

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §80.108, Executive Director Party Status in Permit Hearings and §80.118, Administrative Record. The commission also adopts amendments to §80.17, Burden of Proof; §80.21, Witness Fees; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.127, Evidence; §80.131, Interlocutory Appeals and Certified Questions; §80.153, Issuance of Subpoena or Commission to Take Deposition; §80.251, Judge's Proposal for Decision; §80.252, Judge's Proposal for Decision; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meetings. Sections 80.108, 80.109, 80.118, 80.127, 80.131, and 80.257 are adopted *with changes* to the proposed text as published in the August 24, 2001 issue of the *Texas Register* (26 TexReg 6244). Sections 80.17, 80.21, 80.117, 80.153, 80.251, 80.252, and 80.261 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Prior to the enactment of House Bill (HB) 2912, 77th Legislature, 2001, Texas Water Code (TWC), §5.228, provided that the executive director of the commission was required to be a party in all contested case hearings. As a result of public testimony received during its comprehensive review of the commission, the Sunset Advisory Commission recommended that the statute be changed to allow, rather than require, the executive director to participate in contested case permit hearings. The Sunset Advisory Commission also recommended that: 1) the role of the executive director be more clearly defined; 2) the executive director be expressly prohibited from rehabilitating non-agency witnesses in permit hearings; and 3) the commission adopt rules specifying the factors the executive director must take into account when considering whether to be a party in a permit hearing.

This recommendation was codified in House Bill (HB) 2912, the Sunset Bill for the commission.

Under HB 2912, TWC, §5.228 (the “Act”) was amended to provide that the executive director is required to be a party in a contested case hearing only in a matter where the executive director bears the burden of proof (e.g., an enforcement proceeding). For permit hearings, the executive director may be a party only for the purpose of providing information to complete the administrative record. The commission is required to specify, by rule, the factors the executive director must consider in determining, on a case-by-case basis, whether to participate in a hearing as a party. Factors the commission must consider in developing these rules include: 1) the technical, legal, and financial capacities of the parties; 2) whether the parties have previously participated in a hearing; 3) the complexity of the issues; and 4) the available resources of commission staff. The executive director is expressly prohibited from rehabilitating the testimony of non-agency witnesses or from assisting an applicant in meeting its burden of proof unless that applicant fits a category of permit applicants that under commission rule are eligible for such assistance. The amendments to TWC, §5.228 took effect September 1, 2001, and apply only to hearings in which the executive director is named as a party on or after that date.

This rulemaking is necessary to implement HB 2912 §1.20 and §18.09 as close as practicable to the effective date.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 that statute.

Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the adopted rulemaking is procedural in nature and establishes procedures for the executive director’s participation as a party in contested case hearings on permitting matters, the rulemaking does not meet the definition of a major environmental rule.

In addition, even if the adopted rules are a major environmental rule, a regulatory impact assessment is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law. This adoption does not exceed an express requirement of state law because it is expressly authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and TWC, §5.228, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with TWC, §5.228, which expressly

requires the commission to adopt rules specifying the factors the executive director must consider in determining whether to participate as a party in a contested case permit hearing. Further, TWC, §5.228, requires the commission to adopt rules that establish categories of permit applicants eligible to receive assistance from the executive director in meeting their burden of proof. This adoption does not adopt a rule solely under the general powers of the agency, but rather under specific state law (i.e., TWC, §5.228 and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

The commission received no comments related to the regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed a final analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's final analysis indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rules. Nevertheless, the commission further evaluated the adopted rules and performed a final analysis of whether the adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific primary purpose of the adopted rules is to revise the commission rules to establish procedures for executive director party participation in contested case permit hearings as required by HB 2912, §1.20. The adoption relates to the factors the executive director must consider when deciding whether to participate as a party in a contested case permit hearing as well as to categories of permit applicants eligible to receive assistance in meeting their burden of proof from the executive director. The adopted rules will substantially

advance these stated purposes by providing specific provisions on the aforementioned matters.

Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the adopted language relates to procedural matters relating to executive director party status rather than any substantive requirements.

The commission received no comments related to the takings impact assessment analysis.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adopted rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11.

Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

HEARING AND COMMENTERS

A public hearing was held on September 18, 2001 at 10:00 a.m. in Room 2210 of TNRCC Building F, located at 12100 Park 35 Circle, Austin. Two individuals provided oral comments at the hearing. The following provided oral comments and/or written comments during the comment period: Sierra Club on behalf of the Alliance for a Clean Texas (ACT); Association of Electric Companies of Texas, Inc. (AECT); Guadalupe-Blanco River Authority (GBRA); Lone Star Chapter of the Sierra Club, Environmental Justice (Sierra Club); Texas Association of Business and Chambers of Commerce (TABCC); Texas Center for Policy Studies (TCPS); Texas Chemical Council (TCC); Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP); and Vinson & Elkins (V&E).

All the commenters suggested changes to the proposal as stated in the SECTION BY SECTION / RESPONSE TO COMMENTS section of the preamble; regarding the rulemaking proposal overall, TCC and TABCC made comments generally supporting the agency's approach on the rule proposal. While many of the commenters recommended changes to the proposed rules, no commenter expressly opposed this rulemaking. Sierra Club did state concern that the rules as proposed were not following the legislative intent of HB 2912.

SECTION BY SECTION / RESPONSE TO COMMENTS

General

ACT commented that the rules should provide that even when the executive director is not a party, he is subject to the same ex parte prohibitions in communicating with the commissioners as the named parties in the hearing. ACT further commented that such a rule will prevent parties from using the executive director as a way around ex parte provisions and ensure a fair decision.

The commission has made no change in response to this comment. The commission will continue to fully comply with all applicable laws related to ex parte prohibitions and in particular, Texas Government Code, §2001.061. The commission notes that Texas Government Code, §2001.061(c) provides that the commission may communicate ex parte with an agency employee who has not participated in a hearing for the purpose of using the special skills or knowledge of the agency and its staff in evaluating the evidence in contested case proceedings. Texas Government Code, §2001.090(d) provides that the decisionmaker may use the special skills or knowledge of the state agency and its staff in evaluating the evidence. The commission responds that the Texas

Government Code provisions apply to contested case hearings concerning permitting matters and allow certain communications between the commission and the executive director's staff. At this time, the commission declines to modify ex parte prohibitions beyond current law.

TCC expressed general agreement on the agency's approach on the rules. TCC commented that at least one of the primary goals of a contested case hearing is to develop the best possible permit that can be issued. TCC further commented that the legislation that these proposed rules implement does not change or effect that goal and that the executive director is a valuable, if not necessary, participant and must be provided the maximum flexibility under the rules in determining party status. TCC also stated that to the extent the draft permit is amended or modified in contested case proceedings, it would not be in the public's interest to exclude the executive director. Finally, TCC noted that these rules should be narrowed or expanded, as appropriate, as the agency gains more experience in the future.

The commission responds that the primary goal of a contested case hearing in a permitting matter is to allow informed decision-making on all relevant statutory and regulatory requirements so that a decision can be made on whether the permit should be issued, and if issued, the provisions protective of human health and the environment that should be included in the permit. The commission agrees that effective implementation of the Act requires that the executive director have a certain amount of flexibility in determining party status. The commission, however, also responds that the Act anticipated that interested parties have some degree of certainty relating to the cases in which the executive director will or will not participate. In addition, there are some cases where the administrative and technical review of the permit by agency staff prior to the

contested case hearing may suffice and further elaboration by the staff is not necessary for informed decision-making by the commission. The commission responds that these rules and, in particular, new §80.108 strike the appropriate balance in that regard. The commission agrees that the executive director plays an important role in the preparation and evaluation of proposed permit provisions. Indeed, one of the factors that weighs in favor of executive director participation is the likelihood that changes to the draft permit could adversely affect human health or the environment. Further, even if the executive director did not participate as a party in a matter for which changed permit provisions are recommended after contested case hearing, the executive director may file briefs after issuance of the proposal for decision on legal or policy issues in response to commission or general counsel request. In response to TCC's request for future re-evaluation of these rules, the commission notes that as it develops further experience with the implementation of the amendments to TWC, §5.228 under HB 2912, it may further refine in future rulemakings the provision relating to Executive Director Party Status in Permit Hearings.

ACT commented that all parties to a contested case hearing should be able to conduct discovery regarding documents or other information held by the executive director as if he were a party, even when the executive director is not a party.

The commission has made no changes in response to this comment. New §80.118 lists all those documents which at a minimum will constitute the administrative record. The documents

identified include documents created by the commission staff which reflect the administrative and technical review of the application. These documents will be available to the parties regardless of the party status of the executive director. Further, the deposition and testimony of agency staff may be obtained by subpoena where it is necessary in accordance with Texas Rule of Civil Procedure 205 and 30 TAC §80.151. Consequently, the rules as written provide for the availability of information held by the executive director. Establishing a process where the executive director acts as a party for some purposes and not for other purposes would introduce confusion and uncertainty into the contested case hearing.

