

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §55.1 and §55.21 and new §§55.101, 55.103, 55.150, 55.152, 55.154, 55.156, 55.200, 55.201, 55.203, 55.205, 55.209, 55.211, and 55.250-55.256, concerning Requests for Reconsideration and Contested Case Hearings; Public Comment. Sections 55.1, 55.21, 55.101, 55.103, 55.150, 55.152, 55.154, 55.156, 55.200, 55.201, 55.203, 55.205, 55.209, 55.211, 55.250, 55.251, 55.253, 55.254, 55.255, and 55.256 are adopted with changes to the proposed text as published in the July 16, 1999 issue of the *Texas Register* (24 TexReg 5356). Section 55.252 is adopted without changes and will not be republished. Proposed new §55.206 is withdrawn by the commission.

Corrections to the proposed rules for Chapter 55 were published in the *Texas Register* on August 20, 1999 (24 TexReg 6573). The corrections consisted primarily of typographical errors and incorrect cross-references. Many of the corrections are in the adopted text.

Certain provisions of the rules will constitute a revision to the state implementation plan (SIP). Specifically, §§55.1; 55.21(a)-(d), (e)(2), (3) and (12), (f) and (g); 55.101(a), (b), (c)(6)-(8); 55.103; 55.150; 55.152(a)(1), (2), and (5) and (b); 55.154; 55.156; 55.200; 55.201(a)-(h); 55.203; 55.205; 55.206; 55.209; and 55.211.

Concurrently with this rulemaking, the commission is also adopting the rules review of and readopting with amendments the existing rules in Chapter 55, concerning Request for Contested Case Hearings, Public Comment, in accordance with the General Appropriations Act, Article IX, §167, 75th

Legislature, 1997. Adoption of the review and readoption of Chapter 55 is in addition to the review and readoption by the commission on September 2, 1999, of Chapters 39, 50, and 80. This adoption also continues the implementation of HB 801.

BACKGROUND

The primary purpose of the adopted amendments and new sections is to implement House Bill (HB) 801, and portions of Senate Bill (SB) 7, SB 211, SB 766, and HB 1479, 76th Legislature (1999). The amendments and new sections are intended to establish avenues for public participation in the permitting process for water, waste, and air applications. This adoption also represents a continuation of the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

OVERVIEW OF HB 801 AND IMPLEMENTATION

HB 801, enacted by the 76th Legislature, revises the commission's procedures for public participation in environmental permitting by adding new Texas Water Code (TWC), Chapter 5, Subchapter M; revising Texas Health and Safety Code, (THSC), Solid Waste Disposal Act, §361.088; revising Texas Clean Air Act (TCAA), THSC §382.056; and revising Texas Government Code, §2003.047. The changes in law made by HB 801 only apply to permit applications declared administratively complete on or after September 1, 1999 and former law is continued in effect for applications declared administratively complete before September 1, 1999. Generally, the amendments made by this law are

procedural in nature and are not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment and an opportunity for hearing are provided.

More specifically, HB 801 encourages early public participation in the environmental permitting process and is intended to streamline the contested case hearing process. The statute requires an applicant to publish newspaper notice of intent to obtain a permit and notice of the executive director's preliminary decision on the application. It also requires the applicant to place a copy of the application and the executive director's preliminary decision at a public place in the county. The executive director is also required to prepare responses to relevant and material public comment received in response to the notices or at public meetings, and file the responses with the chief clerk. This legislation also allows the commission by rule to provide any additional notice, opportunity for public comment or opportunity for hearing as necessary to satisfy federal program authorization requirements. Contested case hearing procedures are also revised. The scope of proceedings and discovery is limited by the new law. These changes are implemented in Chapters 39, 50, 55 and 80. Additional changes to implement HB 801 are adopted in Chapters 106, 116, 122 and 305. Most of these chapters also contain changes necessary for the consolidation of the procedural rules of the agency and to improve consistency among the permitting programs as well as changes to clarify and update agency rules and changes necessary to facilitate permit processing. Changes for all of these chapters, except Chapter 55, were adopted by the commission on September 2, 1999, were filed with the Texas Register for publication on September 24, 1999. Changes to Chapter 321 were also proposed on July 16, 1999, but are not adopted at this time.

OVERVIEW OF HB 1479 AND IMPLEMENTATION

HB 1479 amended §26.028 of the TWC and allows the commission to approve an application to renew or amend a permit without the necessity of a public hearing if (1) the applicant is not applying to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge; (2) the activities to be authorized will maintain or improve the quality of waste; (3) the applicant's compliance history raises no issues regarding the applicant's ability to comply with a material term of its permit; and (4) for TPDES permits, notice and opportunity to comment is provided in accordance with federal program requirements. This adoption implements these provisions.

OVERVIEW OF SB 7 AND IMPLEMENTATION

SB 7, also enacted by the 76th Legislature, restructures electric utility service in Texas. Owners of grandfathered air facilities that generate electric energy for compensation are required to apply for an electric generating facility permit from the commission by September 1, 2000. These permits are subject to notice under §382.056 of the THSC. SB 7 provides that initial issuance of these permits requires notice and comment proceedings. Renewal of these permits requires notice, opportunity for comment and opportunity for contested case hearing.

The notice provisions for electric generating facility permits are implemented through changes to Chapter 39 and to a limited extent through changes to Chapters 50 and 55. Amendments and renewals are subject to Chapters 50, 55, and 80 as previously amended. Additional implementation of the requirements of SB 7 is expected in future rulemaking by the commission.

