

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §55.156, Public Comment Processing, and §55.209, Processing Requests for Reconsideration and Contested Case Hearing, and new §55.210, Direct Referrals. Sections 55.156 and 55.210 are adopted *with changes* to the proposed text as published in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7462). Section 55.209 is adopted *without change* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the adopted amendments and new section is to implement portions of Senate Bill (SB) 688 (an act relating to requirements for public notice and hearing on applications for certain permits that may have environmental impact), 77th Legislature, 2001. More specifically, this rulemaking would implement the SB 688 provisions related to direct referrals of certain permit applications to the State Office of Administrative Hearings (SOAH) for contested case hearing.

In 1999, the 76th Legislature enacted House Bill (HB) 801. House Bill 801 revised the public participation procedures applicable to environmental permits issued under Chapters 26 and 27 of the Texas Water Code (TWC) and Chapters 361 and 382 of the Texas Health and Safety Code (THSC). House Bill 801 provides for early notice of applications, expanded public participation opportunities, and a streamlined contested case hearing process. While the provisions of HB 801 allowed an applicant or the executive director to request referral of a permitting matter to SOAH for contested case hearing, the procedural steps to be followed limited the opportunities for this option to be exercised.

Essentially, since agreement regarding the list of disputed issues and maximum expected duration of the

hearing had to be reached with all timely hearing requesters and all timely hearing requesters could not be identified until 30 days after transmittal of the executive director's decision and response to comments, generally a direct referral to SOAH was only practicable late in the permitting process. The relevant portions of SB 688 now explicitly provide the applicant or the executive director the option of proceeding directly to a contested case hearing immediately after the executive director issues a preliminary decision.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

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 rulemaking is procedural in nature and revises procedures for direct referrals of applications subject to HB 801 to SOAH for hearing, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the rules are major environmental rules, 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 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 authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and TWC, Chapter 5, Subchapter M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the adoption is in direct response to SB 688, 77th Legislature, and does not exceed the requirements of this bill. 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 rules are consistent with, and do not exceed federal requirements. This adoption does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TWC, §5.557). 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.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary analysis for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that analysis. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for direct referrals in certain permitting proceedings as provided by TWC, §5.557. The rules will substantially advance this stated purpose by providing specific provisions on the aforementioned matter. Promulgation and enforcement of these

rules will not affect private real property which is the subject of the rules because the adopted language consists of amendments relating to the commission's procedural rules rather than substantive requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and determined that the adopted sections are not subject to the Texas Coastal Management Program (CMP). The rulemaking action concerns only the procedural rules of the commission which are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

The commission provided notice of a public hearing on the proposed rulemaking to be held on October 25, 2001. No one appeared to provide formal comment, therefore the public hearing was not convened. The comment period closed at 5:00 p.m. on October 29, 2001. Written comments related to Chapter 55 and related provisions were submitted by: Baker Botts L.L.P on behalf of the Texas Industry Project (TIP); Bracewell & Patterson L.L.P. on behalf of interested clients (Bracewell & Patterson); Texas Natural Resource Conservation Commission Public Interest Counsel (PIC); and Vinson & Elkins L.L.P. (Vinson & Elkins).

All the commenters suggested changes to the proposal as stated in the SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS section of the preamble. Overall, TIP supported

the rules as an important step in the commission's continuing efforts to promote fairness and efficiency in its procedural rules. Vinson & Elkins stated that the rules greatly improve the direct referral process. No commenter expressly opposed the rulemaking.

SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS

General

Certain comments were received requesting that this rulemaking include additional rule changes beyond those included in Chapter 55 and this rulemaking proposal. These suggested changes primarily related to clarification of notice requirements applicable in direct referrals. These comments are more specifically described later in this preamble.

TIP commented that this rulemaking or a subsequent rulemaking should clarify by rule the public notice requirements associated with notice of hearing in a case for which a request for direct referral has been submitted under §55.210. The commenter stated that, while the commission's existing rules on issuance of notice of contested case hearing (§39.423) should be followed, it is unclear how the commission's rules on issuance of notice of application and preliminary decision apply to such notice events (§39.411(c) and §39.419). The commenter pointed out the elements of the notice of application and preliminary decision that would not apply in a direct referral case include statements regarding the limited scope of the hearing and the opportunity to request a public meeting.