ACT commented that the executive director may have an incentive to vigorously oppose requests for contested case hearings in order to avoid committing time and resources to a hearing. ACT suggested that the executive director should not respond to requests for hearing and that the commissioners can make their decision based on the information from the hearing requestors, OPIC, and the applicant's responses to the requests for hearing.

The commission has made no change in response to this comment. The executive director has a responsibility to ensure that the commission has the benefit of all relevant information when evaluating hearing requests, including whether a request for hearing meets commission rules and whether the law warrants the grant or denial of a hearing request. In addition, TWC, §5.228 governs executive director participation as a party and not functions performed outside of that context.

GBRA commented that the proposed rules appear to be contrary to the intent of the legislature found in Senate Bill (SB) 1, 75th Legislature, 1997, to plan and implement projects for a statewide water plan in Texas.

No change was made as a result of this comment. The commission does not find that the new rules are in any way contrary to SB 1. Specifically, with respect to the statewide water plan for Texas, TWC, §11.134 states that the commission shall not grant an application for a water right unless the application addresses a water supply need in a manner that is consistent with the statewide water plan and an approved regional water plan for the area in which the project will be located, unless the commission determines a waiver is warranted. These rules do not affect this requirement and are not contrary to the provisions of SB 1. Rather, these rules are procedural in nature and primarily relate to the executive director's participation in contested case hearings.

TABCC supported the rule package as a good faith attempt at following legislative intent and reassuring the protestant public, who have the impression that the executive director is biased in favor of the applicant.

The commission appreciates the comment in support of these rules.

Subchapter A, General Rules

Section 80.17, Burden of Proof, will reflect that the executive director must comply with adopted new §80.108, relating to the executive director's party status in permit hearings. This adopted change

implements amended TWC, §5.228(e). The commission adopts this change as a cross-reference to new §80.108 to give parties notice regarding changes to the burden of proof consistent with TWC, §5.228.

Section 80.21, Witness Fees, will clarify that a commission employee who is compelled to testify as a witness or deponent is only entitled to receive those expenses allowed by commission policy and applicable law. The commission anticipates that agency staff may be subpoenaed in more instances than in the past when the executive director participated in all contested case hearings. Thus, the commission seeks to clarify the provisions relating to witness fees paid to commission staff consistent with the provisions of Texas Government Code, §659.005 and agency policy.

Subchapter C, Hearing Procedures

New §80.108, Executive Director Party Status in Permit Hearings, will implement TWC, §5.228(b) - (e). This adopted new section directs when, and under what circumstances, the executive director may participate in contested case permit hearings. This adopted new section provides for mandatory abstention of the executive director in some permitting matters, mandatory participation in other permitting matters, and discretionary participation, based on an evaluation of certain criteria, in permitting matters not covered by the mandatory provisions.

New §80.108(a) will prohibit the executive director from participating in the following permit hearings:

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

§361.069; 2) an application for an air quality standard permit to authorize a concrete batch plant under THSC, §382.05195; 3) an application for an air quality permit to authorize emissions from facilities which solely emit the types of emissions that do not require health and welfare effects review as specified on the Toxicology and Risk Assessment (TARA) Emissions Screening List; 4) an application for a permit for a municipal solid waste transfer facility under 30 TAC §330.4; 5) an application for a permit for the processing of grit and grease trap waste under 30 TAC §330.4; 6) an application for a permit for composting facilities under 30 TAC §332.3; and 7) an application to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements for secondary treatment in 30 TAC Chapter 309. The hearings identified involve matters for which executive director party participation is not necessary for one or more of the following reasons: 1) commission technical staff have limited expertise on the issue in controversy (e.g., land use compatibility); 2) the permit conditions for the authorization sought have been developed after extensive technical evaluation and no other unique conditions are involved (e.g., concrete batch plant standard permits); or 3) the issues to be considered are of limited complexity or are ones for which the technical evaluation of staff reflected in the administrative record is not likely to require further elaboration.

With regard to municipal solid waste applications where land use is the sole issue at hearing set forth in §80.108(a)(1), the commission's staff has limited expertise on the issue of land use compatibility.

Commission staff perform a review of applications to ensure that all the documentation required by TNRCC rules relating to land use is submitted. The rules require an applicant to submit information relating to zoning at the site and in the vicinity, character of surrounding land uses within one mile of the proposed facility, growth trends of nearest community, proximity to residences and other uses, and

a description of all known wells within 500 feet of the proposed site. Affected parties in the vicinity of the proposed site are better able to present evidence concerning the impact of the site on the surrounding area. Therefore, it is not necessary for the executive director to participate as a party in a hearing where the only issue is land use compatibility.

Regarding new §80.108(a)(2), the commission issued a new air quality standard permit for concrete batch plants (CBPs) effective September 1, 2000, which is applicable to permanent, temporary, and specialty CBPs. The standard permit is based on a comprehensive evaluation of air quality emissions and potential impacts and statutory requirements of THSC Chapter 382, including changes made by SB 1298, 76th Legislature, 1999. Senate Bill 1298 amended the existing THSC, §382.058, by adding subsection (d), which prohibits the executive director from requiring applicants to submit air dispersion modeling for a CBP registration under THSC, §382.057 if modeling was relied upon in the adoption of an exemption from permitting, and provides that evidence regarding air dispersion modeling may not be submitted in a contested case hearing on that application. Air dispersion modeling is used to demonstrate whether the predicted maximum concentration of emissions from the plant will meet the state and federal ambient air quality standards. The commission relied, in part, on air dispersion modeling in adopting this standard permit, an alternate form of authorization.

The standard permit is designed to allow for registration of a typical CBP. However, it is not intended to provide an authorization mechanism for all possible plant configurations and production rates. Those facilities which cannot meet the standard permit conditions may apply for a case-by-case review air

quality permit under 30 TAC §116.111. In addition to combining the requirements in the existing CBP permits by rule (30 TAC §§106.201 - 106.203), the commission added requirements to control dust, based on current best available control technology (BACT) as required by 30 TAC §116.602(c) and distance limitations or setbacks based on emission estimations, computer dispersion modeling, impacts analysis, and plant observations performed to verify the protectiveness of the standard permit. The commission has conducted extensive research which shows that the standard permit for CBPs is protective of the public health and welfare and that facilities which operate under the conditions specified will comply with commission rules and regulations.

Because the conditions under which a CBP can construct and operate are contained within the standard permit, this authorization does not provide for the addition of conditions which are unique to the applicant. Therefore, the commission is exempting the executive director from contested case permit hearings on this type of air authorization.

Regarding new §80.108(a)(3), the TARA Section Emissions Screening List includes types of emissions which do not require effects review. However, this list does not limit staff's discretion to evaluate these types of emissions on a case-by-case basis. The list is included in the agency publication Technical Guidance Package for Modeling and Effects Review Applicability, RG-324 (Revised, Draft October 2000) compiled, published, and distributed by the Air Permits Division and Toxicology and Risk Assessment Section.

A category or type of emissions becomes a candidate for this list after numerous individual emissions

sources within the category have undergone full engineering and toxicological review, and have proven, over time, to have the following characteristics: 1) typical sources within the category have been shown not to pose a threat to human health and the environment; and 2) site-specific emissions scenarios are relatively consistent across sites. For these types of applications, the executive director would not expect to obtain any additional information in a contested case hearing regarding the issue of effects that would result in changing the executive director's preliminary decision or recommended terms of the draft permit. The technical evaluation of staff reflected in the administrative record is not likely to require further explanation. Therefore, the commission is exempting the executive director from contested case hearings on air permits with solely these types of emissions.

Regarding new §80.108(a)(4) and (5), which concerns applications for municipal solid waste transfer station facilities and for grease and grit trap processing permits under 30 TAC §330.4, the commission has determined that the administrative and technical review of these permits by agency staff prior to contested case hearing will suffice and further elaboration by the staff is not necessary for informed decision making by the commission. Application requirements for these types of facilities are relatively straightforward and of limited complexity. Thus, given the available resources of commission staff and the limited complexity of the issues to be considered during the hearing, the commission finds that executive director participation in these matters is not necessary.

Regarding new §80.108(a)(6), under 30 TAC §332.3 operations that compost mixed municipal solid waste or operations that add any amount of mixed municipal solid waste as a feedstock in the composting process are required to obtain a permit. These facilities are not involved in the disposal of

waste, instead the composting involves the controlled, biological decomposition of organic solid waste under aerobic conditions. Properly operated compost facilities will result in the reduction of waste and the production of reusable organic material. The commission does not believe that it is necessary for the executive director to participate in contested case hearings for these facilities because the administrative and technical review of these permits by agency staff prior to contested case hearing will suffice and further elaboration by the staff is not necessary for informed decision making by the commission.