OVERVIEW OF SB 211 AND IMPLEMENTATION

SB 211 amends §2001.142(c) of the Texas Government Code, relating to notice of decision in an administrative hearing, provides that a party is presumed to have been notified on the third day after notice has been mailed. This requirement has been implemented in Chapters 39, 50, 55 and 80.

OVERVIEW OF SB 766 AND IMPLEMENTATION

SB 766, enacted by the 76th Legislature, also amends TCAA, Chapter 382 by, among other things: (1) requiring the commission to establish procedures to authorize standard permits and permits by rule; (2) dividing the current category of exemptions from permitting into two categories: permits by rule for construction of facilities with insignificant air emissions, and exemptions from permitting for changes to certain existing facilities with insignificant air emissions; and (3) creating a voluntary emission reduction permit (VERP) for grandfathered facilities that must be applied for by September 1, 2001. Notice requirements for these changes are implemented in the changes to Chapter 39 because of the critical nature of the timing of the permit program. Public participation requirements applicable to VERPs under SB 766 are included in those chapters, specifically §39.403(11) and §39.606, and in addition, §55.101. Additional implementation of the requirements of SB 766 is expected to occur in future rulemaking proposals by the commission.

OVERVIEW OF CHANGES NOT RELATED TO HB 801, HB 1479, SB 7, SB 211 and SB 766

Section 55.101(c)(9) includes weather modification applications in the list of applications which are not subject to contested case hearings. This implements in rule the commission's interpretation of law on this subject.

ORGANIZATION OF CHAPTER

HB 801 applies only to certain applications that are administratively complete on or after September 1, 1999. Thus, in the adopted rules in Chapter 55, Subchapters A-B are amended to apply only to applications that were administratively complete before September 1, 1999. At the same time, new Subchapters D-G apply only to applications that are administratively complete on or after September 1, 1999. More specifically, Subchapter G applies to applications other than those under Chapter 13, 26 or 27, §§11.036, 11.041, 12.013, TWC and Chapter 361 or 382, THSC that are declared administratively complete on or after September 1, 1999. Subchapter C is not used here; it is reserved for future rulemaking. While HB 801 continues former law in effect for applications administratively complete before September 1, 1999, the commission recognizes that it may be a year or more before all of those applications have been acted on, especially those that go to contested case hearing. Therefore, the commission has chosen this parallel subchapter structure because the commission believes that it is useful for the public to have easy access to rules for older applications as well as for new ones. After all applications that were administratively complete before September 1, 1999 have been processed, the commission will repeal the subchapters that apply to those applications.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the 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 the act.

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

“Major environmental rule” means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and establishes procedures associated with public comment on permit applications and requests for contested case hearing, the rulemaking does not meet the definition of a “major environmental rule.”

In addition, even if the rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does not: (1) exceed a standard set by federal law; (2) exceed an express requirement of state law; (3) exceed a requirement of a delegation agreement; or (4) 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; TWC, Chapter 5, Subchapter M; and other statutory authorities cited in the

STATUTORY AUTHORITY section of this preamble. This adoption does not exceed a requirement of a delegation agreement or contract between the State and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with TWC, §5.551, which expressly requires the commission to adopt any rules necessary to satisfy any authorization for a federal permitting program. This rulemaking does not adopt a rule solely under the general powers of the agency in TWC §5.102, but rather under a specific state law (i.e., TWC, Chapter 5, Subchapter M and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these adopted rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific primary purpose of the adopted amendments and new sections is to revise the procedures for requesting a contested case hearing and processing public comments on certain applications. The adopted rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the rule language consists of amendments and new sections relating to the commission's procedural rules rather than substantive requirements. In other words, these rules are procedural in nature and do not affect a property owner's use of property.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the rulemaking and has determined that the adopted sections are not subject to the Coastal Management Program (CMP). The adopted actions concern only the procedural rules of the commission and general agency operations, 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 (31 TAC Chapter 505; 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

A public hearing on the proposal was held August 10, 1999, at 2:00 p.m. in Room 201S of Texas Natural Resource Conservation Commission Building E, located at 12100 Park 35 Circle, Austin. Oral comments were received on Chapter 55 from Locke, Liddell and Sapp, L.L.P.. The comment period for written comments on the proposed rules closed at 5:00 p.m., August 16, 1999. Written comments were submitted by Baker & Botts, L.L.P., on behalf of the Texas Industry Project; Brown McCarroll & Oaks Hartline, L.L.P. (Brown McCarroll), on behalf of the Texas Chemical Council, Texas Association of Business and Chambers of Commerce (TABCC), and Texas Oil and Gas Association; Brown, Potts & Reilly, L.L.P.(Brown, Potts) on behalf of Merco Joint Venture, L.L.C.; Exxon Chemical Company's Baytown Chemical Plant, Baytown Olefins Plant and Mont Belvieu Plastics Plant (Exxon Chemical); Exxon Company, U.S.A., Baytown Refinery (Exxon Company); Henry, Lowerre, Johnson & Frederick, Attorneys at Law (Henry, Lowerre), on behalf of Blackburn and Carter, Clean Water Action, Consumers Union, Environmental Defense Fund, Henry, Lowerre, Johnson & Frederick, National Wildlife Federation, Public Citizen, Sierra Club, Lone Star Chapter, Texas Center

for Policy Studies, and Texas Committee on Natural Resources; Jenkens & Gilchrist, P.C.; Public Interest Counsel (PIC), Texas Natural Resource Conservation Commission; Small Business Compliance Advisory Panel (CAP); Texas Instruments Incorporated (TI); Thompson & Knight, L.L.P. (Thompson & Knight); and the United States Environmental Protection Agency Region 6 Office (EPA).