The commission agrees that some of the language of §39.411(c) would not apply when the Notice of Application and Preliminary Decision is issued after, or concurrent with, the chief clerk's

referral to SOAH under §55.210. Specifically, since SB 688 provides that TWC, §§5.554 - 5.556 and Texas Government Code, §2003.047(e) and (f) (which relate to certain public meeting requirements and the limitation of issues) do not apply to an application that is directly referred, the commission has added §55.210(e) to address this inconsistency. This subsection provides that if Notice of Application and Preliminary Decision is provided after, or concurrent with a direct referral under this section, the text of the notice shall not include statements that relate to these inapplicable statutory requirements. The commission has not made corresponding changes to the Chapter 39 rulemaking (which is being adopted concurrently in this issue of the *Texas Register*) because the commission did not propose changes to the applicable sections in this rulemaking. The commission will address such changes in a future rulemaking.

TIP also commented that the notice of contested case hearing and any required elements of the notice of application and preliminary decision should be combined so that there are not multiple, different publication requirements for a direct referral case. TIP also commented that if a public meeting is required by law on a case that is the subject of a direct referral, and that public meeting is held during the preliminary hearing, notice of that public meeting should also be combined with any notice of contested case hearing.

The commission agrees that notices may be combined under certain circumstances. The commission responds, however, that there may be certain instances where the applicant may elect not to combine notices and it would not be appropriate to eliminate this flexibility. Further,

existing §39.405(d) authorizes combined notice. Thus, no change to the rule has been made as a result of this comment.

PIC commented that the Notice of Receipt of Application and Intent to Obtain Permit would need to provide accurate information to the public that a request for direct referral had been filed and would not solicit requests for public meetings or requests for hearing. Otherwise the notices would be misleading or confusing. PIC acknowledged that modifying the notices is an implementation issue that need not be addressed in the rulemaking but must be considered in order to ensure that the new procedural rules are workable.

The commission agrees that, where appropriate, the notices need to conform to the new rule changes. No changes are being made to the text of the Notice of Receipt of Application and Intent to Obtain a Permit because, under SB 688, procedures do not change until the matter is referred to SOAH.

Subchapter E, Public Comment and Public Meetings

Adopted §55.156, Public Comment Processing, describes applicable public comment procedures. This adopted section has been modified from the proposal to ensure consistency with the changes to the Chapter 39 rulemaking (which is being adopted concurrently in this issue of the *Texas Register*). Specifically, subsection (c) has been modified to reflect that instructions for requesting a hearing or reconsideration need not be included for applications described in newly adopted §39.420(d).

In addition, adopted §55.156 sets forth the provisions of this section that do not apply to a case that is referred to SOAH under §55.210. Subsection (e) has been modified from the proposal to clarify that subsection (b)(1) and (3) still applies when matters are directly referred pursuant to §55.210. That is, a response to comment is required before an application may be approved and the deadline for filing a response to comment is retained. This modification is consistent with TWC, §5.557(c), that requires the commission by rule to provide for public comment and the executive director's response to public comment to be entered into the administrative record of decision for matters that are directly referred. The commission has also made grammatical changes to this section to conform with *Texas Register* style requirements.

Subchapter F, Requests for Reconsideration or Contested Case Hearing

Adopted §55.209, Processing Requests for Reconsideration and Contested Case Hearing, is amended to delete subsection (h) relating to procedures for requesting that a matter be referred directly to SOAH for contested case hearing. This subsection is repealed because a new section is being adopted in this rulemaking to apply to direct referrals authorized by the provisions of SB 688.

Adopted new §55.210, Direct Referrals, allows either the executive director or the applicant to file a request with the chief clerk that the application be sent directly to SOAH for a hearing on whether the application complies with all relevant statutory and regulatory requirements. As provided by SB 688, the adopted rule also provides that the application may be referred after the executive director has issued his preliminary decision on the application and thus, completed his technical review. The adopted rule also provides that the chief clerk may then refer the matter to SOAH.