Finally, with regard to new §80.108(a)(7), which pertains to applications to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements for secondary treatment in 30 TAC Chapter 309, the commission finds that as a general rule, the administrative and technical review of these permits by agency staff prior to contested case hearing will suffice and further elaboration by the staff is not necessary for informed decision making by the commission. The regulatory requirements detailing the technical analysis necessary to the issuance of an irrigation permit and setting effluent limitations (30 TAC Chapter 309, Subchapters A and C) were promulgated to address the potential for unpermitted discharges and to address potential contamination of waters in the state due to such discharges. This is reflected in the highly technical and detailed requirements of the rules, the nature of information requested in the application, and the extensive review by staff of this information. Thus, further input by the executive director during the course of a contested case hearing is not necessary to complete the administrative record.

New §80.108(b) will require the executive director to participate in the following matters: 1)

applications concerning water rights; 2) applications for which the executive director has recommended denial of the permit; 3) involuntary amendments; and 4) applications for which the draft permit includes provisions opposed by the applicant. Executive director participation in the matters identified in 1 - 4 is required for one or more of the following reasons: 1) the executive director is essentially serving in the role of trustee of a natural resource (e.g., water rights); or 2) the executive director's position in the proceeding is contrary to that of the applicant and his participation is necessary to ensure that the commission has the benefit of all relevant information necessary to make a decision (e.g., application for which the executive director has recommended denial).

Concerning §80.108(b)(5), ACT commented that this provision, which was proposed to require the executive director to participate when the applicant requests a hearing, should be eliminated. ACT suggested that the rule should be modified to provide that the executive director consider under §80.108(c) whether the applicant has requested a hearing in order to challenge proposed draft permit provisions, which would weigh in favor of executive director participation.

The commission has deleted proposed §80.108(b)(5) as a factor triggering executive director mandatory participation because the circumstances described in subsection (b)(2) - (4) address the type of situations where the applicant would be in a position contrary to that of the executive director and requesting a hearing on a permitting matter.

Concerning §80.108(b), V&E asked why a direct referral mandates executive director participation.

V&E stated that if full HB 801 cases are unlikely to occur again, then all future contested case hearings

will be direct referrals and the executive director will participate as a party.

A direct referral does not mandate executive director participation and it was not the intent of the proposed rules to require it. The commission recognizes and agrees that simply because a matter is direct referred for hearing should not by itself trigger executive director party participation. The proposed rules were written to provide that where the applicant requested a hearing on a permitting matter, the executive director should participate in that matter. However, in view of this comment, and after reconsideration of §80.108(b), the commission has eliminated subsection (b)(5) as a factor triggering executive director participation since the circumstances described in subsection (b)(2) - (4) address the type of situations where the applicant would be requesting a hearing on a permitting matter due to disagreement with the executive director's technical evaluation of the proposed permit.

The commission developed the mandatory provisions of §80.108(a) and (b) with due consideration of the factors that the commission is required to take into account in developing rules implementing TWC, §5.228. More specifically, the mandatory provisions are based on an evaluation of whether the complexity of the issues to be presented at the hearing merited executive director participation as a party as well as the best use of available commission resources. The commission's goal is to ensure a complete administrative record in all cases while also focusing the use of agency resources on those matters for which it is likely that the executive director's technical review merits further elaboration during the hearing process.

If the mandatory provisions of this new section for participation or abstention do not apply, then §80.108(c) outlines the factors to be considered by the executive director in determining, on a case-by-case basis, whether to participate in a contested case permit hearing as a party. The executive director, as a preliminary matter, shall consider whether there is any issue that merits his participation, based on the existence of one or more of the following conditions: 1) one or more of the issues to be presented in the hearing are new, unique, or complex, including consideration of whether an issue relates to more than one medium, and whether it is likely that construction of prior agency policy or practice will be involved; 2) it is likely that the decision on any of the issues to be presented in the hearing will have significant implications for other agency actions or policies; 3) it is likely that changes to proposed permit conditions could adversely affect human health or the environment; or 4) any issue to be considered is likely to affect federal program approval or authorization.

Based on an evaluation of these conditions, the executive director may elect to participate as a party or he may proceed with an analysis of additional party-specific factors. These factors include whether there is a significant disparity in the legal, financial, and technical capacities of the parties, whether there are limitations on the availability of commission staff and whether the draft permit contains any provision included by the executive director to address an applicant's compliance history.

Several commenters expressed concerns over the two-pronged analysis set forth in §80.108(c), which focuses first on issues and then, as a discretionary matter, on other party-specific factors. TCPS commented that the executive director should look at all the factors set forth in TWC, §5.228 at the same time in order to determine party status. AECT similarly stated that nothing in the statute would

support the rule provision as written and allow the executive director to consider issues as a preliminary matter prior to consideration of the factors in the Act. ACT, GBRA, and AECT also stated that the factors in TWC, §5.228 are not discretionary and the executive director must consider all the factors in each case.

The commission has made no changes in response to this comment. Section 80.108(c), as structured in the proposal, fully satisfies TWC, §5.228. The statute requires the commission by rule to specify factors the executive director must consider in determining whether to participate as a party in a contested case permit hearing. The statute goes on to state that the commission, and not the executive director, must consider certain enumerated factors in developing the rules. The commission has fully considered each of the statutory factors in TWC, §5.228 in developing these rules and has developed a workable framework bearing each of the factors in mind. The commission has determined that the two-pronged approach to permitting cases not covered by the mandatory provisions best satisfies legislative intent by focusing first on the importance of the issues in a hearing and only thereafter, as necessary, on who the parties to that hearing may be. This approach focuses the available resources of commission staff on those matters involving issues that merit continuing input by staff beyond the input provided during administrative and technical review. It also ensures that the commission, on matters of particular significance to the agency, have available all relevant information including any and all information prepared or presented by commission staff during the contested case hearing.

ACT and TCPS both commented that the rule language in §80.108(c) should be modified to include a

provision whereby the executive director documents the basis for his decision to participate in a contested case hearing in a memorandum, which would be provided to the parties, the hearings examiner, and the commissioners. ACT further stated that the memo should clearly explain how the factors were evaluated and balanced. To the contrary, TCC commented that a documentation process is unnecessary and would require an unjustified allocation of agency resources. TCC further stated that the executive director's notice letter can provide a brief justification instead.

The commission agrees in part with this comment and has made certain revisions to the rule. New subsection (k) now provides that the executive director will record his decision on a party status as well as the grounds for that decision on a case-by-case basis. In addition, new subsection (l) requires that the executive director compile the required records and provide the information to the commission in an annual report. The recordation and reporting requirements will ensure appropriate commission oversight of the executive director's party status decisions. Since the executive director's decision is not appealable to the commission or SOAH, the rule does not require that the records be filed in each contested case proceeding.

Concerning §80.108(c), V&E commented that the legislation was intended to even the playing field between applicants and protestants and questioned whether executive director participation where disparity amongst the parties favors participation is contrary to legislative intent.

The commission has made no change in response to this comment. The commission responds that

the rule requires that an issue meriting executive director participation be found first before party-specific factors may even be reached in the §80.108(c) party participation analysis. The purpose of providing the preliminary issues analysis by the executive director was to eliminate those cases with routine issues not likely to impact broader agency policy or legal interpretation despite who the parties to the proceeding may be. The commission notes that TWC, §5.228 requires the commission to consider the technical, financial, and legal capacities of the parties in developing these rules. In considering the statutory factors, the commission determined that disparity in capacities is the relevant inquiry. Disparity among the parties' technical, financial, and legal capacities is included in these rules as one factor favoring executive director's participation because it is in those situations where the executive director's participation may even the playing field and ensure that the commission has a complete administrative record on which to base its permitting decisions. The result in all cases should be a complete and accurate record.

AECT commented that it was inappropriate to provide criteria in §80.108(c) for the executive director that "in his discretion" he may or may not consider.

AECT appears to interpret §80.108(c) to allow the executive director to ignore the factors set forth in the rule and develop completely new factors when determining party participation on a case-by-case basis. The commission did not intend to allow the executive director to look outside the criteria set forth in the rule in any permitting case nor did the commission envision that the executive director could develop alternative criteria for considering certain permitting cases. The use of the word "shall" in §80.108(c) is intended to require the executive director to consider at

least the issues prong of the two-pronged analysis in permitting cases that are not covered by the mandatory provisions. The commission has modified the rule text to delete the phrase “in his discretion” to clarify that the factors in subsection (c) apply to all permitting cases except those set forth in subsections (a) and (b).