COMMENTS REQUESTED

The commission solicited comments on improving the standards in §55.206 for determining the relevance and materiality of issues. During the comment period, a number of comments were received from Baker & Botts; Brown McCarroll; Henry, Lowerre; Jenkens & Gilchrist and Thompson & Knight.

Brown, McCarroll noted the proposed standards are generally adequate, but that the preamble should include examples of the application of the standards. Jenkens & Gilchrist commented that the proposed rule appears to appropriately address the factors to be considered, but noted that each decision will necessarily need to be a case-specific determination. Henry, Lowerre commented that the rule should not attempt to define “relevant” or “material” because to do so creates limits not intended or provided for in HB 801, and that the terms mean what they do in court.

Three commenters suggested definitions for the term “material issue.” Baker & Botts suggested that the definition should be restricted in accordance with the scope limitations of §50.115. Jenkens & Gilchrist commented that the proposed definition should be limited to what the executive director

determines is relevant and material for purpose of responding to public comment but that “material issue” should be defined as those issues for which the development of an evidentiary record is deemed necessary for a decision by the commission. Thompson & Knight suggested that it be defined as one that relates to an ultimate statutory finding required to be considered for the commission to act upon an application that would make a difference in the outcome of the permit on which is substantial and important.

Thompson & Knight also suggested that the commission revise the definition of “relevant issue” by changing the phrase “within the scope of” to “is related to or bears directly upon.”

The commission has not adopted these changes and has decided not to define the terms. The commission has considered all of these comments and this is more fully described in the response to the comments regarding §55.206 in the “Analysis of Adopted Comments and Adopted Rules” section of this preamble.

ANALYSIS OF COMMENTS AND ADOPTED RULES

Public Hearing

The commission held a public hearing on this rulemaking on August 10, 1999. An attorney with the law firm of Locke Liddell & Sapp, L.L.P. (LLS) provided comment related to the definition of disputed issue and this comment is addressed specifically in the analysis of §55.206.

General Comments on Chapter 55

Henry, Lowerre recommended that the proposed rules be revised to assure adequate notice, adequate time for preparation for participation, and to assure that the public input is as meaningful and effective as it can be. Henry, Lowerre also suggested that the agency find a balance between the need for public input for sound decisions and the need for timely decisions.

The commission is dedicated to the goal of implementing procedures which are fair to all participants. The adopted rules are designed to achieve this goal. For example, the commission has extended the time for a hearing requestor to prepare and file a reply to response to hearing request from 10 days, as proposed, to 14 days, as adopted in §55.209. Another example is that the commission extended the deadline for requests for reconsideration and for contested case hearing from 20 days, as proposed, to 30 days, as adopted in §55.201. The commission believes that these comprehensive rules will afford all interested participants the opportunity to take part in agency proceedings and continue to enable the commission to make decisions on applications within a reasonable period of time. While the commission has made no specific change in response to this general comment, the need to balance between ensuring meaningful and effective public participation and ensuring timely discussion guided the development and adoption of these rules. Further, to the extent that the need for such adjustments becomes evident as implementation occurs, the commission is committed to making the needed adjustments.

Baker & Botts commented that the proposed rules should streamline the hearing process and not expand it.

The commission believes that the adopted rules streamline the hearing process, consistent with the requirements of HB 801. For example, the rules provide that the commission may only refer disputed issues to SOAH if they are relevant and material issues of fact that were raised during public comment. Another example of streamlining is the requirement in §55.211(b)(3) that the commission set a maximum expected duration of the hearing. Therefore, the commission believes these rules accomplish the goal of streamlining the hearing process consistent with HB 801's dual objectives of streamlining the hearing process and encouraging early public participation.

The CAP recommended that the commission streamline the proposed rules and provide clear and concise steps throughout the permitting process. The CAP also recommended that the complexity of the rules be simplified.

The commission agrees with this comment, and has taken measures to streamline the adopted rules and provide clear and concise steps throughout the public participation aspects of the permitting process. Consistent with HB 801, the rules also streamline the hearing process, which in turn minimizes the overall permit processing time, by encouraging early public participation. For example, early identification of issues and interested persons allow the applicant to address those issues to the satisfaction of those interested persons thereby eliminating the need for or

reducing the length and complexity of any hearing. The commission also notes that the Office of Small Business and Environmental Assistance is available to aid the small business community in the permitting process. In addition, the executive director also prepares publications and guidance documents that are available to the public about the permitting process. Finally, the commission's Office of Public Assistance will update guidance so that it incorporates changes made by HB 801 for members of the public who wish to participate in the permitting process.

Brown McCarroll recommended that the commission clearly indicate that the procedural rule changes will be revisited following their implementation to allow for corrections or revisions.

The commission agrees that as it implements the requirements of HB 801, it may be necessary to refine and improve the rules. The commission continually seeks opportunities to improve its rules, and it welcomes any input from stakeholders. The commission will revisit these rules for possible additional rulemaking when experience indicates that further revisions are necessary.