This section further states that the provisions of HB 801 relating to public meetings do not apply to cases referred under this section. In the rule as proposed, the public meeting procedures and requirements that do apply to direct referrals were set forth by cross-reference to 30 TAC §55.25(b)(2). However, for purposes of clarity and in response to comment as described later in this preamble, this adopted section now specifically describes applicable public meeting requirements. In addition, applicable public comment processing and text of notice requirements are clarified.

PIC commented that proposed §55.210(a) should be adopted with the following sentence added as a second sentence in this subsection: “A request for direct referral that is filed with the chief clerk cannot be withdrawn.” PIC explained that this sentence should be added because under the proposed rule, an applicant may request a referral, avoid otherwise applicable procedures such as the §55.154 public meeting requirements, then withdraw the request before the preliminary decision is issued unless prohibited from withdrawing the request.

To address the potential problem identified by PIC and to more closely track the language of the statute, the commission has changed §55.210(c). Under the new rule, the trigger for exempting certain procedural requirements will be referral of the matter to SOAH rather than the filing of a request for direct referral. This language is also consistent with §55.156(e).

TIP and Vinson & Elkins commented that proposed §55.210(b) could be interpreted to require a contested case hearing in a proceeding that has been directly referred under §55.210 even if no person appears at the preliminary hearing and seeks to be admitted as a party. Both also commented that even

under direct referral, each protestant should be required to prove that he or she is an affected person before being allowed to participate in the contested case hearing.

The rule does not change the requirement that the administrative law judge determine at the preliminary hearing who shall be admitted as a party in accordance with 30 TAC §80.109. SOAH's authority to remand a matter in accordance with 30 TAC §80.101 is also not affected by this rule. Thus, no change to the rule has been made.

TIP and Bracewell & Patterson commented that under TWC, §5.557(b), the public meeting requirements of TWC, §5.554 do not apply to an application that is the subject of a direct referral. The commenters concluded that once a direct referral request has been filed, there is no opportunity for a member of the public to request a public meeting under the standards in TWC, §5.554 and therefore, there is no reason to provide additional notice of such an opportunity. TIP further commented that under proposed new §55.210, the commission's intent with respect to the holding of a public meeting in proceedings that have been directly referred to SOAH is unclear. TIP commented that it does not believe that a public meeting should be mandatory in every case that is subject to the direct referral process which appears to be the intent of §55.25, but instead should be held only when required by some law other than TWC, §5.554.

The commission acknowledges that TWC, §5.557 provides that applications that are directly referred to SOAH are no longer subject to the TWC, §5.554 public meeting requirements. However, the statute does not prohibit the imposition of regulatory public meeting requirements

or affect public meeting requirements otherwise imposed by law (e.g., THSC, §361.0791). The commission notes that federal regulations for authorized programs include public meeting requirements (e.g., 40 CFR §124.10 and §124.12). Under the adopted rule, an applicant is subject to the mandatory §55.154 public meeting requirements until the matter is directly referred to SOAH. After the direct referral, the public meeting requirements are set forth in §55.210(c). Under §55.210(c), the executive director must hold a public meeting when there is a significant degree of public interest in a draft permit (the standard set forth by federal regulations for federally authorized programs). Although not all the permitting programs subject to these rules are governed by the requirements for federally authorized programs, the commission has applied this standard to all permitting programs subject to these rules for procedural consistency. In addition, public meeting requirements required by law other than TWC, §5.554, continue to apply.

TIP commented that if a public meeting is not held, notice of opportunity to submit written comments could still be provided in the required notice of hearing.

The commission responds that notice of the opportunity to provide written comments is included in both the Notice of Receipt of Application and Intent to Obtain Permit and the Notice of Application and Preliminary Decision whether or not a public meeting is held. Further, the commission has elected to retain the bifurcated public comment and contested case hearing process for direct referrals. Thus, no rule change has been made as a result of this comment.

Vinson & Elkins commented that since proposed §55.210(c) provides that directly referred applications are subject to the public meeting requirements of §55.25(b)(2), the commission is missing an opportunity to streamline the public meeting requirements for direct referrals because this section allows the executive director to specify that the public meeting be held at a different time and location separate and apart from the preliminary hearing. Vinson & Elkins commented that to streamline this process, the commission should instead provide that any public meeting held after direct referral must be held as part of the preliminary hearing but only in the procedural sense. That is, Vinson & Elkins expressed the belief that the public meeting and preliminary hearing should be coordinated, but that the two should be kept separate. TIP also commented that if any public meeting is held on a permit application, it is appropriate in many cases to have that meeting held in conjunction with the preliminary hearing.

