

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §80.6, Referral to SOAH, and §80.105, Preliminary Hearings, and new §80.126, Public Comment in Direct Referrals. Sections 80.6, 80.105, and 80.126 are adopted *with changes* to the proposed text as published in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7465).

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 certain 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 in matters subject to HB 801.

In addition, the commission is also adopting certain changes to modify commission rules to expressly provide for the judge to take public comment in certain water utilities matters.

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 to SOAH for hearing and taking public comment at certain preliminary hearings, 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. 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., SB 688). 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 adopted 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 required by SB 688. In addition, the rules also modify certain existing procedural requirements relating to taking public comment at certain preliminary hearings. The rules will substantially advance these stated purposes 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 in Austin on October 25, 2001. No one appeared to provide formal comment, therefore the public hearing was not convened. Four commenters submitted written comments related to the changes proposed for Chapter 80 during the comment period which closed at 5:00 p.m. on October 29, 2001. Written comments 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); Brown McCarroll L.L.P. on behalf of several clients (Brown McCarroll); and Vinson & Elkins, L.L.P. (Vinson & Elkins).

All 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 agency's continuing efforts to promote fairness and efficiency in its procedural rules. Vinson & Elkins stated that the rules would greatly improve the direct referral process. Brown McCarroll generally supported the agency's approach in the proposed rules. No commenter expressly opposed the rulemaking.

SECTION BY SECTION DISCUSSION AND RESPONSE TO COMMENTS

Adopted §80.6, Referral to SOAH, is amended to reflect that: 1.) the chief clerk is not required to send the commission's list of disputed issues or maximum expected duration of the hearing; and 2.) the provisions of subsection (d) regarding the limitation of issues that may be considered by the judge do not apply when an application is referred under adopted new §55.210, implementing the direct referral provisions of SB 688. Consistent with new §5.557(a) - (b) of the TWC, as added by SB 688, the adopted rule reflects that contested case hearings on matters that are referred directly to SOAH will address all applicable statutory and regulatory requirements. In addition, subsection (b)(4) of this section has been modified to incorporate the provisions of recently adopted new 30 TAC §80.118, relating to Administrative Record, (see the November 9, 2001 issue of the *Texas Register* (26 TexReg 9105)) setting forth certain components of the chief clerk's case file on permitting matters. This subsection has also been modified from the proposal to reflect that for direct referrals, public comments and the executive director's response to comments will be included in the chief clerk's case file. This change is consistent with TWC, §5.557(c) which provides that the commission by rule shall provide for public comment and the executive director's response to comment to be entered into the administrative record of decision and with new §80.126 adopted in this rulemaking. This change is also made, in part, to respond to the comments made by TIP that, in direct referrals, comments and the executive director's

response to comments should be added to the list of items included in newly adopted §80.118. While the commission agrees that inclusion of these items in the administrative record of the proceeding more closely tracks the language of SB 688, §80.118 was not included in this rulemaking proposal. Thus, changes to that section cannot be made at adoption in this rulemaking. However, because the commission does agree that the comments and the executive director's response to comments should be included in the chief clerk's case file, the commission has modified §80.6 accordingly. The commission notes, however, that since a referral under §55.210 may occur immediately after the executive director's preliminary decision and the Notice of Application and Preliminary Decision and Notice of Hearing may be combined provided that all statutory and regulatory requirements are met, it is likely that the public comment period may not have closed at the time of the chief clerk's referral to SOAH. Under these circumstances, at the time of referral, the chief clerk's case file may not contain all timely public comment or the executive director's response to public comment. Therefore, the rule provides that the chief clerk may later transmit to SOAH the subsequently filed public comment and response to public comment.

Adopted §80.105, Preliminary Hearings, is amended to reflect that preliminary hearings shall be held in all matters referred under adopted new 30 TAC §55.210. Given that the direct referral process eliminates certain procedural steps that would be applicable otherwise and that the request for direct referral is made precisely so that a hearing may be convened on the application, it is appropriate to provide that in all such matters a preliminary hearing must be held. At the preliminary hearing, the judge may undertake any actions as set forth in §80.105 and this may include, among other things, the naming of parties and providing the parties an opportunity for settlement negotiations. Section 80.105

is also amended to provide that the judge shall accept public comment not only in enforcement hearings, but also in certain water utilities matters.

