submit that it is consistent with the court’s discussions for such date to be the effective date for all other purposes as well, and that the same logic should apply on actions other than contested cases. Relying on that as the date of effectiveness, albeit with the risk that the decision could be overturned, is supported by the judicial determination in HEAT.

If the Commission remains concerned about the lack of clarity with regard to the effective date of its actions, we would suggest that it either: a) substitute an “effective date” for the “issue date” on its order’s signature pages; or b) adopt a rule applicable to Commissioner actions, which is relative to the effective date of E.D. actions. Either would be consistent with the HEAT decision.

EXECUTIVE DIRECTOR ACTIONS

Most of the actions taken by the commission on a daily basis occur outside the scope of a contested case hearing and most of those have been delegated to the E.D. An illustrative example is making a determination of administratively completeness of an application for

municipal solid waste permit. Texas Health & Safety Code § 361.068 establishes that such an application becomes subject to the contested case hearing process only after the application is determined to be administratively complete. Action on the application prior to that determination (or a determination that the application is not administratively complete) is not subject to the contested case process.²

TCEQ rules at 30 TAC § 50.131 contain a laundry list of the types of actions the E.D. may take on behalf of the agency. The “effective date” of these actions is governed by Section 50.131 which clearly states that a “permit or other approval is effective when signed by the executive director, unless otherwise specified in the permit.”³ Logically, this requires that E.D. actions must be written. Thus, similar to an order or decision arising from a contested case, an interested party may act in reliance upon and in accordance with a permit or other action once it is signed and issued by the executive director. However, for a period of time after being signed and becoming effective, the permit or approval may possibly be overturned by administrative or judicial process.

Pursuant to 30 TAC §50.139(a), a person may file with the chief clerk a motion to overturn the executive director’s action on the various different types of matters listed in 30 TAC §50.131(b). Such motion 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, or no later than 20 days after the date persons who timely commented on the WQMP update are notified of the response to comments

² TCEQ v. Kelsoc, 286 S.W. 3d 91 (Tex.App.—Austin 2009) (review denied)

³ 30 TAC §50.135

and the certified WQMP update.⁴ These motions are not subject to the APA procedures for contested case hearings and do not affect the “effectiveness” of the action.

According to subpart (d) of this same section, “[a]n action by the executive director is not affected by a motion to overturn... unless expressly ordered by the commission.” Thus, the executive director’s action remains effective during the filing and review stages of the motion to overturn (“MTO”) process. If a MTO 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 (unless an extension of time is granted).⁵

The Water Code and Health and Safety Code Chapter 361 both include sections which provide a method for challenging TCEQ actions.⁶ Pursuant to Texas Water Code §5.351(a), persons affected by actions of “the commission may file a petition to review, set aside, modify, or suspend the act of the commission.” This section of the Water Code applies to the issuance of uncontested permits and other actions taken by the executive director, and to Commission actions where there is no contested case hearing. Only when action by the commission invokes the contested case process do the provisions of Tex. Government Code 2001.171 apply.

To be timely, a person affected by a ruling, order, or decision of the commission must file his petition within 30 days after the effective date of the ruling, order, or decision.⁷ That means, unless otherwise specified, a petition for judicial review of an action of the executive director must be filed within 30 days after the executive director signs the permit or approval.

⁴ 30 TAC §50.139(b), (c)

⁵ 30 TAC §50.139(f)(1). TCEQ rules still include a separate subchapter which applies to actions taken prior to September 1, 1999, and includes virtually identical requirements, though a motion to overturn is called a motion for reconsideration.

⁶ Tex. Health & Safety Code §361.321 contains provision for appeal of action by the commission. This section requires an appeal within 30 days “after the date of the ruling, order, decisions, or other act of the” Commission. This differs from Tex. Water Code § 5.351 which has its 30 days run from the “effective date” of such action.