V&E stated that the list in §80.108(c)(1) looks like it give the executive director the option of joining every case or no case.

The commission acknowledges that this subsection does give the executive director a certain amount of flexibility in determining party status for those matters that do not fit within the mandatory participation or abstention provisions. Such flexibility is necessary given that this is a procedural rule that applies to all types of permitting matters and varying situations, not all of which can be precisely anticipated. However, the subsection, consistent with HB 2912, also places certain parameters on the executive director’s exercise of discretion. The executive director is required to consider whether any issues to be presented in the hearing merit participation and the factors to be considered are specifically listed in the rule. If the executive director proceeds with a consideration of party-specific factors, the factors to be considered are also prescribed by rule. Therefore, no changes have been made in response to this comment.

Concerning §80.108(c)(1), ACT commented that all of the issues to be evaluated are too broad and should be narrowed. For example, ACT stated that consideration should be limited to an issue that would, “affect adversely” the approval or authorization by a federal agency of a state program. ACT

suggested combining the issues analysis into an alternative more pragmatic approach.

The commission has made no changes in response to this comment. The commission acknowledges that the issues to be evaluated are broadly defined. It is important to recognize, however, that the purpose of this rulemaking is to provide guidance, but not unduly constrain the executive director's decision-making regarding party status. These rules are intended to apply to varying types of permitting matters involving a wide variety of situations. The rule does limit the executive director's decision-making in those cases for which mandatory participation or abstention is prescribed, but for the remaining cases for which the commission is not setting out mandatory participation or abstention, there is a need to allow the executive director some degree of flexibility to exercise judgment, within certain parameters, about the cases which merit participation as a party. The commission disagrees that, under subsection (c)(1)(D), consideration should be limited to an issue that would affect adversely the approval of a federal program. There may be circumstances where an issue merits executive director party participation because it may affect federal program approval in some way, but resolution of that issue does not necessarily implicate federal program disapproval.

Concerning §80.108(c)(1), ACT commented that the executive director's participation should, by rule, be limited to those issues which merit his participation.

The commission has made no changes in response to this comment. Establishing a hearing process

where the executive director participates as a party for some purposes, but not for others would introduce unnecessary confusion and uncertainty in the hearing process. If the executive director is to participate as a party in a contested case, then he should function as a party subject to the obligations and privileges of a party. To do otherwise would result in a potentially unworkable process whereby depending on the issue the executive director would have differing rights and obligations. This would undermine certainty in the process and complicate administration of the hearing. In addition, certain issues often have a relationship to other equally pertinent issues, and if the executive director's participation is needed for a particular issue, it may also be needed in the context of other issues in the proceeding. The commission recognizes that these rules do allow, in very limited circumstances, post-hearing briefing by the executive director in matters where he has not participated as a party. Thus, there may be circumstances where the executive director is allowed a role in the proceedings more limited than that of a party. However, such circumstances would arise in only a narrow set of proceedings and unlike the suggested change, would not affect or complicate the development of the factual record.

ACT commented that §80.108(c)(2)(A)(ii) should not provide for review of financial capacity only if requested. ACT stated that under HB 2912 a review of the financial capacities of the parties is a mandatory and not an optional consideration. In addition, TCPS commented that it is not clear in §80.108(c)(2)(A)(ii) who requests executive director review of financial capacity.

The commission modified §80.108(c)(2)(A)(ii) to provide for the executive director's review of financial capacity in all cases where §80.108(c)(2) is reached. Further, the rule now provides that

the executive director may review financial documentation or evidence of financial disparity if offered by any party. The commission understands the concerns of individuals who seek equity in the financial review process, but sees no viable alternative to the amended language as the statute does not provide a mechanism for compelling an entity to produce financial records prior to discovery if that party does not voluntarily wish to do so. Thus, only a party seeking review of its own financial records can provide documentation or evidence to be considered by the executive director in his review of financial capacity. The commission further responds that the statute requires the commission, and not the executive director, to consider the financial capacities of the parties as one of several factors in developing the rules. The commission has considered financial capacity and included it as a matter the executive director may consider in determining whether to participate as a party in a contested case permitting matter and finds that the regulatory approach adopted satisfies TWC, §5.228.

Concerning §80.108(c)(2)(A)(ii), ACT suggested adding consideration of whether any of the parties is a “low income” person to the financial disparity analysis.

The commission has made no change in response to this comment. The rule allows the executive director to consider whether there is a significant disparity in the experiences and resources of all types of parties. If one of the parties is at a financial disadvantage, the executive director can consider that as a factor. Whether or not a significant disparity exists among the parties can be determined without regard to a defined category applicable to a particular person or entity.

Concerning §80.108(c)(2)(A)(ii)(II), GBRA stated that this provision raises questions concerning unequal application of law regarding non-profit organizations. GBRA commented that the rules usurp the authority of the legislature and the governor to make state policy as found in SB 1. Additionally, GBRA commented that the rules will create an increased workload which will lead to delays, because the rules will encourage an increase in new permit applications. ACT commented that a definition of “non-profit entity” needed to be added to the rules and suggested a definition.

The proposed rules direct the executive director to consider whether there is a significant disparity in the experiences and resources of the parties. One factor which the executive director may consider in determining disparity is whether a party is a non-profit entity. However, the executive director is not required to participate in any case where a non-profit is a party. For water rights cases, these factors will not come into play, because the commission has determined that the executive director shall be a party in all water rights cases. In addition, the rules do not mandate that the executive director assist an applicant in meeting its burden of proof in any case, but rather allow such assistance only after §80.108(e) has been satisfied.

The commission does not agree that the proposed rules usurp the authority of the legislature and the governor to make state policy. Specifically, the proposed rules are not contrary to SB 1. The statute (codified in relevant part in TWC, §11.134) states that the commission may not issue a water right for municipal purposes in a region that does not have an approved water plan unless the commission determines that conditions warrant a waiver. The proposed rules relating to the executive director's party status do not affect this requirement and are not contrary to the statute.

The commission disagrees that the new rules will generate an additional workload that will result in additional delays. Overall, the rules provide for more limited executive director participation in contested case hearings. With respect to water rights matters, the rules continue the existing practice of the executive director participation in contested case hearings.

The commission agrees with the commenters that the term “non-profit entity” needs to be defined. The commission has added §80.108(j)(3) to provide that a non-profit entity shall mean those entities which are defined in 26 United States Code, §501(c)(3) and (4). The commission recognizes that this definition of non-profit entity is widely used.

Concerning §80.108(c)(2)(A)(ii)(III), ACT commented that many of the companies that would meet the definition of small business have sufficient resources to participate effectively in a contested case hearing. Further, ACT stated that the executive director should focus on “micro-businesses” (20 or less employees) instead of small businesses. TCPS also commented that the small business review should be limited to micro-businesses.

The commission has made no change in response to this comment. The commission notes that whether an entity is a small business is considered in the context of determining the financial capacity of the parties. The rule does not prohibit consideration of any other information relevant to financial capacity. Further, the consideration of financial capacity is significant only with respect to whether there is a significant disparity in the experience and resources of the parties. Significant disparity can be determined regardless of the defined category applicable to a

particular entity. Further, the commission notes that the use of the small business category in determining financial capacity is consistent with other legislative enactments that recognize that small businesses may require special considerations. (See, for example, THSC, §382.056(a) which allows for alternative notice procedures for small businesses and TWC, §5.1175, which allows a small business to pay a penalty in periodic installments.)

Concerning §80.108(c)(2)(C), ACT and TCPS both commented that the executive director's need to introduce compliance history information should not be a factor favoring executive director party participation. ACT further stated that because of the new compliance history provisions in HB 2912, compliance history will be an issue in almost all permitting matters. ACT also commented that compliance history information could be available as a certified agency record for introduction by any party.

The commission has modified §80.108(c)(2) in response to these comments. The commission has modified the rule to provide that a factor weighing in support of executive director participation may be whether the draft permit contains any provision that has been included by the executive director to address an applicant's compliance history. The commission has determined that executive director party participation may be necessary to maintain the integrity of a draft permit that contains unique provisions which have been included based on an applicant's compliance history.

New §80.108(d) states that when the executive director participates as a party under subsections (b) or

(c), he shall do so solely for the purpose of providing information to complete the administrative record.

Concerning §80.108(d), TABCC and TCC commented that language needs to be added to the rule, or, TCC noted, in guidance, to clarify that “information to complete administrative record” should include evidence or testimony presented by the executive director and should be interpreted broadly to avoid confusion and delay.

The commission has not made changes in response to these comments. The rules as written provide sufficient guidance on what constitutes the administrative record to allow the commission to appropriately interpret their provisions. In addition, §80.127(h) has been clarified to provide that testimony or evidence given by agency staff concerning the administrative record shall not constitute assisting an applicant with its burden of proof.

New §80.108(e) will clarify that the executive director may assist the applicant in meeting its burden of proof only if the applicant is eligible for such help because it meets certain criteria. Those criteria are: 1) the applicant is a qualifying local governmental entity as defined in commission rule; or 2) the applicant is a non-profit entity as defined in commission rule; and 3) there is a significant public need for the permit to avoid adverse impact to human health or the environment.

AECT commented that §80.108(e) appears to limit the executive director’s assistance to an applicant to situations involving discharge permits from publicly-owned treatment works where a significant

environmental problem exists. AECT suggested that the factors in the statute should be considered in determining whether the executive director will assist an applicant with its burden of proof. V&E commented that the “imminent adverse impact” threshold seems too high if the rule was intended to allow the executive director to help small utilities amend their wastewater discharge permits.

The provision allowing the executive director to assist an applicant in meeting its burden of proof does provide for this specialized type of assistance in very limited circumstances. This is consistent with the statutory requirement that the commission by rule establish categories of permit applicants eligible to receive such assistance. The commission disagrees, however, that only the type of applicant described by AECT would fit into the defined category. While the commission has written the rule in such a way as to consider the capacities of the parties, TWC, §5.228 mandates that the statutory factors including technical, legal, and financial capacity be considered in developing the rules related to executive director party participation to assist in completing the administrative record and not in determining the categories of applicants eligible to receive assistance in meeting their burden of proof. The commission intends to interpret the burden of proof provisions narrowly in order to satisfy legislative intent and limit situations where the executive director assists the applicant in meeting the burden of proof to the circumstances set forth in §80.108(e). Notwithstanding all of these considerations, the commission acknowledges that requiring that a significant public need for the permitting action to avoid imminent adverse impact on human health or the environment may set too high a bar on the type of situations for which an applicant might be eligible to receive assistance. Therefore, the commission has modified the rule language to delete the reference to “imminent” to avoid unduly limiting the

application of rule to what might be considered an emergency.

TCC commented that the commission should clarify that §80.108(e) relating to burden of proof applies to situations where the executive director is participating as a party and not to situations where agency staff are available to be called by another party as expert witnesses to provide technical information through testimony in a contested case permit hearing.

The commission has modified §80.108(e) to clarify the intent of the commission and limit the burden of proof section to situations where the executive director is participating as a party and not to include situations where an agency witness is testifying at hearing upon the subpoena of a party other than the executive director.

Concerning §80.108(e), V&E asked how a qualifying local government goes about demonstrating that it lacks the technical, legal and financial resources to go forward and who at the TNRCC decides that the local government has made that showing. V&E also asked why a non-profit should apply for a permit and automatically get help.

The commission has made no changes in response to this comment. The rule does not prescribe any procedures for a qualifying local government to demonstrate lack of technical, legal, or financial capacity. It is the intent of these rules that qualifying local governmental entities be allowed a flexible approach to demonstrate that they meet the relevant criteria. Ultimately, the

executive director decides that a local government has made the appropriate showing in this regard. The commission disagrees that a non-profit entity automatically receives assistance under these rules. The rules provide that the executive director may not provide an applicant assistance with meeting its burden of proof unless it fits into prescribed categories that include a non-profit entity. To be eligible for assistance, the applicant must fall within a prescribed category and there must also be a finding that there is a significant public need for the permitting action to avoid adverse impact to human health or the environment. Further, the satisfaction of those conditions makes an applicant eligible for assistance but does not require the executive director to provide such assistance.

Concerning §80.108(e), GBRA expressed concern that the commission would represent non-profits in water rights hearings.

The commission has made no changes in response to this comment. The executive director may, in his discretion, assist non-profit entities in meeting their burden of proof only if there is a significant public need for the permitting action to avoid adverse impact to human health and the environment.

Concerning §80.108(e), GBRA asked if the executive director would be required to represent the San Marcos River Foundation in water rights permit application No. 5724, even though the permit is not part of the region L water plan approved by the Texas Water Development Board.

The new rule states that the executive director may assist an applicant in meeting its burden of proof if the applicant is a qualifying local government entity or a non-profit entity, and there is a significant public need for the permitting action to avoid adverse impact to human health or the environment. With regard to specific applications, the executive director, as part of its technical review, must first determine whether the application meets the elements of TWC, §11.134, then make a determination of whether to assist an applicant under §80.108(e). The executive director is not required to provide assistance even where the conditions in §80.108(e) are satisfied.

Concerning §80.108(e), GBRA commented that the rules raise issues of unequal application of the law, and asked what justification the commission has for affording non-profit organizations special status.

The rules state that the executive director “may” assist a non-profit organization in meeting its burden of proof, provided that there is a significant public need for the permitting action to avoid adverse impact to human health or the environment. Non-profit organizations may lack the technical, legal, and financial resources of other organizations. In those cases, the executive director would have the option of assisting the organization; however, the executive director would not be required to assist all non-profit organizations.

Concerning §80.108(e), GBRA commented that giving the executive director discretion in deciding which non-profits to assist usurps the authority of the legislature and the governor to determine state policy.

The commission does not agree that the proposed rules usurp the authority of the legislature and the governor to make state policy. Specifically, the proposed rules are not contrary to SB 1. The statute (codified in relevant part in TWC, §11.134) states that the commission may not issue a water right for municipal purposes in a region that does not have an approved water plan unless the commission determines that conditions warrant a waiver. The rules relating to the executive director's party status do not affect this requirement and are not contrary to the statute. The rules are consistent with the requirement under TWC, §5.228(e) for the commission to designate categories of permit applicants eligible to receive assistance.

Concerning §80.108(e), GBRA commented that the additional workload generated could be considerable and result in additional delays.

The commission disagrees that the new rules will generate an additional workload that will result in additional delays. Overall, the rules limit executive director participation in hearings. With respect to water rights matters, the rules continue the existing practice of the executive director party participation in contested case permit hearings. If the executive director makes a determination to assist an applicant in meeting its burden of proof, the additional workload is not expected to be significant.

New §80.108(f) will provide that the executive director may assist an applicant in meeting its burden of proof once subsection (e) has been satisfied, notwithstanding subsections (a) - (d), which set forth the matters in which the executive director shall and shall not participate as well as the factors to be

considered.

A number of commenters had concerns regarding the language of §80.108(f). AECT stated that §80.108(f) appears to contradict sections §80.108(d) - (e). TABCC supported the language of the rule and believes that the executive director must continue to exercise significant flexibility under these rules so that he can determine whether and to what extent to participate as a party in a contested case hearing. TCC strongly agreed with §80.108(f) because it is crucial to provide the executive director with maximum flexibility to determine whether and to what extent to participate as a party in a contested case hearing. V&E stated that §80.108(f) appears to contradict subsection (e). ACT commented that §80.108(f) should be eliminated from the proposed rule because the provision could circumvent the statutory language and intent of HB 2912. Alternatively, ACT recommended that the provision be modified to tie it to the burden of proof section. Sierra Club commented that the “notwithstanding” language in §80.108(f) is problematic and alarming and does not follow legislative intent. Thus, the Sierra Club recommended that the subsection be deleted. TCPS commented that §80.108(f) would have the effect of allowing the executive director to participate in all hearings and, therefore, should be deleted.

The commission recognizes that the proposed rule as written may be subject to more than one interpretation. Therefore, the rule has been modified to more clearly reflect that the executive director may assist an eligible applicant with its burden of proof without going through the analysis required by §80.108(a) - (c). In order to be eligible to receive such assistance, an applicant must satisfy §80.108(e).

New §80.108(g) will require the executive director to notify all parties of his intention to participate in a contested case permit hearing as a party as soon as practicable, but no later than one week after the end of the preliminary hearing.

Concerning §80.108(g), ACT commented that the executive director should make his decision to participate before the matter is referred for hearing because ACT argued that there is plenty of information available at that point. Further, if the case is referred directly to hearing, ACT commented that the executive director should make his decision before the preliminary hearing.

Section 80.108(g) does not prohibit the executive director from notifying the parties prior to or at the preliminary hearing of his intention to participate as a party. It is anticipated that in some situations the executive director will be able to do so. The executive director needs to know the issues that will be the subject of the contested case hearing to apply the factors in §80.108(c). Without knowing what the issues are, the executive director cannot comply with subsection (c). The time period before the preliminary hearing affords parties the opportunity to narrow the issues and, if that is done, the executive director would have a different set of issues to evaluate under the analysis in subsection (c). Although some of the parties will be known prior to the preliminary hearing, there is always the possibility that other persons can be admitted as parties by the administrative law judge (ALJ) at that time in accordance with 30 TAC §55.27(f) or §55.211(e). If new parties are admitted, the executive director needs the time to conduct the analysis in §80.108(c), if needed, particularly the analysis in subsection (c)(2) regarding the technical, legal, and financial capacity of the parties to make a final decision as to party

participation. While in direct referral cases and in those matters subject to the HB 801 process for which the commission has specified the issues to be considered by the ALJ, the issues are known prior to the preliminary hearing, additional parties may be named at the preliminary hearing. Therefore, the executive director needs the opportunity to timely collect and evaluate the information necessary to conduct such analysis. The commission believes that one week is a reasonable maximum amount of time to conduct the analysis and notify the parties of its decision on party participation.

