

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §50.139.

### **Background and Summary of the Factual Basis for the Proposed Rule**

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 10 includes changes to the contested case hearings process of the TCEQ.

#### *HB 2694, §10.01 and §10.05(a): Limitations for State Agencies*

HB 2694, §10.01 amends Texas Water Code (TWC), §5.115(b) by adding language that a state agency receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission. This section further adds that for the purposes of this subsection, "state agency" does not include a river authority. HB 2694, §10.05(a) provides instructive language regarding the effective date for applicability.

The change to TWC, §5.115(b) provides that state agencies receiving notice under this particular subsection may comment on, but not contest, the issuance of a permit or license issued by the commission. TWC, §5.115(b) lists the general powers and duties of the commission that apply to the commission's air, water, and waste permitting programs. TWC, §5.115(a) specifies that it applies to contested cases arising under the

commission's air, water, or waste programs. Because TWC, §5.115(b) is in Subchapter D and also follows and builds upon TWC, §5.115(a), it is reasonable to conclude that the changes to TWC, §5.115(b) are also intended to apply to contested cases for air quality, water quality, water rights, and waste applications.

*HB 2694, §10.02 and §10.04: Executive Director Participation*

HB 2694, §10.02 amends TWC, §5.228(c) and (d) to require the executive director to participate as a party in contested case hearings. That section also states that the executive director's role in the hearing is to provide information to complete the administrative record and support the executive director's position developed in the underlying proceeding, and deletes the limitation that the executive director may testify for the sole purpose of providing information to complete the administrative record.

HB 2694, §10.04 deletes TWC, §5.228(e), which prohibited the executive director from assisting a permit applicant in meeting its burden of proof in a hearing at the State Office of Administrative Hearings (SOAH) unless the permit applicant was in a category of permit applicants that the commission had designated as eligible to receive assistance.

*HB 2694, §10.03: Discovery*

HB 2694, §10.03 adds new TWC, §5.315 which provides that in a contested case hearing

held by SOAH that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony. Further, this section clarifies that water and sewer ratemaking proceedings are exempt from this requirement.

*HB 2694, §10.05(b)*

HB 2694, §10.05(b) states that the changes in law made in HB 2694, Article 10 apply to proceedings before SOAH that are pending or filed on or after September 1, 2011.

Therefore, the changes in HB 2694, §§10.02 - 10.04 will apply to these contested case hearings.

*Proposed Rule Amendments*

Implementation of HB 2694, Article 10 includes changes to commission rules in 30 TAC Chapters 50, 55, and 80, and the changes to all chapters are concurrently proposed by the commission under Rule Project Number 2011-030-080-LS. HB 2694, §10.01 and §10.05(a) would be implemented through amendments concurrently proposed to §50.139, Motion to Overturn Executive Director's Decision; §55.103, Definitions; §55.201, Requests for Reconsideration or Contested Case Hearing; §55.203, Determination of Affected Person; §55.256, Determination of Affected Person; and §80.109, Designation of Parties.

HB 2694, §§10.02, 10.04, and 10.05(b) would be implemented through amendments

concurrently proposed to §80.17, Burden of Proof; §80.108, Executive Director Party Status in Permit Hearings; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.131, Interlocutory Appeals and Certified Questions; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meetings.

HB 2694, §10.03 and §10.05(b) would be implemented through the amendment concurrently proposed to §80.151, Discovery.

### **Section Discussion**

The commission proposes to amend §50.139, Motion to Overturn Executive Director's Decision, by adding language to subsection (a) that states that notwithstanding any other law, a state agency, except a river authority, may not file a motion to overturn the executive director's action on an application that was received by the commission on or after September 1, 2011 unless the state agency is the applicant. This change is necessary to implement HB 2694, §10.01, which made changes to TWC, §5.115(b) by adding language that provides that state agencies, except river authorities, receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission.

**Fiscal Note: Costs to State and Local Government**

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

HB 2694 requires the agency to amend its rules concerning the contested case hearing process. This proposed rule would amend Chapter 50 in conjunction with required amendments to Chapters 55 and 80 to implement the provisions of HB 2694. The fiscal impact of the amendments to Chapters 55 and 80 will be detailed in separate, but related fiscal notes. This fiscal note only pertains to the proposed amendment to Chapter 50 which would prohibit certain state agencies (as specified in the proposed amendment to Chapter 55) from contesting the issuance of a permit or license by filing a motion to overturn the executive director's action.

It is generally uncommon for other state agencies to participate as parties in contested case hearings. Historically, the Texas Parks and Wildlife Department (TPWD) has been the only state agency that has participated as a protesting party in hearings on water right applications, and that participation has been limited to a small number of hearings. Therefore, the proposed amendment to Chapter 50 is not expected to have a significant fiscal impact on TPWD or other state agencies.

The proposed rule will not have a fiscal impact on units of local government since it does not apply to local governments.

### **Public Benefits and Costs**

Nina Chamness also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law, specifically HB 2694.

The proposed amendment to Chapter 50 would not have a significant fiscal impact on individuals or businesses that apply for a license or permit since the rule only applies to certain state agencies. The historical instances of those agencies participating as protesting parties in a contested case hearing and filing a motion to overturn the executive director's action have been rare. Therefore, any cost reduction that an individual or business might experience as a result of the proposed prohibition is not expected to be significant.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule which prohibits certain state agencies from filing a motion to overturn the executive director's action when issuing a license or permit. A small business is

expected to experience the same fiscal impact as that experienced by individuals or large businesses under the proposed rule.

### **Small Business Regulatory Flexibility Analysis**

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

### **Local Employment Impact Statement**

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or

reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to Chapter 50 is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendment is procedural in nature and no fiscal impact is expected if the amendment is adopted. Therefore, this rulemaking action does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendment to Chapter 50 is

developed to implement HB 2694. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically authorized under the specific sections listed in the Statutory Authority sections listed elsewhere in this preamble.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission evaluated the proposed amendments and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendment is procedural in nature, and therefore promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed amendment does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5).

### **Consistency with the Coastal Management Program**

The commission has reviewed this action and found that the action will not adversely affect any applicable coastal natural resource areas identified in the Texas Coastal Management Program. The proposed rule updates the commission's contested case hearing process and does not approve or authorize an action listed in 30 TAC §281.45, Actions Subject to Consistency With the Goals and Policies of the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on December 12, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-030-080-LS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466, or Kathy Humphreys, Environmental Law Division, (512) 239-3417.

## **SUBCHAPTER G: ACTION BY THE EXECUTIVE DIRECTOR**

### **§50.139**

#### **Statutory Authority**

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements for requests for reconsideration and contested case hearings.

Additionally, the amendment is proposed 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, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011. The amendment is also proposed under Texas Government Code, Chapter 311.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

**§50.139. Motion to Overturn Executive Director's Decision.**

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion to overturn [of] the executive director's action on an application or water quality management plan (WQMP) update certification. Notwithstanding any other law, a state agency, except a river authority, may not file a motion to overturn the executive director's action on an application that was received by the commission on or after September 1, 2011 unless the state agency is the applicant. Wherever other commission rules refer to a "motion for reconsideration["], that term should be considered interchangeable with the term "motion to overturn executive director's decision."

(b) A motion to overturn must be filed no later than 23 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director to the applicant and persons on any required mailing list for the action.

(c) A motion to overturn must be filed no later than 20 days after the date persons who timely commented on the WQMP update are notified of the response to comments and the certified WQMP update. A person is presumed to have been notified on the third day after the date the notice of the executive director's action is mailed by first class mail.

(d) An action by the executive director under this subchapter is not affected by a motion to overturn filed under this section unless expressly ordered by the commission.

(e) With the agreement of the parties or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions to overturn and for taking action on the motions so long as the period for taking action is not extended beyond 90 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.

(f) Disposition of motion.

(1) Unless an extension of time is granted, if a motion to overturn is not acted on by the commission within 45 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director, the motion is denied.

(2) In the event of an extension, the motion to overturn is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.

(g) When a motion to overturn is denied under subsection (f) of this section, a motion for rehearing does not need to be filed as a prerequisite for appeal. Section 80.272 of this title (relating to Motion for Rehearing) and Texas Government Code, §2001.146, regarding motions for rehearing in contested cases do not apply when a motion to overturn is denied. If applicable, the commission decision may be subject to judicial review under Texas Water Code, §5.351, or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.