

The Texas Commission on Environmental Quality (commission) adopts an amendment to §80.108 without changes to the proposed text in the February 23, 2007 issue of the *Texas Register* (32 Tex Reg 711) and therefore will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The amendment will provide the commission with the express authority to direct the executive director to participate as a party in contested case hearings regarding certain permit applications. The amendment would add subsection (m) which provides the commission with an option to direct the executive director to participate as a party in the types of hearings listed in subsections (a) and (c). Subsection (a) provides that the executive director shall not participate as a party in contested case hearings regarding permit applications for seven types of applications. Subsection (c) applies to applications not included in subsections (a) or (b) and provides that the executive director shall consider certain criteria in determining whether to participate as a party. This change will afford the commission the opportunity to benefit from the executive director's specialized knowledge by his participation in selected contested case hearings. The types of hearings in subsection (a) were included in the initial rulemaking because they were identified as less complex or not having unique conditions. However, experience has shown that technical and policy issues in these types of cases may warrant participation by the executive director as a party. It will also ensure that the administrative record is complete.

Prior to September 1, 2001, Texas Water Code, §5.228 required the executive director of the commission to participate as 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) that the executive director be expressly prohibited from rehabilitating non-agency witnesses in permit hearings; and (3) that 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 adopted in House Bill (HB) 2912, (77th Legislature, 2001) the Sunset Bill for the commission. Under HB 2912, Texas Water Code, §5.228 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 Texas Water Code, §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. Section 80.108 was one of the new rules adopted by the commission, effective November 15, 2001, implementing the revisions to Texas Water Code, §5.228.

SECTION DISCUSSION

Section 80.108 is amended by adding subsection (m) which provides an option for the commission to direct the executive director to participate as a party in the types of hearings listed in subsections (a) and (c).

In addition, cross-references in subsection (a)(4) and (5) are updated.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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 Texas Government Code, §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 rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopts a rule solely under the general powers of the agency. This amended rule does not exceed a standard set by federal law. This amended rule does not exceed an express requirement of state law because it is authorized by Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and Texas Water Code, §5.228, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This amended rule 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 Texas Water Code, §5.228, which expressly requires the commission to adopt rules necessary to specify the factors the executive director must consider in determining whether to participate as a party in a contested case permit hearing. This amended rule does not adopt a rule solely under the general powers of the agency, but rather under specific state law. Finally, this rulemaking is not adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

No comments were received regarding the Draft Regulatory Impact Analysis Determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rule. Nevertheless, the commission further evaluated the adopted rule as to whether the rule constitutes a taking under Texas Government Code, Chapter 2007. The specific primary purpose of the adopted rule is to revise a commission rule to establish procedures for executive director party participation in certain contested case hearings as required by Texas Water Code, §5.228. The amended rule relates to when the executive director will participate as a party as directed to do so by the commission. The adopted rule will substantially advance this purpose by providing the commission the express authority to direct the executive director to participate as a party. Promulgation and enforcement of this rule 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.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program. No comments were received regarding the consistency of the rule with the CMP.

PUBLIC COMMENT

No comments were received.

SUBCHAPTER C: HEARING PROCEDURES

§80.108

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.013, concerning General Jurisdiction of the commission, which establishes the commission's general authority to carry out its jurisdiction; §5.102, concerning the commission's General Powers, including calling and holding hearings and issuing orders; §5.103, concerning Rules, 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; and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and §5.228, which establishes the executive director's authority to participate in contested case hearings. Additionally, the amendment is adopted under Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders and Decisions, which requires state agencies to adopt rules of practice and procedure.

The amendment implements Texas Water Code, §5.228.

§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 §330.7 of this title (relating to Permit Required);

(5) an application for a permit for the processing of grit and grease trap waste under §330.7 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
- (2) the applicant is a non-profit entity; and
- (3) there is a significant public need for the permitting action to avoid adverse impact to human health or the environment.

(f) The executive director may elect to participate as a party for the purpose of assisting an applicant in meeting its burden of proof in accordance with subsection (e) of this section notwithstanding the provisions of subsections (a) - (d) of this section.

(g) The executive director must notify all parties and the SOAH judge of his intention to participate as a party to a contested case hearing concerning a permitting matter in writing or on the record as soon as practicable, but not later than one week after the end of the preliminary hearing.

(h) The executive director's decision on participation as a party in contested case hearing concerning a permitting matter and the executive director's decision on whether an applicant is eligible to receive assistance in accordance with subsection (e) of this section are not subject to review by the commission or SOAH.

(i) This section does not apply to matters in which the executive director is a party in accordance with §80.109(b)(1) of this title (relating to Designation of Parties).

(j) For purposes of this section:

(1) “qualifying local governmental entity” means a district, authority, county, or municipality that demonstrates that it lacks the technical, legal, and financial resources to support its application in the contested case hearing process; and

(2) “small business” means a small business as defined by §70.9(b)(1) and (2) of this title (relating to Installment Payment of Administrative Penalty).

(3) “non-profit entity” shall mean those entities which are defined in 26 United States Code, §501(c)(3) and (4).

(k) The executive director shall record his decision on party participation and the grounds for his decision under this section on a case-by-case basis.

(l) The executive director shall on an annual basis compile the records required by subsection (k) of this section and present this information to the commission in a written report.

(m) Notwithstanding the requirements of subsections (a) and (c) of this section regarding executive director party participation, the executive director shall participate as a party if directed to do so by the commission.