Concerning 80.108(g), AECT stated that it is inappropriate for the executive director to have the option to wait until one week after a preliminary hearing before deciding to participate, and that it is more appropriate for the executive director to make his intention known not later than one week prior to the first preliminary hearing. TCPS commented that the executive director should make his decision on participation before the preliminary hearing. TABCC commented that it would be more efficient for the executive director to provide notice about participation as a party at or before the preliminary hearing and that the current subsection appears to be backsliding from HB 801 which directed the agency to expedite the contested case process. TCC is concerned that delaying the executive director's announcement could cause a hardship to the other parties and the ALJ and could present significant delay in time, and wants the executive director to designate party participation at or before the preliminary hearing.

The commission disagrees that the only appropriate time period for the executive director to make his decision as to party participation is one week prior to the preliminary hearing or the day of the

preliminary hearing. Although some of the parties will be known prior to the preliminary hearing, there is always the possibility that other persons can be admitted as parties by the ALJ at that time. If new parties are admitted, the executive director needs the time to conduct the analysis in §80.108(c) to make a final decision as to party participation. Therefore, the executive director needs the opportunity to timely collect and evaluate the information necessary to conduct such analysis. The commission finds that one week is a reasonable maximum amount of time to conduct the analysis and notify the parties. Section 80.108(g) does not prohibit the executive director from notifying the parties prior to or at the preliminary hearing. Given these considerations, the commission finds that a one week time period is appropriate and is not contrary to the mandates set forth in HB 801. If there is any hardship caused by the week's delay, as in conducting discovery, the executive director may be in an equal or more difficult position in meeting the schedule for the hearing because of that delay. The commission agrees that clarifying the rule to notify SOAH and providing the option of notification on the record at the preliminary hearing are appropriate changes and has modified the rule accordingly.

Concerning §80.108(g), V&E stated that letting the executive director decide about party participation one week after the preliminary hearing is too late for applicants because of the applicant's need to prefile testimony of any executive director staff witnesses that they may call. V&E additionally commented that without the ability to prefile agency witness testimony, it will be a nightmare trying to pull testimony out of them and will also eat up all the applicant's hearing time.

Applicants are responsible for meeting their burden of proof and presenting any evidence

necessary to support the application. This includes anticipating the availability of witnesses and participants to the proceedings and conducting any discovery necessary. While the commission recognizes that the potential lack of certainty regarding executive director party status until after the preliminary hearing may impose certain challenges for parties in managing discovery and hearing schedules, the commission has determined that in order to comply with the analysis required by §80.108(c), the executive director must be given the flexibility to make his decision after the preliminary hearing if necessary.

New §80.108(h) provides that the executive director's decisions on party participation and on whether an applicant is eligible to receive assistance are not subject to review by either the commission or SOAH.

Concerning §80.108(h), TIP, AECT, ACT and TCPS commented that the executive director's decision to participate should be subject to review by the commissioners. Further, ACT and TIP stated that the review should be available at the request of a party to the hearing. ACT commented that such a review will ensure consistency, objectivity, and fairness and reduce the opportunity for arbitrary decision-making. ACT also suggested the procedures for how this review should be done. TCC commented to the contrary that the commission should not be allowed to review the executive director's decision because to do so would introduce significant delay in the process. TCC added that the statute specifically addresses this oversight issue by requiring the commission to adopt rules regarding executive director party participation and does not provide any appeals process.

The commission made no change to the rule as a result of this comment. This interlocutory process cause delay in the hearings process. The commission has specifically enumerated what information should be considered by the executive director in making the party participation decision in those matters not subject to the mandatory provision. While consistency and fairness are goals, the determination is a case by case decision and calls for discretion based on individual circumstances. The commission responds that §80.108 offers adequate and appropriate guidance to the executive director on when to participate as a party and commission review of the executive director's decision to participate or not is unnecessary and may cause delay in the hearings process. Further, the statute directs the commission to adopt rules for executive director participation but does not require a commission decision on whether the executive director should be a party in a particular case.

Concerning §80.108(h), V&Es questions whether the district court will exercise the same restraint as the commission in not reviewing executive director party status determinations.

Texas Water Code, §5.228(f), expressly provides that the fact that the executive director is not named as a party is not grounds for appealing a commission decisions. Where the executive director has elected to participate, judicial remedies may arguably not be available. If they are, nothing in these rules affects the availability of those remedies.

Section 80.109(a), Designation of Parties, will provide that under certain circumstances, the executive director may be added as a party to a permit hearing after the date of the preliminary hearing, without

the otherwise required finding of good cause and extenuating circumstances.

Concerning §80.109(a), TCC, V&E, and AECT commented that the executive director should not be admitted (without showing good cause) after parties are designated.

The commission made no change to the rule as a result of these comments. The rule amendment is intended only to allow the addition of the executive director as a party within one week after the conclusion of the preliminary hearing as provided for in §80.108(g). If new parties are admitted at the preliminary hearing, the executive director needs the time to conduct the analysis in §80.108(c) to make a final decision as to party participation. Therefore, the executive director needs the opportunity to timely collect and evaluate the information necessary to conduct such analysis. The commission concludes that the one week period provided for in §80.108(g) is a reasonable maximum amount of time to conduct the analysis and notify the parties. The executive director is not prohibited from notifying the parties prior to or at the preliminary hearing of his decision to participate as a party. The requirements to show that good cause and extenuating circumstances exist for late intervention and that the hearing in progress will not be unreasonably delayed are applicable to the executive director if he seeks party status after the one week period has passed.

Section 80.109(b) will provide that the executive director is a required party in commission proceedings concerning matters in which the executive director bears the burden of proof. The executive director will also be named as a party to commission proceedings in matters concerning TWC, §§11.036,

11.041, and 12.013; TWC, Chapters 13, 35, 36, and 49 - 66; Texas Local Government Code, Chapters 375 and 395; matters arising under Texas Government Code, Chapter 2260 and 30 TAC Chapter 11, Subchapter D; and matters under TWC, Chapter 26, Subchapter I, and 30 TAC Chapter 334, Subchapters H and L. The executive director may also be a party in contested case hearings concerning permitting matters if he participates as a party in accordance with the provisions of §80.108. Adopted §80.109(b)(5) (formerly §80.109(b)(3)) will correct cross-references to rules relating to affected persons. The amended section will be renumbered to accommodate the changes made in the rule.

Section 80.109(b)(1)(A), regarding proceedings under TWC Chapters 11 and 12 relates to the state's obligation to serve as a trustee of an important natural resource, state water. Therefore, it is appropriate for the executive director to participate in proceedings concerning the provision of state water or the rates charged for the purchase of state water.

In proceedings under TWC, Chapter 13, the executive director is statutorily required to fulfill a particular role that necessitates the executive director's active party participation in hearings. Section 13.011 provides that the executive director's duties include "preparation and presentation of evidence before the commission or its appointed examiner in proceedings" and "protection and representation of the public interest, together with the public interest advocate, before the commission." In addition, in rate cases in particular, intervening parties do not generally have the technical, legal, or financial capacity to ensure that a thorough record addressing all relevant issues is developed.

For district matters under TWC, Chapters 35, 36, and 49 - 66 and Texas Local Government Code,

Chapters 375 and 395, the statutes at issue implement provisions of the Texas Constitution specifically related to the conservation and development of all natural resources. In order to assist the commission in fulfilling this purpose, it is appropriate for the executive director to be a party in district proceedings and use the special expertise of commission staff with respect to the issues involved. Furthermore, for standby fees and impact fees, the executive director's participation assists the commission in ensuring that the fees equitably allocate costs among all feepayers.

Concerning §80.109(b)(1)(B) and (C), regarding matters arising under Texas Government Code, Chapter 2260 and Chapter 11, Subchapter D and matters under TWC, Chapter 26, Subchapter I and Chapter 334, Subchapter H and L, the executive director is a necessary party in these cases because the executive director is the respondent in both cases and is required to be present in order to have a complete adjudication of the claims and counterclaims and to protect the interests of the agency.

Section 80.117, Order of Presentation, will remove the requirement that the executive director open with a simple statement of his position in a permit hearing. The applicant will open the proceeding instead. In those cases where the executive director is participating as a party, the executive director will follow the applicant, protesting parties, and public interest counsel in presenting evidence and testimony. The rule change is necessary to provide an appropriate order of presentation for permitting matters both in cases where the executive director participates and where he does not participate.

ACT commented that §80.117(b) should be modified to allow the SOAH judge reasonable flexibility in setting the order of presentation, and allow the judge to align any party.

No change was made as a result of this comment. This issue is addressed by existing commission rule at 30 TAC §80.4(c)(5), which gives SOAH judges the authority to align parties and establish the order for presentation of evidence, but provides that the executive director and the public interest counsel shall not be aligned with any party.

New §80.118, Administrative Record, will list those documents which at a minimum constitute the administrative record. These documents include: 1) the final draft permit, including any special provisions or conditions; 2) the executive director's preliminary decision, or the executive director's decision on the permit application, if applicable; 3) the summary of the technical review of the permit application; 4) the compliance summary of the applicant; 5) copies of the published and/or mailed public notices relating to the permit application, as well as affidavits of public notices; and 6) any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application. New §80.118(b) states that for the purpose of referrals to SOAH under §80.5 and §80.6, the chief clerk's case files must include the documents described in subsection (a).

Concerning §80.118, AECT stated that as written it seems the documents listed in this section do not need to be introduced into evidence or meet the requirements of the Texas Government Code prior to becoming part of the record. ACT stated that this seems inappropriate for §80.118(a)(5). Further, ACT stated that there is no provision that would allow another party to supplement or question the determination of the executive director on what to include in §80.118(a)(5).

No change has been made as a result of this comment. New §80.118 lists those documents which at a minimum constitute the administrative record. The rule requires that certified copies of documents be provided. In accordance with Texas Rules of Evidence 902(4) and 1005, certified copies of public records are self-authenticating. Any of the documents in §80.118 can be challenged by a party during the hearing and any party can subpoena the author of the document in accordance with the Texas Rules of Civil Procedure. With regard to §80.118(a)(5), the rule specifies that these documents must be necessary to reflect the administrative and technical review of the application. Thus, the executive director does not have unlimited discretion to introduce any agency documents he desires. In addition, the parties are free to supplement the record with additional documents which support or contradict agency records. Section 80.118(a)(5) is intended to be broad enough to cover the documents produced by agency staff in their technical and administrative reviews of all types of permit applications, but is not intended to provide limitless discretion to the executive director on what may be included as part of the record under this subsection.

Concerning §80.118, TABCC and TCC commented that language needs to be added to the rule to clarify that “information to complete administrative record” should be interpreted broadly to avoid confusion.

The commission partly agrees with this comment and has added language to the rule which states that the record in a contested case hearing includes, “at a minimum” the documents which are

enumerated in §80.118(a)(1) - (5). The commission has provided adequate guidance in these rules on what constitutes “information to complete the administrative record.”

Concerning §80.118, V&E stated that this section defines the record but doesn't say who prepares it or who offers it. In addition, V&E stated that there is no provision for objection to anything tossed in under the catch-all §80.108(a)(5) or left out.

No change was made as a result of this comment. In accordance with the rules applicable to the various media over which the commission has jurisdiction, it is understood that the executive director prepares the draft permit, compliance summary, and technical summary. The public notices and affidavits are prepared by the applicant and filed with the commission's chief clerk consistent with applicable law. Documents constituting subsection (a)(5) are also prepared by the executive director and vary depending upon which media the permitting case involves. These documents are all produced in the commission's regular course of business and are self-authenticating in accordance with Texas Rules of Evidence 902(4) and 1005. Any party has the option of subpoenaing the author of the documents set forth under §80.118(a) to question their findings or authenticity. In addition, parties are free to supplement the record by introducing additional documents which support or contradict agency records. In accordance with §80.5 and §80.6, the commission's chief clerk shall send a copy of the chief clerk's file to SOAH upon referral of a contested case. Section 80.118(b) states the chief clerk's case file contain the administrative record as defined by §80.118(a).

Concerning §80.118, ACT commented that the definition of “administrative record” should be clarified to state that the record “includes, but is not limited to, ...” the enumerated documents.

The commission agrees in part with this comment and has modified the rule to state that the administrative record include “at a minimum” the enumerated documents. The commission does not intend for this rule to be interpreted to limit a party’s ability to introduce evidence consistent with applicable law.

Concerning §80.118, ACT additionally commented that this section should be clarified to state that the agency documents referred to in §80.118(a)(1)-(5) be admissible under the Texas Rules of Evidence as applied in TNRCC hearings.

No change was made as a result of this comment. New §80.118 lists those documents which at a minimum constitute the administrative record. Section 80.127(a) provides that the Texas Rules of Evidence shall be followed in contested case proceeding. However, when necessary to ascertain facts not reasonable susceptible of proof under those rules, the commission rule provides that evidence not admissible under those rules may be admitted, except when precluded by statute, if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs. The commission intends to abide by its rules in considering the admission of the administrative record. In addition, Texas Rules of Evidence 902(4) and 1005 provide that certified copies of public records are self-authenticating. Based on these considerations and the fact that the commission needs certain information before it in order to make a final decision on a permit

matter, the commission finds that the administrative record rule is justified and consistent with applicable law.

Concerning §80.118, ACT commented that documentation of the executive director's decision to participate should also be included in the administrative record.

No change has been made in response to this comment. As set forth more fully in response to the comments concerning §80.108(c), the commission does not intend to require the filing of written documentation of the executive director's analysis on party participation. This rule section is not intended to be a comprehensive list of all documents included in the administrative record and is not intended to limit a party's ability to introduce evidence consistent with applicable law. The documents included in §80.118(a) are intended to primarily evidence the executive director's technical and administrative review of the permit application. Since the executive director's party status determination is not appealable to the commission or SOAH, it is not necessary for the documentation required by §80.108(k) to be included by rule in the administrative record.

Concerning §80.118(a)(1), ACT commented that the term "final draft permit" should be replaced by the phrase, "decision of the executive director on the application," and that "to any draft permit" should be added to the end of the sentence after the language concerning special provisions or conditions.

The commission agrees in part with this comment and has included in the rule language an

additional subsection which provides for inclusion of the executive director's preliminary decision or the executive director's decision on the permit application, if applicable.

Section 80.127, Evidence, will prohibit the executive director from rehabilitating the testimony of a non-agency witness in permitting matters. The executive director may only rehabilitate agency witnesses who are testifying solely for the purpose of completing the administrative record. The adopted change implements TWC, §5.228(d). New subsection (h) will also be added to clarify that commission staff testimony or evidence relating to the administrative record as defined by adopted new §80.118 or any other executive director function required by law shall not constitute assistance to permit applicants in meeting their burden of proof.

Concerning §80.127(h), AECT stated that parties other than the executive director should be free to offer whatever relevant evidence they feel is appropriate so long as it meets the admissibility requirements of the Texas Government Code. AECT further commented that it is beyond legislative intent to exclude expert testimony from state employees who have expended significant time reviewing an application.

The rule has been clarified in response to this comment and those detailed the following comments. Neither the statute nor the rule excludes expert testimony of state employees who have reviewed an application, prepared a draft permit, and responded to comments. In addition, §80.127(h) does not limit what evidence or testimony a party can present at hearing. Regardless of whether the executive director is a party to a case, agency staff may be subject to being

subpoenaed as witnesses by the parties in a permit application hearing. However, there is no requirement in the rules that expert testimony from agency employees be included in the hearing. New §80.118 (relating to Administrative Record) requires that for all permit hearings, the record in a contested case includes certified copies of documents which reflect the required commission review of permit applications. Therefore, at a minimum, the identified documents evidencing the review will be before the commission at the time it makes its decision on the application. How the parties use the administrative record or whether the parties subpoena agency staff as witnesses at the hearing are matters which are controlled by the parties to a proceeding in cases where the executive director is not a party.

Concerning §80.127(h), TIP stated that the rule should expressly recognize that the applicant or other parties to the proceeding may need to offer testimony or evidence relating to the staff's review of the application. TCC strongly agreed with the goal of this provision, but is concerned about how the terms, "offered by agency staff" may be interpreted. TCC stated that the correct interpretation is that it includes testimony or evidence presented by the agency staff when they are called by other parties. V&E stated that this section should not be left open to interpretation, and suggested language which clarifies that any party may offer any agency staff witness, and evidence so elicited shall not be construed as assisting the permit applicant in meeting its burden of proof. AECT stated that the rule should clarify that all staff testimony offered as evidence other than by the executive director, which is otherwise admissible, does not constitute assistance to the permit applicant in meeting its burden of proof. ACT commented that in the first sentence of §80.127(h) the words, "relating to" should be changed to "explaining" to more closely reflect the nature of the testimony. Further, ACT commented

that this provision should be clarified to provide that such testimony or evidence is not automatically required to complete the administrative record.