The commission has clarified §55.210 in response to comment. The intent of new §55.210(c) is to provide that the time and location of the public meeting and the preliminary hearing should coincide to the extent practicable. The commission anticipates that this will be the case for the majority of applications. However, some flexibility needs to be built into the rule. For example, the hearing location may not have enough capacity to accommodate the number of people anticipated to attend the public meeting or there may not be enough time to conduct both on the same day. The situation may also arise where requests for a public meeting are filed after the preliminary hearing has been scheduled but there is insufficient time to provide the required notice of the public meeting prior to the preliminary hearing date. The new rule provides for a

shorter notice time period of ten days, unless longer notice is required by statute or federal regulation to minimize the possibility that this would occur.

STATUTORY AUTHORITY

The amendment is adopted under SB 688, §5, 77th Legislature, 2001 (the Act), which requires the agency to adopt rules to implement TWC, §5.557 and THSC, §382.056, as added and amended by the Act; TWC, §5.557; and THSC, §382.056. 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 to carry out its jurisdiction; 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 the agency; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

SUBCHAPTER E: PUBLIC COMMENT AND PUBLIC MEETINGS

§55.156

§55.156. Public Comment Processing.

(a) The chief clerk shall deliver or mail to the executive director, the Office of Public Interest Counsel, the Office of Public Assistance, the director of the Alternative Dispute Resolution Office, and the applicant copies of all documents filed with the chief clerk in response to public notice of an application.

(b) If comments are received, the following procedures apply to the executive director.

(1) Before an application is approved, the executive director shall prepare a response to all timely, relevant and material, or significant public comment, whether or not withdrawn, and specify if a comment has been withdrawn. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes.

(2) The executive director may call and conduct public meetings, under §55.154 of this title (relating to Public Meetings), in response to public comment.

(3) The executive director shall file the response to comments with the chief clerk within the shortest practical time after the comment period ends, not to exceed 60 days.

(c) After the executive director files the response to comments, the chief clerk shall mail (or otherwise transmit) the executive director's decision, the executive director's response to public comments, and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing. Instructions for requesting reconsideration of the executive director's decision or requesting a contested case hearing are not required to be included in this transmittal for the applications listed in §39.420(c) and (d) of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision). The chief clerk shall provide the information required by this section to the following:

- (1) the applicant;
- (2) any person who submitted comments during the public comment period;
- (3) any person who requested to be on the mailing list for the permit action;
- (4) any person who timely filed a request for a contested case hearing in response to the Notice of Receipt of Application and Intent to Obtain a Permit for an air application;
- (5) the Office of Public Interest Counsel; and
- (6) the Office of Public Assistance.

(d) The instructions sent under §39.420(a) of this title regarding how to request a contested case hearing shall include at least the following statements:

(1) for air applications, that a person who may be affected by emissions of air contaminants from the facility or proposed facility is entitled to request a contested case hearing from the commission;

(2) that a contested case hearing request must include the requestor's location relative to the proposed facility or activity;

(3) that a contested case hearing request should include a description of how and why the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(4) that only relevant and material disputed issues of fact raised during the comment period can be considered if a contested case hearing request is granted; and

(5) that a contested case hearing request may not be based on issues raised solely in a comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(e) Subsections (b)(2), (c), and (d) of this section do not apply to a case referred to SOAH under §55.210 of this title (relating to Direct Referrals).

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR
CONTESTED CASE HEARING**

§55.209, §55.210

STATUTORY AUTHORITY

The amendment and new section are adopted under SB 688, §5, 77th Legislature, 2001 (the Act), which requires the agency to adopt rules to implement TWC, §5.557 and THSC, §382.056, as added and amended by the Act; TWC, §5.557; and THSC, §382.056. 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 to carry out its jurisdiction; 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 the agency; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§55.209. Processing Requests for Reconsideration and Contested Case Hearing.