⁷ Texas Water Code §5.351(b)

This language clearly shows that the thirty-day deadline to file a petition for judicial review under the Water Code is independent of any administrative remedies that may be available pursuant to TCEQ rule. As suggested in the *West* case, in the context of actions other than contested cases, an interested person may decide “to forego the filing of a motion to overturn in favor of a timely petition for judicial review. As a practical matter, [one] could [do] both.”⁸

In the *West* case, the E.D. granted an uncontested permit application, signed the permit on December 9, 2005, and his decision became effective that same day. Walter West first filed an MTO and then filed a petition for judicial review on January 18, 2006 – 40 days after the effective date of the permit. The district court determined that the petition was untimely, granted the Commission’s pleas to the jurisdiction, and dismissed the suit for want of jurisdiction.⁹

In the appeal that followed, West contended that the APA provides an independent right to judicial review in contested case decisions, and that the district court’s dismissal was in error. The court disagreed, holding “[a]n agency’s enabling legislation determines the proper procedures for obtaining judicial review of an agency decision.”¹⁰ Looking to the Commission’s enabling legislation, the *West* Court cited §5.351 of the Water Code, which gives the 30-day timeline governing petitions for judicial review.¹¹

⁸ *West v. Texas Commission on Environmental Quality*, 260 S.W.3d 256, 263 (Tex.App.—Austin 2008, no pet.) (citing *Heat Energy Advanced Tech. v. West Dallas Coalition for Env’tl. Justice*, 962 S.W.2d 288, 293 (Tex.App.—Austin 1998, pet. denied) (concluding that petition for judicial review filed within section 5.351’s thirty-day time period properly invoked district court’s jurisdiction even if motion for rehearing was required under the APA))

⁹ *West v. Texas Commission on Environmental Quality*, 260 S.W.3d 256 (Tex.App.—Austin 2008, no pet.)

¹⁰ *Id.* at 260 (citing *Texas Natural Resource Conservation Commission v. Sierra Club*, 70 S.W.3d 809, 811 (Tex.2002))

¹¹ *West v. Texas Commission on Environmental Quality*, 260 S.W.3d 256, 260 (Tex.App.—Austin 2008, no pet.)

Thus, because of the respective deadlines applicable to the separate judicial and administrative procedures, a person seeking to challenge an action of the executive director should simultaneously file a petition for judicial review, pursuant to Texas Water Code §5.351, along with either a motion to overturn or a motion for reconsideration, pursuant 30 TAC §50.139 or § 50.39, respectively.

The logic of the *West* decision was recently reaffirmed in *TCEQ v. Kelsoe*.¹² In that case, the executive director made a written determination that an application for municipal solid waste permit was administratively incomplete and returned it to the applicant. The applicant first filed an MTO and then filed its appeal with the district court, more than 80 days later after the executive directors action. Because the application had never been subject to the contested case process, the Third Court of Appeals granted the TCEQ's plea to the jurisdiction on the basis that the appeal was filed after the 30 day deadline of Tex. Water Code §5.351.

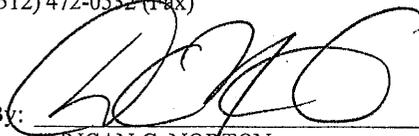
These cases show that practitioners should not presume that action taken by the commission is subject to the contested case process or that the Commission's MTO rules delay the effective date of Commission or E.D. actions. If the regulated community recognizes that the motion for rehearing and finality consideration of the Texas Government Code only apply in contested case situations, much of the recent confusion over filing deadlines will be avoided.

¹² *Supra*.

CONCLUSION

Lloyd Gosselink appreciates the opportunity to file this brief and hopes that the Commissioners find the information contained herein helpful. Lloyd Gosselink stands ready to participate in any further discussions or inquiries regarding this or other issues on which the Commission may seek input.