As part of the rulemaking implementing HB 801 provisions in September of 1999, §80.105 was amended to provide that the judge shall, for enforcement hearings only, take public comment. Prior to that time, it was fairly common for a judge to begin a preliminary hearing with the acceptance of public comment. Generally, the change adopted in 1999, was intended to maintain the distinction between informal public comment and the evidentiary hearing in permitting matters. In particular, this also effectuated the framework established by HB 801 whereby the public comment period occurs early in the process, public comments are addressed in the executive director's response to comment, and only limited issues are referred for contested case hearing.

While maintaining these distinctions is of continued importance, in particular, for matters undergoing the HB 801 permitting process, certain water utilities matters (which are not subject to the provisions of HB 801) may be better suited to different procedures. For these matters, the preliminary hearing may be the first opportunity for affected citizens to express their views regarding an application and provide public comment. While existing rules do not prohibit the taking of public comment by the judge in any matter, they do not currently explicitly address the public comment procedures for such water utilities matters. Thus, this rule change is adopted to explicitly provide for the taking of public comment at preliminary hearings held in connection with certain water utilities matters.

Bracewell & Patterson commented that, despite the clear language of TWC, §5.557(b) which renders the public meeting and public comment process inapplicable in direct referrals, the proposed rules

preserve the public comment process in proposed §80.105(b)(2). The commenter stated that SB 688 makes no provision for any additional public comment, but merely preserves any comments that may have been filed in response to the initial notice of intent to obtain a permit. The commenter also stated the belief that the proposal is based on a misconception of SB 688, §3(c), which preserves in the direct referral case a provision “for public comment and the executive director’s response to comments to be entered into the administrative record of decision on an application.” Bracewell & Patterson also commented that the proposal goes so far as to put SOAH in charge of taking public comment, rather than the executive director. Finally, the commenter stated that, even under existing law (standard HB 801 procedures), the collection and evaluation of all public comments and the management of public meetings was by the commission’s staff, not SOAH judges.

The commission does not agree with the commenter’s interpretation of SB 688 provisions. Texas Water Code, §5.557(b) provides that §§5.554, 5.555, and 5.556, do not apply to an application that is referred for hearing under the direct referral provisions of TWC, §5.557(a). Sections 5.554 - 5.556 of the TWC relate to the statutory public meeting, response to comment, and request for hearing and request for reconsideration requirements of the HB 801 process. The commission notes that TWC, §5.553, relating to Preliminary Decision; Notice and Public Comment, is not included among the provisions of HB 801 that are made inapplicable to applications that are direct referred. Thus, nothing in TWC, §5.557(b) or elsewhere in SB 688 abbreviates or repeals any notice or comment provisions that would otherwise be applicable. In addition, notice of draft permit and public comment on the draft permit is required for federally authorized permitting programs. (See, for example, 40 CFR §124.10.) Thus, the commission

cannot agree that the only public comment that may be considered by the commission is that comment which is received in response to Notice of Intent to Obtain Permit under TWC, §5.552. Further, SB 688 expressly requires that the commission by rule provide for public comment and the executive director's response to comment in the administrative record of decision.

With regard to the commenter's view that the executive director, rather than SOAH, is more appropriately charged with accepting public comment, the commission responds that while the HB 801 public participation process did result in a bifurcation of the public comment and SOAH hearing process as discussed earlier in this preamble, such a bifurcation did not always exist. In some cases (for example, water utilities matters), providing for public comment to be accepted at preliminary hearings may actually lead to a more efficient and effective public participation process. However, the commission does agree that, for HB 801 applications, including those that are directly referred to SOAH, agency staff should continue to be charged with taking public comment. While SB 688 does anticipate that public comment and the executive director's response to comment is to be entered into the administrative record of decision, it does not mandate that the judge be charged with taking public comment. Also, while the combination of a public meeting procedure and preliminary hearing procedure might have had a streamlining effect on the process, such a consequence might not actually be achieved in all cases. Further, the commission has also taken into consideration the effect of implementation of TWC, §5.228, as added by HB 2912, the agency's Sunset Bill, relating to executive director participation in contested permit hearings on the procedural steps to be established for SB 688 direct referrals. As reflected in commission rules implementing TWC, §5.228, the executive director may not be a

party in all permit hearings. Since the executive director may not in all cases be participating in preliminary hearings, establishing a procedure whereby public comment (to which the executive director has a duty to respond) is taken at the preliminary hearing may not be appropriate. Therefore, the commission has modified the rule as originally proposed so that it no longer requires the judge to take public comment at preliminary hearings in matters that are directly referred under §55.210.