The commission's rationale in drafting §80.127(h) was not intended to be interpreted to prevent the parties from utilizing agency resources such as documentation or witnesses under appropriate circumstances and consistent with applicable discovery law. The commission agrees that parties should not be limited as to who may offer testimony and evidence and has revised the rule to clarify that other parties may subpoena commission staff witnesses and/or introduce TNRCC records without such evidence or testimony being considered assistance by the executive director to the permit applicant in meeting its burden of proof. Regardless of whether the executive director is a party to a particular hearing, commission staff may be subject to being subpoenaed as witnesses and additional documents may be obtained from the commission by any party for use in the hearing in accordance with Texas Rule of Civil Procedure 205.

Section 80.131, Interlocutory Appeals and Certified Questions, will reflect that the judge must send copies of certified questions to the executive director, whether or not he is a party to the hearing.

Copies of all briefs and replies must be served on the executive director in accordance with 30 TAC §1.11. The executive director may file briefs and responses to all certified questions within the deadlines imposed on the parties to the proceeding. Finally, the chief clerk is required to give the executive director notice of any commission meeting where the certified questions will be considered.

These amendments will allow executive director participation on significant policy issues certified to the commission regardless of party status. Since policy implications often affect more than the parties in a

particular contested case hearing, the executive director is a necessary participant in certified questions.

Concerning §80.131, ACT suggested that language be added to the rule to clarify that when the executive director is not a party, he should only be allowed to provide responses to certified questions to the commissioner upon written request, and that other parties should be able to respond to those responses.

The commission has made clarifying changes to §80.131, but makes no changes as a result of this comment. The commission has determined that the executive director is an essential participant in all certified questions brought to the commission. Section 80.131(b) states that a question regarding commission policy, jurisdiction, or the imposition of any sanction by the judge may be certified by the judge to the commission. Appropriate policy questions may concern the commission's interpretation of its rules and applicable statutes, the applicability of law to the proceeding, or whether policy should be established or clarified on a substantive or procedural issue of significance. Since policy and jurisdictional implications often affect more than the parties in a particular contested case and affect the functions which are statutorily delegated to the executive director, his response to certified questions pertaining to such issues is crucial to the commission's deliberation and decision on those issues and to the executive director's ability to administer agency responsibilities and the functions of his office. The commission additionally responds that the procedural safeguards afforded to the parties prevent any due process concerns.

Concerning §80.131, V&E stated that the rule should clarify that the deadline for the executive director

in all certified question is established by the ALJ.

No change was made as a result of this comment. The rule as written states that if a question is certified, the judge shall file a request to answer the certified question with the chief clerk and serve copies on the parties and the executive director. The rule further states that within five days after the request is filed, the executive director and all parties to the proceeding may file briefs or replies.

Subchapter D, Discovery

Section 80.153(a), Issuance of Subpoena or Commission To Take Deposition, will add a cross-reference to §80.21, which specifies the witness fees that must be paid. A new subsection (f) will also be added to explicitly provide that the executive director's legal staff may participate in defending the deposition of any agency employee upon whom a subpoena or commission is served. The commission anticipates that agency staff may be subpoenaed in more instances than in the past when the executive director participated in all contested case hearings. Thus, the commission seeks to clarify witness fees paid to commission staff consistent with the provisions of Texas Government Code, §659.005 and agency policy and the ability of the commission's legal staff to defend the deposition of an agency employee.

Subchapter F, Post Hearing

Section 80.251, Judge's Proposal for Decision, applies to any application that is administratively complete before September 1, 1999. Section 80.252, Judge's Proposal for Decision, applies to any

application that is administratively complete on or after September 1, 1999. These sections will require that the SOAH judge send to the executive director a copy of the proposal for decision regardless of his party status. These amendments are intended to keep the executive director informed about the status of permit applications for which he has performed administrative and technical review.

Section 80.257, Pleadings Following Proposal for Decision, will clarify that any party may file exceptions or briefs. For permit hearings in which the executive director has not participated as a party, the commission or the general counsel may request that the executive director file briefs concerning legal or policy issues. The request shall be in writing and served on the parties and the ALJ. In addition, the request shall set deadlines for the executive director's response and the parties' replies to the response, avoiding delay of the matter to the extent practicable.

Concerning §80.257, ACT commented that when the executive director is not a party, he should be able to provide briefs after a proposal for decision in cases only upon written request of the commissioners or general counsel. Further, ACT commented that the rules should provide that a copy of the request, stating the reasons why a brief is needed and the issues to be briefed should be timely served on all parties and the parties should be given a fair opportunity to respond to the executive director's brief. ACT further commented that the rules should limit the opportunity for the commissioners or general counsel to request briefs to key policy or legal issues. TCPS similarly commented that there should be some clear limits on briefs filed by the executive director after the proposal for decision when the executive director has not participated in the contested case proceeding as a party. V&E commented that the executive director should not be allowed to file post hearing briefs where he has not participated

as a party. V&E urges that where briefs are necessary, the executive director should have participated as a party from the beginning of the contested case proceeding. Finally, V&E states that the inclusion of the executive director so late in the process is sure to cause additional delay in the hearing process.

The commission has made changes in response to these comments. The proposed rule text has been modified to provide that the commissioners or general counsel's request that the executive director file post hearing briefs where he has not participated as a party should be in writing and should concern a legal or policy issue. In addition, the rule text has been modified to provide that the written request shall be served on all parties, shall specify the issues to be briefed, and shall set reasonable time frames for the executive director's response and the parties' replies to that response. The commission responds that it would be impractical for the executive director to ascertain all permitting cases which will have issues which merit his participation when the executive director must determine party status so early in the process. Therefore, the rule allows for executive director briefs in order to provide the commission with some assurance that important policy and legal interpretations are given due consideration, based on a complete administrative record. The commission declines to modify the rule to provide that the request state the reasons why a brief is needed. The commission intends to use this provision in limited circumstances and the rule must provide some flexibility to the commissioners or general counsel in identifying which cases merit the request for the executive director to file briefs.

Section 80.261, Scheduling Commission Meetings, will require that the SOAH judge, in all cases, notify the executive director of the date of the commission meeting at which a proposal for decision will

be heard. Additionally, this section will require that the chief clerk notify the executive director of any rescheduled commission meetings, whether or not he is a party to the hearing. This amendment is intended to keep the executive director informed about the status of permit applications for which he has performed administrative and technical review and provide the executive director with notice of the commission's intent to consider a particular matter at its public meeting.

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

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

SUBCHAPTER A: GENERAL RULES

§80.17, §80.21

§80.17. Burden of Proof.

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

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

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

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

amount of the penalty has the burden of proving those facts by a preponderance of the evidence.

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

§80.21. Witness Fees.

(a) A person who is not a party and is compelled to attend any hearing or proceeding or to produce books, records, papers, or other objects is entitled to receive mileage reimbursement if the location of the hearing or proceeding is more than 25 miles from the person's place of residence. Reimbursement shall be at the current rate for state employees. The person is also entitled to receive a minimum fee of \$70 or the amount equal to state employees' current maximum travel reimbursement for overnight lodging plus meals, whichever is greater, for each day or part of a day the person is necessarily present as a witness or deponent. This fee shall be paid to the witness or deponent even if overnight lodging is not used, and the fee shall not be prorated for parts of days. A witness or deponent who is an agency employee may only receive travel expenses, to the extent allowed by applicable law and commission policy.

(b) Mileage and fees to which a witness is entitled under this section shall be paid by the party at whose request the witness appears or the deposition is taken, on presentation of proper vouchers sworn by the witness and approved by the judge.

SUBCHAPTER C: HEARING PROCEDURES

§§80.108, 80.109, 80.117, 80.118, 80.127, 80.131

STATUTORY AUTHORITY

The amendments and new sections are adopted under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

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

§80.108. Executive Director Party Status in Permit Hearings.

- (a) Except to the extent superseded by subsection (b) of this section, the executive director

shall not participate as a party in the following contested case hearings concerning permitting matters:

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

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

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

(4) an application for a permit for a municipal solid waste transfer facility under §330.4 of this title (relating to Permit Required);

(5) an application for a permit for the processing of grit and grease trap waste under §330.4 of this title;

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

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

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

(1) an application concerning water rights;

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

(3) an involuntary amendment; and

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

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

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

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

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

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

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

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

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

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

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

(I) a qualifying local governmental entity;

(II) a non-profit entity; or

(III) a small business; and

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

(I) the number and complexity of the administrative and technical notices of deficiency issued during the administrative and technical review of the application;

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

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

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

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

(d) The executive director's participation as a party under subsection (b) or (c) of this section shall be for the sole purpose of providing information to complete the administrative record.

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

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