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2009 OCT 16 PM 4: 57

**Brief relating to the "Effective Date" of an act, order, or decision
issued by the Commission of executive director
Docket No. 2009-1562-MIS**

CHIEF CLERKS OFFICE

Lowerre, Frederick, Perales, Allmon & Rockwell ("LFPAR") submits this brief, on behalf of the firm and on behalf of the Sierra Club, in response to the Commission's request for briefs relating to the effective date of an act, order, or decision issued by the Commission or executive director. In short, because the current rule defining "effective date" of an executive director's decision creates confusion regarding the proper procedure for seeking review of that decision and creates so many pitfalls for the unwary, many parties end up missing their opportunity to seek judicial review of agency decisions. LFPAR therefore recommends that the Commission amend the definition of "effective date." The "effective date" for purposes of seeking judicial review of a Commission decision should be after all administrative remedies are exhausted, *i.e.*, after any motion to overturn or motion for rehearing has been overruled. This would further the policy articulated in the Texas Administrative Procedure Act of providing uniform practice and procedure for state agencies. *See* Tex. Gov't Code § 2001.001.

Issue Presented: How does one determine the "effective date" of a Commission decision for purposes of pursuing judicial review of that decision? More specifically, if the Executive Director issues a permit (or makes any sort of "final" permitting decision) and no contested case hearing took place before the decision was rendered, how does one determine the deadline for filing a petition for judicial review of that decision?

Background: When TCEQ issues a permit without first conducting a contested case hearing, there are potentially two different statutes that allow for judicial review of

that decision: Chapter 5 of the Water Code and the APA (Chapter 2001 of the Government Code).¹

Under Chapter 5 of the Water Code, a party wishing to pursue an administrative appeal must file the petition in district court within 30 days of the “effective date” of TCEQ’s decision.² Generally, under TCEQ’s rules, the “effective date” of a TCEQ permit decision for which no contested case hearing has taken place is the date that the Executive Director signs the permit. Thus, any person seeking judicial review of an executive director’s permitting decision must file a petition in district court within 30 days of the date that the executive director signed the permit.

By contrast, under the APA, which generally applies to agency decisions that follow an *opportunity* for a contested case hearing, a party must first exhaust its administrative remedies, typically by filing a motion for rehearing and awaiting the agency’s decision on that motion, before seeking judicial review. So, under the APA, a party *must* await a ruling on its motion for rehearing (or an equivalent motion) before it may file a petition in district court. In fact, if a party files prematurely, before the Commission has ruled on the motion for rehearing, the party risks losing its right to appeal and failing to invoke the district court’s jurisdiction. Chapter 5 of the Water Code does not contain a similar “exhaustion of remedies” requirement.

¹ Other statutes might also provide a right to judicial review for specific program areas. For instance, Section 361.321 of the Texas Health and Safety Code provides a right to appeal of a Commission decision, order, or other act, under the Solid Waste Disposal Act. This brief, however, does not specifically address each of those judicial review provisions. For the most part, arguments related to the judicial review provision in Chapter 5 of the Water Code also apply to any other judicial review provision, except the one found in the APA.

² Section 5.351(b) of the Water Code states: A person affected by a ruling, order, or decision of the commission must file his petition within 30 days after the effective date of the ruling, order, or decision.” It is worth pointing out that this is not explained in TCEQ’s notice.

TCEQ takes the position, in judicial proceedings, that the APA does not apply to TCEQ permit decisions for which no contested case hearing has occurred, even if a hearing was requested but denied. And recently, the Court of Appeals agreed with this position, in a case involving the denial of a hearing request for a wastewater discharge permit amendment. *West v. Texas Comm'n on Env't'l Quality*, 260 S.W.3d 256 (Tex. App.—Austin 2008, pet. denied). So, a party seeking judicial review of a Commission decision for which no contested case hearing was held must proceed via Chapter 5 of the Water Code, and therefore, must determine the “effective date” of the Commission’s decision in order to calculate its deadline for filing a petition in district court.