§55.1

Proposed §55.1 was amended to provide greater clarity on which applications are subject to Subchapters A-B of Chapter 55. The first sentence of proposed §55.1 was moved to §55.1(b) and revised to provide that hearing requests and comments regarding any permit application that is declared administratively complete before September 1, 1999 are subject to Subchapter A-B. The remaining portion of proposed §55.1(a) was revised and is adopted as §55.1(a). Proposed §55.1(b), providing that

hearing requests on certain applications, as described in further detail below, are not subject to Subchapter A-B, was moved to §55.1(c) and revised to describe additional applications whose hearing requests are not subject to Subchapters A-B. New §55.1(d) was also adopted, providing that certain applications, as described in further detail below, are not subject to Subchapters A-B.

The amendments to §55.1(a) reflect that subchapters A and B of this chapter apply to applications declared administratively complete before September 1, 1999, and Subchapter D describes applications declared administratively complete on or after September 1, 1999, which will be subject to the procedures in Subchapters E, F, and G. Subchapters E and F establish procedures that apply to applications filed under Chapters 26 and 27 of the TWC, and Chapters 361 and 382 of the THSC. Subchapter G addresses procedures on other types of applications declared administratively complete on or after September 1, 1999. This amendment satisfies the requirement of HB 801, §7(b) that applications declared administratively complete before the effective date of the new legislation are subject to the law in effect before the effective date of that legislation.

Proposed §55.1(b), which describes those applications whose hearing requests are not subject to Subchapters A-B of Chapter 55, has been moved to §55.1(c) and revised as follows. Hearing requests for applications for federal permits under Chapter 122 are no longer covered by the exception provision in adopted §55.1(c). Instead applications for federal operating permits under Chapter 122 are made completely exempt from Subchapter A-B of Chapter 55 by §55.1(d)(5) because there is no opportunity for contested case hearing on these applications under THSC §382.0561 and because procedures for

processing public comment on these applications are set out in Chapter 122. Section 55.1(c)(3) provides that hearing requests on air quality exemptions from permitting under Chapter 106, except for construction of concrete batch plants which are not temporarily located contiguous or adjacent to a public works project, are exempt from the requirements of Subchapter A-B because there is no opportunity for contested case hearing on these applications under THSC §382.057. Section 55.1(c)(4) provides that hearing requests on applications for weather modification permits and licenses under TWC Chapter 18 are not subject to subchapters A-B. TWC Chapter 18 does not require evidentiary contested case hearings on these applications. Section 18.081, TWC provides that the commission shall hold at least one public hearing if at least 25 persons request one. The commission has determined that this statute does not require that this hearing be a contested case hearing, but only a public comment hearing. Therefore, the provisions of Chapter 55 will not apply to hearing requests on weather modification permit or license applications.

New §55.1(d) describes applications which are exempt from the requirements of Subchapters A-B because there is no opportunity for contested case hearing on these applications provided by statute and because procedures for processing public comment procedures are set out in other commission rules. Section 55.1(d)(1) exempts applications for sludge registrations and notifications under Chapter 312. Section 55.1(d)(2) exempts applications for authorization under Chapter 321, except for applications for individual permits under Subchapter B of Chapter 321. Section 55.1(d)(3) exempts applications for municipal solid waste registrations under Chapter 330. Section 55.1(d)(4) exempts applications for compost facility registration or notification under Chapter 332. Section 55.1(d)(5) exempts applications

for federal operating permits under Chapter 122 and was described in further detail above in the discussion on §55.1(c). Section 55.1(d)(6) exempts air quality standard permits under Chapter 116.

Brown McCarroll proposed revisions to the titles of Subchapters A, B, D, E, F, and G.

The commission believes that the revisions of language in §§55.1, 55.101, 55.150, 55.200, and 55.250, adequately define the scope of each subchapter. Therefore, the commission has made no changes in response to this comment.

Baker & Botts, Exxon Chemical, and TI recommended that the commission rules encourage timely identification of issues and concerns in response to early public notice so the issues may be addressed during the technical review of an application.

The commission agrees that the rules should encourage identification of issues at as early a stage of permit review as possible. The rules implementing HB 801 in Chapters 39, 50, 55 and 80 of this title encourage early public participation in the environmental permitting process and are intended to streamline the contested case hearing process. For example, an applicant is required to publish newspaper Notice of Receipt of Application and Intent to Obtain Permit within 30 days of administrative completeness. This early notice will provide the opportunity for the public to be involved in the permitting process. For certain applications, the applicant must also publish Notice of Application and Preliminary Decision after technical review of the application. For

certain applications, the applicant must also place a copy of the application and the executive director's preliminary decision at a public place in the county. The rules provide that public comment is initially solicited after the first notice - Notice of Receipt of Application and Intent to Obtain Permit. Public comment is not submitted only after first notice. However, the commission may not require that all public comment be submitted prior to the completion of technical review of an application because this would not be consistent with HB 801. Section 5.553, TWC, states that the executive director shall conduct a technical review and issue a preliminary decision on the application. The applicant is then required to publish a Notice of Preliminary Decision in a newspaper. Under §5.553(c)(4), TWC, this notice must provide an opportunity for public comment. Therefore, it is not consistent with HB 801 to require that all public comment be submitted prior to the completion of the executive director's technical review. The executive director is also required to prepare responses to relevant and material or significant public comment received during the public comment period and file the responses with the chief clerk. The executive director is required to hold a public meeting when there is a significant degree of public interest in a permit application.