(a) This section and §55.211 of this title (relating to Commission Action on Requests for Reconsideration or Contested Case Hearing) apply only to requests for reconsideration and contested case hearing that are timely filed.

(b) After the final deadline to submit requests for reconsideration or contested case hearing, the chief clerk shall process any requests for reconsideration or hearing by both:

(1) referring the application and requests for reconsideration or contested case hearing to the alternative dispute resolution director. The alternative dispute resolution director shall try to resolve any dispute between the applicant and the requestors; and

(2) scheduling the hearing request and request for reconsideration for a commission meeting. However, if only a request for reconsideration is submitted and the commission has delegated its authority to act on the request to the general counsel, the request for reconsideration shall be scheduled for a commission meeting only if the general counsel directs the chief clerk to do so. The chief clerk should try to schedule the requests for a commission meeting that will be held approximately 44 days after the final deadline for timely filed requests for reconsideration or contested case hearing.

(c) The chief clerk shall mail notice to the applicant, executive director, public interest counsel, and all timely commenters and requestors at least 35 days before the first meeting at which the commission considers the requests. The notice shall explain how to participate in the commission decision, describe alternative dispute resolution under commission rules, and explain the relevant requirements of this chapter.

(d) The executive director, the public interest counsel, and the applicant may submit written responses to the requests no later than 23 days before the commission meeting at which the commission will evaluate the requests. Responses shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, the director of the Office of Public Assistance, the applicant, and any requestors.

(e) Responses to hearing requests must specifically address:

(1) whether the requestor is an affected person;

(2) which issues raised in the hearing request are disputed;

(3) whether the dispute involves questions of fact or of law;

(4) whether the issues were raised during the public comment period;

(5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;

(6) whether the issues are relevant and material to the decision on the application; and

(7) a maximum expected duration for the contested case hearing.

(f) Responses to requests for reconsideration should address the issues raised in the request.

(g) The requestors may submit written replies to a response no later than nine days before the commission meeting at which the commission will evaluate the request for reconsideration and

contested case hearing. A reply shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, and the applicant.

§55.210. Direct Referrals

(a) The executive director or the applicant may file a request with the chief clerk that the application be sent directly to SOAH for a hearing on the application.

(b) After receipt of a request filed under this section and after the executive director has issued his preliminary decision on the application, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

(c) A case which has been referred to SOAH under this section shall not be subject to the public meeting requirements of §55.154 of this title (relating to Public Meetings). The agency may, however, call and conduct public meetings in response to public comment. A public meeting is intended for the taking of public comment, and is not a contested case proceeding under the APA. Public meetings held under this section shall be subject to following procedures.

(1) The executive director shall hold a public meeting when there is a significant degree of public interest in a draft permit, or when required by law.

(2) To the extent practicable, the public meeting for any case referred under this section shall be held prior to or on the same date as the preliminary hearing.

(3) Public notice of a public meeting may be abbreviated to facilitate the convening of the public meeting prior to or on the same date as the preliminary hearing, unless the timing of notice is set by statute or a federal regulation governing a permit under a federally authorized program. In any case, public notice must be provided at least ten days before the meeting.

(4) The public comment period shall be extended to the close of any public meeting.

(5) The applicant shall attend any public meeting held.

(6) A tape recording or written transcript of the public meeting shall be filed with the chief clerk and will be included in the chief clerk's case file to be sent to SOAH as provided by §80.6 of this title (relating to Referral to SOAH).

(d) A case which has been referred to SOAH under this section shall be subject to the public comment processing requirements of §55.156(a) and (b)(1) and (3) of this title (relating to Public Comment Processing).

(e) If Notice of Application and Preliminary Decision is provided at or after direct referral under this section, this notice shall include, in lieu of the information required by §39.411(c) of this title (relating to Text of Public Notice), the following:

(1) the information required by §39.411(b)(1) - (3), (4)(A), (6) - (9), (10)(A), (B)(i) - (iii), and (C) - (D), (11), (12), and (14) of this title;

(2) the information required by §39.411(c)(4) and (5) of this title; and

(3) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted, the deadline to file public comments or request a public meeting, and a statement that a public meeting will be held by the executive director if there is significant public interest in the proposed activity.

These public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice.