

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §35.28, Hearing Requests.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission is proposing a number of changes to its procedural rules in this issue of the *Texas Register*. The changes include proposed revisions to Chapters 1, 35, 39, 50, 55, 80, 106, and 116. These chapters contain proposed changes to update and clarify agency rules, to facilitate permit processing and to more clearly set out the responsibilities of those involved in the permitting process. In addition, in part, the changes proposed in this issue of the *Texas Register* are intended to be responsive to comments received during the rulemaking proceedings implementing House Bill (HB) 801 during the summer and early fall of 1999 requesting that the adopted rules be subject to subsequent review to address any deficiencies which became apparent following adoption. (See September 24, 1999 issue of the *Texas Register* (24 TexReg 8190).)

Specifically, the proposed amendment to this chapter is intended to incorporate changes to the definition of affected person made by HB 801 in the 76th Legislative Session, 1999. House Bill 801 amended Texas Water Code (TWC), §5.115(a) by repealing the provision stating that the commission is not required to hold a hearing if the basis for a person's hearing request is not reasonable or is not supported by competent evidence. The reasonableness and competent evidence standards contained in §35.28(b) are thus no longer applicable to hearing requests related to emergency and temporary orders. Therefore, subsection (b) is proposed for deletion.

SECTION BY SECTION DISCUSSION

Title 30 TAC §35.28(b) is proposed for deletion and the remaining subsections are renumbered accordingly.

This proposed change will make the rule consistent with the statutory definition of “affected person” in TWC, §5.115(a) as amended by HB 801.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendment is in effect there will be no significant fiscal impacts for units of state and local government as a result of administration or enforcement of the proposed amendment.

The proposed amendment incorporates changes made by HB 801, 76th Legislature, Regular Session, relating to hearing requests by affected persons for emergency and temporary orders. House Bill 801 repealed a provision stating that the commission is not required to hold a hearing if it is determined that a hearing request is not reasonable or is not supported by competent evidence. Thus, a request for hearing on an emergency or temporary order is determined on the grounds of whether the person has a justiciable interest, not on the grounds of whether the request was deemed reasonable or supported by competent evidence. The proposed changes are procedural in nature and are not anticipated to result in fiscal implications for units of state and local government.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be

to ensure that the commission's hearing request actions related to emergency and temporary orders with respect to affected persons is consistent with the change in the law.

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SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of the proposed amendment. The proposed amendment incorporates changes made by HB 801 relating to hearing requests by affected persons for emergency and temporary orders.

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DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the statute. “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. The rulemaking is procedural in nature and is only intended to incorporate changes to the definition of an affected person made by HB 801 in the 76th Legislative Session. Therefore, the rulemaking does not meet the definition of “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rulemaking pursuant to Texas Government Code, §2007.043. The specific purpose of the rulemaking is to incorporate changes to the definition of an affected person made by HB 801 in the 76th Legislative Session. The rulemaking contains procedural rule changes only and does not affect private real property. Therefore, the rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rulemaking is neither identified in the Coastal

Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP) nor does it affect any action or authorization identified in §505.11. The rulemaking concerns only the procedural rules of the commission. Therefore, the rulemaking is not subject to the CMP.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal on March 6, 2001 at 10 a.m., Building F, Room 2210, Texas Natural Resource Conservation Commission Complex, 12100 Park 35 Circle, Austin, Texas. The hearings are 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 hearings; however, agency staff members will be available to discuss the proposal 30 minutes before each hearing and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Duron, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-016-035-AD. Comments must be received in writing by 5:00 p.m., March 12, 2001. For further information or questions concerning this proposal, please contact Debi Dyer,

Policy and Regulations Division, at (512) 239-3972.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules and to set policy by rule; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

The proposed amendment implements TWC, §5.115(a).

SUBCHAPTER C: GENERAL PROVISIONS

§35.28

§35.28. Hearing Requests.

(a) (No change.)

[(b) The commission is not required to hold a hearing if it determines that the basis of a person's request for a hearing as an affected person is not reasonable or is not supported by competent evidence.]

(b) [(c)] All relevant factors shall be considered in the evaluation of a person's request for a hearing as an affected person, including, but not limited to, the following:

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

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

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

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

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

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

(c) [(d)] A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.