Brown McCarroll noted, by way of an overview statement on Chapter 55, that the need to adopt parallel provisions for applications declared administratively complete before, or on and after September 1, 1999 causes confusion in the applicability of the various rules. This commenter offered an understanding of the general structure of Chapter 55 and recommended that utility cases be excluded

from Subchapter G. Under §55.1, Brown McCarroll suggested clarifying amendments relating to applicability.

The commission agrees with the commenter that language explaining the structure and purpose of the chapter would be useful and has generally incorporated the language in this adoption under §55.1, relating to Applicability, as discussed earlier in this preamble. The commission also agrees that utility rate and CCN matters are excluded from Subchapter G because these matters are governed by the procedural rules in 30 TAC Chapter 291.

Brown, Potts commented that Chapter 55 conflicts with the public notice and comment provisions in 30 TAC §312.13, which sets out procedures to be followed for registrations for the beneficial use of biosolids, and suggested that the commission provide that other, more specific, regulations which would control in the event of a conflict with Chapter 55. The commenter also stated that the commission should exclude Chapter 312 registrations and other similar authorizations from coverage under Chapter 55.

The commission agrees that, because §312.13 provides the applicable procedures for registrations for the beneficial use of sludge and biosolids, including notice and comment procedures and procedures for challenging the executive director's action issuing a registration, the Chapter 312 procedures control. New §55.1(d)(1) and §55.101(g)(1) clarifies that Chapter 55 does not apply to Chapter 312 sludge registrations and similar authorizations because those authorizations are

currently exempt from the procedures allowing for requests for contested case hearing and HB 801 was not intended to expand or restrict the types of commission actions for which an opportunity for hearing is provided.

Brown McCarroll suggested a change to §55.1 which would have the effect of limiting Subchapters A and B, for applications declared administratively complete before September 1, 1999, to only those applications affected by HB 801.

The commission has made no changes in response to this comment. Subchapters A and B apply to applications declared administratively complete before September 1, 1999, not only under Chapters 27 and 27, TWC and 361 and 382, THSC, but also those that were filed under other statutory provisions, such as those in TWC Chapters 11, 12, 35, 36, and 49, to which HB 801 did not apply.

Brown McCarroll suggested two revisions to §55.1 to explain the applicability features of Subchapters D, E, F, and G. The commenter provided a rewrite of an existing sentence to have it specify that Subchapters D-F apply to applications subject to HB 801 declared administratively complete on or after September 1, 1999. The commenter included a sentence which states that Subchapter G will cover hearing requests and public comment on all other applications other than utility applications and applications subject to HB 801 declared administratively complete on or after September 1, 1999

The commission agrees that clarification is required, but believes that changes made in response to other comments and the changes to the applicability sections in each subchapter provide sufficient clarification. The commission agrees that Subchapter G does not apply to applications filed under TWC Chapter 13, and TWC §§11.036, 11.041, or 12.013 and has made the corresponding changes to Subchapter G and §55.101(g)(5).

§55.21

Adopted new §55.21(a) provides that subchapter B of Chapter 55 applies to applications declared administratively complete before September 1, 1999, in accordance with the intent of HB 801, §7(b). The rule was also amended to add headings in each subsection of the rule regarding the different procedures to request a hearing and to provide public comment. These headings were added to clarify the process. In addition, to reflect prior commission decisions, the commission adopts new §55.21(h)(2) which states that there is no right to a contested case hearing on applications for weather modification licenses or permits under TWC Chapter 18. Texas Water Code Chapter 18 does not require evidentiary contested case hearings on these applications. Section 18.081 provides that the commission shall hold at least one public hearing if at least 25 persons request one. The commission has determined that this statute does not require that this hearing be a contested case hearing, but only a public comment hearing. Therefore, the provisions of Chapter 55 will not apply to these applications.

Under §55.21, Brown McCarroll proposed language limiting this section's applicability, which as proposed applies to all applications declared administratively complete before September 1, 1999, to

only those applications filed under Chapters 26 and 27 of the TWC and Chapters 361 and 382 of the THSC.

The commission has made no changes in response to this comment. The existing section applies to all applications not just those subject to HB 801.

Brown McCarroll suggested the deletion of the last sentence in §55.21(a) to assist in clarifying the rules.

The commission agrees with the commenter that this language can be deleted because this language is also in §55.1(a) and therefore has deleted the following sentence in adopted §55.21(a): “Requests for public meetings, requests for reconsideration and contested case hearing, and public comments regarding any application that is declared administratively complete on or after September 1, 1999 are subject to Subchapters D - G of this chapter (relating to Applicability and Definitions, Public Comment and Public Meetings, Requests for Reconsideration or Contested Case Hearing, and Requests for Contested Case Hearing and Public Comment on Certain Applications).” Additionally, the commission has deleted the following proposed text: “to issue, amend, modify, renew, or transfer a permit, license, registration, or other authorization or approval.” The proposed text was deleted because the definition of application in Chapter 3 of TNRCC rules is broad enough to cover all of these types of actions and authorizations. This

change is not intended to be substantive. Titles have also been added to subsections (a) through (h) to make the section easier to use.

EPA commented, concerning §55.21(e), that only those portions of the rule relative to the air program should be submitted as State Implementation Plan (SIP) revisions.

The commission agrees with this comment, and will submit to EPA only those portions of this rulemaking that relate to the air program as a SIP revision. No changes to the proposal are necessary in response to this comment.