Moreover, the Attorney General, acting on behalf of the TCEQ, has taken the position in judicial proceedings that when appealing a Commission decision under Chapter 5 of the Water Code (whether that decision was made by the Commissioners or the Executive Director), one must first file a motion for rehearing with TCEQ. In other words, the Attorney General maintains that if a party seeks review of the executive director’s issuance of a permit, for instance, that party must first file its motion for rehearing (or the equivalent) within 20 days of the date that the Executive Director signed the permit AND that party is also required to file its petition in district court within 30 days of the date that the Executive Director signed the permit, without awaiting a decision on its motion for rehearing.

This is an unnecessarily complicated interpretation of the law, for many reasons. For one, exhaustion of remedies does not generally refer to the mere filing of a motion for rehearing; it also means allowing the Commission to rule on the motion before

seeking review in district court. More importantly, however, this interpretation of the law creates such a complicated procedure that pro se participants will find impossible to maneuver.

Legal Argument: The appellate courts (particularly the Austin Court of Appeals and the Texas Supreme Court) have rendered opinions regarding the proper procedure for appealing a non-contested-case-hearing decision, but those opinions are far from clear and uniform regarding applicable deadlines and exhaustion of remedies requirements. In fact, because of the various interpretations of the law governing such appeals, oftentimes, parties resort to filing at least 2 petitions in district court to ensure that they have complied with either one of the two possible mechanisms for calculating the 30-day filing deadline.³ A brief review of some of those decisions follows.

Simmons v. Texas State Board of Dental Examiners, 925 S.W.2d 652 (Tex. 1996):

In *Simmons*, the appellant Dr. Simmons faced two conflicting judicial review provisions applicable to his appeal of the revocation of his dental license. Under the Dental Practice Act, Dr. Simmons was required to appeal the State Board of Dental Examiners' (the "Board") decision within 30 days from the service of notice of the Board's action (like Chapter 5 of the Water Code). *Id.* at 653. But the APA required Dr. Simmons to file a timely motion for rehearing *before* seeking review in district court. *Id.* Dr. Simmons

³ In at least one case that Sierra Club is involved in, Sierra Club has already filed 3 petitions in district court and intends to file a fourth. This is because in that case the Commissioners issued an order, denying Sierra Club's hearing request and conditionally granting the applicant a license. But, months later, the executive director signed the actual license and included an "effective date" with his signature. Thus, Sierra Club was compelled to comply with the 30-day filing deadline for the Commissioners' initial decision and also exhaust its administrative remedies by awaiting a ruling on its motion for rehearing. Then, after the executive director signed the license and included an "effective date," Sierra Club again filed a petition in district court within 30 days of that "effective date" and filed a motion to overturn, so as to exhaust its administrative remedies. After that motion is ruled upon, Sierra Club will file its fourth petition.

elected to file his petition in district court within 30 days of the Board's decision, but before the Board had ruled on his motion for rehearing. The district court and the appellate court held that because Dr. Simmons did not exhaust his remedies—he did not await a ruling on his motion for rehearing before filing his petition in district court—he could not pursue his administrative appeal. The Supreme Court reversed, however, and held that because the Dental Practice Act (the Board's governing Act) directly conflicts with the APA “a dentist cannot wait for the Board to overrule a motion for rehearing and still be assured of a timely appeal to district court.” *Id.* The Court ultimately held that Dr. Simmons properly invoked the district court's jurisdiction and was entitled to judicial review of the Board's decision. *Id.* at 654.

HEAT Energy Advanced Tech. v. West Dallas Coalition for Env'tl Justice, 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied). In the *HEAT* case, HEAT applied to the Commission for a renewal of a permit. The “Coalition” opposed HEAT's application and requested an adjudicative hearing. *HEAT*, 962 S.W.2d at 289. The Commission referred the request to SOAH to determine whether the Coalition satisfied the “affected person” requirements. *Id.* Following the evidentiary hearing, the SOAH judge recommended granting the Coalition's hearing request, but the Commission disagreed and denied the hearing request. *Id.* at 289-90.

The Coalition filed a petition for judicial review under section 5.351 of the Water Code and simultaneously filed a motion for rehearing with the Commission. At the district court, HEAT, the permittee, argued that the Coalition failed to invoke the district

court's jurisdiction because it filed its petition for judicial review *too early*, before it exhausted its administrative remedies as required by the APA. *Id.* at 290.

In rejecting HEAT's argument, the Austin Court of Appeals recognized that the Coalition faced a "catch-22": "The Coalition was . . . in the difficult position of having to file its petition to preserve its right to judicial review *before* it had received a ruling from the Commission on the motion for rehearing." *Id.* at 293. The Coalition could not satisfy its exhaustion of remedies requirement under the APA and still be assured of a timely appeal to district court. *Id.* Thus, concluded the Court, the Coalition properly invoked the jurisdiction of the district court under the APA, notwithstanding its *premature petition*. *Id.* at 293. Significantly, the appellate court also held that because the judicial review provision in Chapter 5 of the Water Code did not contradict the APA with regard to the exhaustion of remedies requirement, the Coalition was required to file a motion for rehearing, *and await a ruling*, in order to invoke the district court's jurisdiction. *Id.* Even though the Coalition failed to await a ruling on its motion in this case, the Court found jurisdiction appropriate because the judicial review provisions were contradictory.

West v. Texas Comm'n on Envt'l Quality, 260 S.W.3d 256 (Tex. App.—Austin 2008, pet. denied). In the *Walter West* case, the Austin Court of Appeals deviated a bit from its holding in *Heat*. That case involved an application for a TPDES permit amendment. The Commission granted one hearing request, but denied Mr. West's and Sierra Club's. Before the case reached SOAH, the one party whose hearing request had been granted settled her protest, and thereafter, the application was remanded to the executive director for approval. Mr. West and Sierra Club first exhausted their remedies,

by filing a motion to overturn and awaiting a ruling on the motion, before filing a petition for judicial review in district court. In doing so, they failed to file their petition within 30 days of the date that the executive director signed the permit amendment.

The Austin Court of Appeals held that in that case, the judicial review provision in the Water Code applied, and under that provision, Mr. West and Sierra Club were required to file their petition for judicial review within 30 days of the executive director's approval of the permit amendment. What the Court of Appeals left up in the air, however, is whether exhaustion of remedies is required under Chapter 5 of the Water Code. The Attorney General, acting on behalf of TCEQ, represented to the appellate court in a letter brief that its interpretation of the law is that Mr. West and Sierra Club "were required to have done both—to have filed their suit for judicial review . . . while they exhausted their administrative remedy of pursuing a motion to overturn the Executive Director's decision." The appellate court did not comment on whether this was a correct interpretation of the law.

TCEQ v. Kelsoe, 286 S.W.3d 91 (Tex. App.—Austin 2009, pet. denied). In *Kelsoe*, the Austin Court of Appeals essentially applied *Walter West* to an Executive Director's decision determining that a solid waste permit application was not administratively complete. The Court reiterated that an appeal of such a decision is governed by Chapter 5 of the Water Code, and Kelsoe was required to file his petition within 30 days of the Executive Director's decision.

Finally, a brief discussion regarding the exhaustion of remedies requirement is warranted here. Whether exhaustion of remedies is a prerequisite to an appeal of a

Commission decision is an issue that remains unresolved, but has major repercussions on a party's ability to seek judicial review. If exhaustion of remedies is required before a party may seek judicial review, then, clarification of how one exhausts his or her administrative remedies is warranted.