Vinson & Elkins commented that the rules should be revised to delete §80.105(b)(2)(C), which provides that the judge shall accept public comment on directly referred applications at the preliminary hearing. In the commenter's view, public comment should be left to the executive director's staff. Vinson & Elkins further commented that while the time and location of the public meeting and preliminary hearing should be coordinated, the two should be kept separate and the judge should not participate in the public meeting.

As previously stated and for the reasons set forth in this preamble, the commission agrees and adopted §80.105 no longer provides that the judge is to take public comment in direct referrals.

Adopted new §80.126, Public Comment in Direct Referrals, reflects the procedures for commission consideration of public comment and the executive director's responses to public comment in direct referrals. Consistent with the requirements of federal program authorization, it also specifically provides that commission decisions are to include consideration of public comment and the executive director's response to comment.

TIP, Vinson & Elkins, Brown McCarroll, and Bracewell & Patterson all opposed the provisions of §80.126 providing for inclusion of public comment and the executive director's response to comment in the evidentiary record of the proceeding. Each of these comments are described more specifically in the following paragraphs.

TIP expressed concern about the language in proposed §80.126 requiring that public comment and the executive director's responses to such comment be included in the "evidentiary record." The commenter stated that this requirement goes beyond the statutory mandate of SB 688 that public comment be made part of the "administrative record." TIP commented that the mandatory admission of unsworn public comments into the evidentiary record on a permit application is not in accordance with applicable evidentiary rules and could create unnecessary factual disputes in the record that the applicant would be forced to rebut. The commenter stated that public comment in a contested case hearing and the responses of the executive director should simply be added to the list of items included in the administrative record. TIP further stated that the proposed rule would conflict with evidentiary rules by admitting into evidence testimony in the form of public comment from persons not under oath and not subject to cross-examination. Finally the commenter stated that, if public comments are required to be admitted into evidence, then the applicant would have the right to, and would be forced to, cross-examine any commenters.

Vinson & Elkins commented that proposed §80.126 oversteps SB 688 by requiring that all timely public comments and the executive director's response to such comments be admitted into the "evidentiary record," and commented that such information belongs in the "administrative record" only. The

commenter stated that it is unnecessary to allow the parties to present evidence on each issue raised in public comment or the executive director's responses, and that to allow such evidence would significantly lengthen the hearing process for directly referred applications. Vinson & Elkins further stated that, instead, the executive director should be allowed to respond to comments after the contested case hearing and before the commission's consideration of the administrative law judge's proposal for decision.

Brown McCarroll commented that SB 688 does not authorize public comments or the executive director's responses to be entered into the evidentiary record, and pointed out that the statutory language specifies that the commission by rule shall provide for public comment and the executive director's response to public comment to be entered into the administrative record. The commenter stated that the use of the words "evidence" and "evidentiary record" in the proposed rule must be a mistake, and provided comments regarding the meaning of "evidence." Brown McCarroll further stated that the proposed provision would allow any member of the public's comment on an application, as long as they are timely, to be considered part of the evidentiary record, regardless of the rules of evidence and whether the applicant has the opportunity to cross-examine the commenter. Finally, the commenter recommended that the proposed word "evidentiary" be replaced with the word "administrative" and the proposed word "evidence" be replaced with the word "comments" in the §80.126 adoption.

Bracewell & Patterson commented concerning proposed §80.126 that non-record comments cannot by commission rule be made "evidence" in a record on which the commission could base a decision, and stated that the evidence in contested cases must be adduced through sworn testimony that complies with

the rules of evidence, subjected to cross-examination. The commenter concluded that the comments are not part of the evidentiary record, but of the administrative record, which is part of the agency file, but of course is not part of the evidence on which SOAH can base a proposal for decision or on which the commission can base any decision. Finally, the commenter stated that the administrative record may serve solely to inform the executive director's staff and perhaps influence the position it takes in an evidentiary hearing.

The commission does not agree with the analysis presented by the commenters in connection with §80.126. The commission is an administrative agency, not a trial court. A rule providing for inclusion of public comments and the executive director's response and consideration of public comment is entirely consistent with the requirements of the Administrative Procedure Act (APA). Specifically, Texas Government Code, §2001.060(7) provides that the record in a contested case includes all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision. Further, Texas Government Code, §2001.090 authorizes official notice to be taken of all facts that are judicially cognizable and generally recognized facts within the area of the state agency's specialized knowledge. The administrative record, which under these rules includes public comment and the executive director's response to comment, does not serve only to inform the executive director as suggested. It serves as the basis for commission decisions. This result is not only authorized by the APA, it is required in order to meet federal program authorization requirements.