Jenkins & Gilchrist commented that proposed §55.21(e)(1) provides that the deadline for filing hearing requests on a Class 3 modification of a solid waste permit is 60 days after the last publication of the notice of a Class 3 modification of a solid waste permit under the Texas Solid Waste Disposal Act. The commenter assumes that this 60-day period is a reference to the 60-day public comment period following the publication of the notice required in §305.69(d)(2). Jenkins & Gilchrist believed that the reference to this 60-day comment period in proposed §55.21(e)(1) is confusing in that §55.21(e) relates to the deadline for hearing requests which follows the Notice of Application and Preliminary Decision, as opposed to the 60-day comment period under §305.69(d)(2) which occurs following the Notice of Receipt of Application and Intent to Obtain Permit. The commenter proposed that §55.21(e)(1) should be deleted and §55.21(e)(5), (6), and (7) should be revised by inserting the word “modify” between the words “amend” and “extend” in each of those subsections.

The commission recognizes that there may be some confusion between the notice for Class 3 modifications in §305.69(d)(2) and the new notices required by HB 801. However, § 55.21 applies only to applications that are administratively complete before September 1, 1999. Therefore, the 60-day comment period in proposed §55.21(e)(1) refers to the existing 60-day comment period under §305.69(d)(2) and not the comment period which follows the Notice of Application and Preliminary Decision. The commission has determined that the Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title is equal to or more stringent than the current notice provisions for Class 3 modifications under §305.69(d)(2). Therefore, for Class 3 modification applications that are declared administratively complete on or after September 1, 1999, the commission is substituting the more stringent Notice of Receipt of Application and Intent to Obtain Permit for the existing notice of modification in §305.69(d)(2). Applicants for these Class 3 modifications will also be required to publish a Notice of Application and Preliminary Decision and the comment period will begin with the publication of the Notice of Receipt of Application and Intent to Obtain Permit, and concludes 45 days after the publication of the Notice of Application and Preliminary Decision for hazardous waste permits, and 30 days after the publication of the Notice of Application and Preliminary Decision for industrial non-hazardous waste permits. Section 55.152(a)(4) has been revised to reflect this change to the comment period for Class 3 modifications declared administratively complete on or after September 1, 1999. The commission declines to change the comment period to 30 days because this would be inconsistent with the requirements of federally authorized programs.

§55.101

Proposed §55.101 has been reorganized to provide greater clarity. In addition, substantive changes have been made to more accurately describe which applications are subject to Subchapters D-G of Chapter 55 and which applications (or hearing requests on applications) are not subject to Subchapter D-G. Sections 55.101(a)-(e) generally describe the applications that are subject to the requirements of Subchapters D-G. Section 55.101(f) describes the applications whose hearing requests are not subject to the requirements of Subchapters D-G because there is no opportunity for contested case hearing on those applications provided by statute. Section 55.101(g), except §55.101(g)(5), describes the applications which are not subject to any of the requirements of Subchapters D-G because there is no opportunity for contested case hearing on those applications provided by statute and because procedures for processing public comment on those applications are provided by other commission rules. Section 55.101(g)(5) exempts water utility rate applications and CCN applications from the requirements of Subchapters D-G because, even though there is an opportunity for contested case hearing on those applications, procedures for processing requests for contested case hearing are governed by Chapter 291.

Adopted new §55.101 reflects that applications declared administratively complete on or after September 1, 1999 are subject to the requirements of new subchapters D-G, whereas applications declared administratively complete before September 1, 1999 are subject to subchapters A and B. Generally, subchapters D-G set forth procedures for commenting and requesting reconsideration or a contested case hearing and procedures regarding public comments and public meetings. In §55.101 (b),

the commission has deleted the phrase “issue, amend, modify, renew, or transfer a permit, license, registration, or other authorization and approval.” This was deleted to enhance readability and because the definition of “application” in Chapter 3 of this title is broad enough to cover these actions. This is not a substantive change.

Under §55.101(g)(6)-(8), the adopted rule provides that subchapters D-G do not apply to applications for federal operating permits under Chapter 122, and applications for initial issuance of voluntary emission reduction permits and applications for electric generating facilities, because there is no right to an APA contested case hearing on such applications under THSC §382.0561 and §382.05191, and Texas Utilities Code §39.264(r).

Based on THSC §382.056(g), §55.101(e) provides that Subchapters D-F apply to applications for amendment, modification, or renewal of air quality permits that would not result in an increase in allowable emissions, and would not result in the emission of an air contaminant not previously emitted. In general, the commission may not seek further public comment or hold a public hearing for such applications; but may hold a contested case hearing if an application involves a facility for which there are serious, unresolved compliance issues. This provision ensures that hearing requests received on these applications are processed under the normal procedures for hearing requests in anticipation that a facility’s compliance history might warrant a contested case hearing at the discretion of the commission.

Section 55.101(f)(3) provides that hearing requests on applications for air quality exemptions from permitting and permits by rule under Chapter 106, except for construction of most concrete batch plants are exempt from the requirements of Subchapters D-G because there is no opportunity for contested case hearing on these applications under THSC §§382.05196, 382.057, and 382.058. Concrete batch plants which are temporarily located contiguous or adjacent to a public works project are exempt from the requirement to publish notice and opportunity for contested case hearing. Section 55.101(g)(9) provides that applications for air quality standard permits under Chapter 116 are not subject to the requirements of Subchapters D-G because there is no opportunity for contested case hearing on these applications under THSC §382.05195.