As explained above, the Attorney General has taken the position that a party must file a motion for rehearing before filing a petition for judicial review under Chapter 5 of the Water Code. He argues that a party exhausts his administrative remedies by the mere filing of the motion, but should not await a ruling on that motion before seeking judicial review. This raises the question of whether the filing of a motion for rehearing (or the equivalent) serves any real purpose; for it is at least arguable that once the district court acquires jurisdiction of an administrative appeal, the agency loses jurisdiction to act on any pending motion.

The purpose of the exhaustion of remedies requirement is to assure that the appropriate body adjudicates the dispute. *Essenburg v. Dallas County*, 988 S.W.2d 188 (Tex. 1998). The motion is intended to apprise the agency of the claimed error so that the agency has the first opportunity to correct the error or prepare to defend it. *Id.* And as recently as last year, the Austin Court of Appeals has reiterated that where the relevant statutes require exhaustion of remedies as a prerequisite to judicial review, a trial court cannot acquire jurisdiction over the case until the agency rules on the motion for rehearing. *Marble Falls Indep. Sch. Dist. V. Scott*, 275 S.W.3d 558 (Tex. App.—Austin 2008, pet. denied). In other words, if a party prematurely files a petition in district court before the agency has ruled on the motion for rehearing, the premature filing results in a

failure to invoke the court's jurisdiction that cannot be cured. The party loses his right to appeal.

On the flipside, both the Texas Supreme Court and the Austin Court of Appeals have held that when a suit is brought to test the validity of an agency order, that agency loses jurisdiction over the subject matter of the decision while the suit is pending. *See Railroad Comm'n v. Cont'l Bus. Sys.*, 616 S.W.2d 179, 184 (Tex. 1981); *see also South Tex. Indus. Servs., Inc. v. Texas Dep't of Water Resources* 573 S.W.2d 302, 304 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.). In other words, if a party has not prematurely filed his petition for review and has properly invoked the jurisdiction of the court, the agency no longer has jurisdiction to rule on a motion for rehearing or make any other sort of determination regarding the case.

In sum, if exhaustion of remedies is a prerequisite to appeal, then, a party must await a ruling on his motion for rehearing before filing a petition in district court; otherwise, he risks losing his right to appeal by filing prematurely. On the other hand, if exhaustion is not a prerequisite to appeal, yet the Commission argues that a party must nevertheless file a motion for rehearing before filing a petition in district court, then it would seem that the filing of that motion is a futile exercise. This is so because once the district court acquires jurisdiction of the appeal, the agency no longer has jurisdiction to rule on the motion.

Repercussions: The repercussions of the confusing state of the law regarding appeals for non-contested-case-hearing agency decisions are many. For instance, pro se hearing requesters or even those represented by attorneys not well-versed in administrative law

will surely have a hard time discerning what is required to appeal the denial of a hearing request or the executive director's issuance of a permit. And currently, the TCEQ does not adequately explain the process in any of its notice letters.

Moreover, once a petition is filed in district court, it is unlikely that the TCEQ still maintains jurisdiction to rule on a motion for rehearing and correct its decision, should it desire to do so. In other words, the motion for rehearing process is rendered a futile exercise.

Perhaps most significantly, this convoluted process for seeking review of a TCEQ decision is at odds with the Legislature's intent in enacting the APA. The APA was intended to streamline the process for appealing agency decisions for which the Legislature has clearly granted the interested persons *an opportunity* to participate in a contested case hearing. But under the Commission's current interpretation of the law, the administrative appeal process is anything but streamlined.

Possible Remedies: To create a uniform and consistent procedure for appealing all types of Commission decisions, the Commission should specify in its rules that the effective date of any decision, including a decision by the Executive Director, is the date that all administrative remedies have been exhausted, *i.e.*, after a motion for rehearing (or its equivalent) is overruled. By adopting such an approach, the Commission could also simplify and streamline many of its current rules, requirements, and deadlines. This would make the administrative review process easier to maneuver for the general public and for TCEQ's staff.

Respectfully submitted,

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