However, the commission does recognize that SB 688, by its terms, requires that public comment and the executive director’s response to comment be admitted in the “administrative record of decision.” The commission agrees that using this term in the rule would mirror the language of the statute. The commission has modified §80.6 to provide that the chief clerk’s case file that is forwarded to SOAH at the time of referral, or as it is later supplemented, is to include public comment and the executive director’s response to comment. The commission has also revised §80.126 to remove the reference to “evidentiary record.” The rule continues to provide that any party may present evidence to issues raised in public comment or the executive director’s response to comment. Since public comment and the executive director’s response to comment are considered by the commission, it is appropriate to provide parties with the opportunity to respond and present any evidence related to the issues raised by that comment. The commission believes that such modifications are consistent with the statute, the provisions of APA describing the content of the record in a contested case, and the requirements of federal program authorization relating to the consideration of public comment.

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; §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; §§11.036, 11.041, and 12.013, which establish the commission's authority to determine wholesale water rates; and §13.041, which establishes the commission's general authority over water and sewer utilities; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

SUBCHAPTER A: GENERAL RULES

§80.6

§80.6. Referral to SOAH.

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) When a case is referred to SOAH, the chief clerk shall:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing;

(3) issue public notice of the hearing as required by law and commission rules;

(4) send a copy of the chief clerk's case file to SOAH which, in permitting matters, shall include the following certified copies of documents:

(A) the documents described in §80.118 of this title (relating to Administrative Record); and

(B) for cases referred under §55.210 of this title (relating to Direct Referrals) any public comment and the executive director's response to comments to be included in the administrative record, except that these documents may be sent to SOAH after referral of the case, if they are filed subsequent to referral; and

(5) send the commission's list of disputed issues and maximum expected duration of the hearing to SOAH unless the case is referred under §55.210 of this title.

(c) In an enforcement case, the executive director's petition or Executive Director Preliminary Report shall serve as the list of issues or areas that must be addressed.

(d) When a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title (relating to Judges) may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues. This subsection does not apply to a case referred under §55.210 of this title.

SUBCHAPTER C: HEARING PROCEDURES

§80.105, §80.126

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; §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; §§11.036, 11.041, and 12.013, which establish the commission's authority to determine water rates; and §13.401, which establishes the commission's general authority over water and sewer utilities; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§80.105. Preliminary Hearings.

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required in an enforcement matter, except in those under federally authorized underground injection control (UIC) or Texas Pollutant Discharge Elimination System (TPDES) programs. A preliminary hearing is required for applications referred to SOAH under §55.210 of this title (relating to Direct Referrals).

(b) If jurisdiction is established, the judge shall:

(1) name the parties;

(2) accept public comment in the following matters:

(A) enforcement hearings; and

(B) applications under Texas Water Code (TWC), Chapter 13 and TWC, §§11.036, 11.041, or 12.013;

(3) establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes; and

(4) allow the parties an opportunity for settlement negotiations.

(c) When agreed to by all parties in attendance at the preliminary hearing, the judge may proceed with the evidentiary hearing on the same date of the first preliminary hearing.

(d) One or more preliminary hearings may be held to discuss:

- (1) formulating and simplifying issues;
- (2) evaluating the necessity or desirability of amending pleadings;
- (3) all pending motions;
- (4) stipulations;
- (5) the procedure at the hearing;
- (6) specifying the number and identity of witnesses;
- (7) filing and exchanging prepared testimony and exhibits;
- (8) scheduling discovery;
- (9) setting a schedule for filing, responding to, and hearing of dispositive motions; and
- (10) other matters that may expedite or facilitate the hearing process.

§80.126. Public Comment in Direct Referrals

In permit cases referred under §55.210 of this title (relating to Direct Referrals), all timely public comment on the application and the executive director's responses to timely, relevant and material, or significant public comment shall be admitted into the administrative record as defined by §80.118 of this title (relating to Administrative Record). 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. The parties may be allowed to respond and to present evidence on each issue raised in public comment or the executive director's responses. The commission shall consider all public comment in making its decision and shall either adopt the executive director's response to public comment or prepare its own response.