Proposed §55.101(c)(6) has been moved to §55.101(f)(4) and provides that hearing requests on applications for weather modification permits and licenses under TWC Chapter 18 are not subject to Subchapters D-G. TWC Chapter 18 does not require evidentiary contested case hearings on these applications. Section 18.081 provides that the commission shall hold at least one public hearing if at least 25 persons request one. The commission has determined that this statute does not require that this hearing be a contested case hearing, but only a public comment hearing. Therefore, the provisions of Chapter 55 will not apply to hearing requests on these applications. Adopted new §55.101(g)(10) adds multiple plant permits to the list of applications exempt from contested case hearings under THSC §382.05194.

Pursuant to §55.101(g)(5), applications under TWC Chapter 13, and TWC §§11.036, 11.041, or 12.013 are not subject to the procedures of subchapters D-G because the procedure for providing comment and requesting hearings for these applications is specifically set forth in 30 TAC Chapter 291. The commission notes that the references to TWC §11.036 and §11.041 are a correction to the correction letter published in the *Texas Register* on August 20, 1999 (24 TexReg 6573).

Under §55.101(d), water rights applications under Chapter 11, certain district matters, and radioactive material license applications are subject to Subchapter G.

Under §55.101(a) and (b), Brown McCarroll proposed a revision which would eliminate the applicability of Subchapter G to "non-HB 801" applications (such as water rights, districts creations, and standby fee applications) declared administratively complete on or after September 1, 1999, and limit it to HB 801 applications (applications filed under TWC Chapters 26 and 27 or THSC Chapters 361 and 382) only.

The commission has made no change in response to this comment. As previously noted under comments on §55.1 and §55.101, the subchapters serve to differentiate between those applications declared administratively complete on or after September 1, 1999, and those that are declared administratively complete before September 1, 1999. Subchapter G applies to "non-HB 801" applications, such as water rights. Subchapters A and B will continue to apply to all applications declared administratively complete before September 1, 1999.

Brown, Potts recommended that the commission amend the rules to state that there is no right to a hearing on an application for a Chapter 312 registration.

The commission agrees that there is no right to a hearing on an application for a sludge registration, under Chapter 26 of the TWC or under 30 TAC Chapter 312. Accordingly, the commission has added §55.1(d)(1) and §55.101(g)(1) which exclude sludge registrations and notifications under Chapter 312 from the requirements of Chapter 55. In addition, the commission has exempted from the requirements of Chapter 55 certain other applications for which there is no right to contested case hearing (or which are governed by other procedural requirements). This includes applications for authorization, other than those for individual permits, under Chapter 321 and applications for composting facilities, under Chapter 332.

Brown, Potts commented that §55.101(b) provides that Chapter 55, Subchapters D-G apply to hearing requests regarding any application to issue, amend, modify, renew, or transfer a permit, license, registration, or other authorization or approval. Those subchapters contain regulations for the processing of contested case hearing requests and requests for reconsideration. The commenter recommended that §55.101 should expressly state that it does not expand or limit the types of applications for which a person can or cannot obtain a contested case hearing for sludge registrations under Chapter 312.

The commission agrees with the comment and has added §55.1(d)(1) and §55.101(g)(1) which exclude sludge registrations and notifications under Chapter 312 from the requirements of Chapter 55. In addition, the commission has exempted from the requirements of Chapter 55 certain other applications for which there is no right to contested case hearing (or which are governed by other procedural requirements). This includes applications for authorization, other than those for individual permits, under Chapter 321 and applications for composting facilities, under Chapter 332.

In addition, the following phrases: “public comments, public meetings,” and “and requests for reconsideration” have been added to §55.101(b). The commission has also deleted the phrase, “to issue, amend, modify, renew, or transfer a permit, license, registration, or other authorization or approval” from the first sentence of §55.101(b). The definition of “application” in Chapter 3 of this title is broad enough to cover all types of actions and authorizations. This is not a substantive change.

Brown McCarroll proposed to combine published §55.101(d) with §55.101(c), which would add applications filed under Chapter 13 and §11.036, §11.041, and §12.013 to the listing in §55.101(c) and to change references from Subchapters D - G to Subchapters D - F.

The commission has not incorporated the suggested changes, but has instead added §55.101(g)(5) to provide that all applications under TWC Chapter 13 and TWC, §§11.036, 11.041, or 12.013

are excluded from Subchapters D-G since the provisions in 30 TAC Chapter 291 specifically set forth the procedure for providing comment and requesting hearings. In addition, §55.255(d), as proposed, has been deleted because utility matters are not subject to Subchapter G.

Brown McCarroll recommended that §55.101(c)(4), now §55.101(g)(7), be revised to clarify that air permit renewals or other actions not involving an emission increase are not subject to contested case hearings, and proposed that the word “initial” be deleted from this subsection.

The commission has made no change regarding this comment because amendments and renewals are subject to the contested case hearing process. The word “initial” has not been deleted in §55.101(g)(7) because initial issuances of VERPs are not subject to the contested case hearing process, but amendments and renewals are subject to the contested case hearing process, under THSC §382.05191(c). Amendments and renewals are authorized under §§382.0518 and 382.055 of the THSC, which are subject to the contested case hearing process under THSC §382.056, as required by THSC §382.05192.

Brown McCarroll noted that §55.101(c) fails to exempt certain multiple plant permit applications from Chapter 55 requirements as provided by THSC §382.05194(h), and provided language for a new §55.101(c)(9), now §55.101(g)(10), to include this exemption.

The commission has made changes in response to this comment by adding new §55.101(g)(10), in accordance with SB 766, which adds THSC §382.05194. Other regulatory implementation of multiple plant permits is underway in the implementation of Senate Bill 766, and any necessary additional changes to Chapter 55 or other procedural rule chapters will be considered in those rulemaking actions.

Brown McCarroll proposed a revision to §55.101(d) (adopted as §55.101(g)(5)) which would exclude utility applications from the provisions of Subchapter G, in addition to Subchapters D – F, and would strike language authorizing the executive director to review hearing requests and refer cases for hearing.

The commission agrees with this comment, with regard to excluding utility rate and CCN cases from Subchapters D - G, and has revised §55.101(g)(5) accordingly. However, the commission does not agree with the commenter’s suggestion to strike language authorizing the executive director to act on utility cases because this practice is consistent with the existing practice set out in §55.27(d), and the commission has made no change in response to this comment. The processing of utility cases will continue under the current process with some minor modifications to address the amendment to §2003.047, TGC in HB 801 concerning duration of hearings and identification of issues. The following additional clarifying language is adopted under §55.101(g)(5) to implement HB 801: “The maximum expected duration of a hearing on an application referred to SOAH pursuant to this provision shall be no longer than one year from the

first day of the preliminary hearing, unless otherwise directed by the commission. The issues to be considered in a SOAH hearing on an application subject to this provision are all those issues that are material and relevant under the law.”

The commission added §55.101(d) to clarify that Subchapter G applies to applications other than utility rate and CCN applications, TWC Chapters 26 and 27 applications, and THSC Chapters 361 and 382 applications.

§55.103

Adopted new §55.103, provides that the terms in this section shall have certain meanings and has deleted the qualifying phrase “unless the context clearly indicates otherwise” to eliminate ambiguity. This section has also been revised to reflect that if an application is subject to Subchapter G; the determination of whether a person is affected is governed by §55.256. The section includes the same definition of affected person contained in existing §55.3, relating to definitions.

Brown McCarroll proposed that §55.103, containing the definition of affected persons, be deleted and in its place that the existing section relating to definitions, which is §55.3, (rather than §55.2 as noted in the comment letter) be revised to expand its applicability to the new subchapters. Commenter also suggests the revised definition be amended to reference §55.203 regarding the determination of whether a person is “affected.”

The commission has made no change in response to the comment. The commenters proposed changes conflict with the commission's organization of Chapter 55. Subchapter A and the definition of affected person only applies to applications that are administratively complete before September 1, 1999. Therefore, having a section relating to definitions (including definition of affected person) within Subchapter D for applications administratively complete on or after September 1, 1999 will facilitate the repeal of obsolete provisions. Therefore, the commission has not made a change to §55.103 in response to this comment. However, the commission has changed the format of §55.103 to provide clarity and to be consistent with existing §55.3.

§55.150

Adopted new §55.150, concerning Applicability, incorporates the intent of HB 801, §7(b) by providing that new Subchapter E, regarding procedures for processing public comment and requests for reconsideration or hearing, applies only to applications filed under TWC, Chapter 26 or 27 or THSC, Chapter 361 or 382 that are declared administratively complete on or after September 1, 1999.

Brown McCarroll proposed revisions to §55.150 which provide clarity to the sentence structure.

The commission agrees and has made revisions to §55.150 to provide additional clarity. The section now reads as follows: "This subchapter applies only to applications filed under TWC, Chapter 26 or 27 or THSC, Chapter 361 or 382 that are declared administratively complete on or after September 1, 1999."

§55.152

Adopted new §55.152, concerning Public Comment, provides that public comment must be filed before the deadline set forth in the Notice of Application and Preliminary Decision. The deadline shall be 30 days from the date of last publication unless stated otherwise. Adopted new §55.152(a)(1)-(5) provides the length of the comment period for specific applications. Section 55.152(a)(1) has been clarified to more accurately describe which air application actions are covered by this time period. Section 55.152(a)(2) differs from existing 55.21(d)(3) by reflecting that what was formerly a standard exemption for a concrete batch plant is now a concrete batch plant exemption from permitting or permit by rule under Chapter 106 of this title, implementing SB 766 and THSC §§382.05196, 382.057, and 382.058. The section reflects that public comment is now made in response to the Notice of Receipt of Application and Intent to Obtain Permit required by HB 801. The adopted rule also clarifies in Subsections (a)(1) and (a)(2) that, if a second notice is required, the comment period ends after the second notice. The commission has revised §55.152(a)(3) to change the comment period for Class 3 modifications from 60 days (as currently set forth in §55.21(d)(1)), to 45 days after the last publication of the Notice of Application and Preliminary Decision, for hazardous waste permits, and 30 days after the last publication of the Notice of Application and Preliminary Decision, for non-hazardous industrial solid waste permit applications. This change has been made to reflect the additional Notice of Application and Preliminary Decision now required for Class 3 modifications and to reflect that the notice for Class 3 modifications under §305.69(d)(2) (related to Class 3 modifications) has been replaced with the Notice of Receipt and Intent to Obtain Permit.

Brown McCarroll proposed revisions to the titles of notices described in §§55.152, 55.156 and 55.201 (Notice of Application and Preliminary Decision, Notice of Receipt of Application and Intent to Obtain Permit), for consistency with their proposed changes to Chapter 39.

The commission has made no change in response to the comment. The commission believes that the titles adequately describe the subject of the notices.

EPA commented that §55.152 may be rendered totally inoperative for certain air applications by virtue of its reference to §39.418 and reliance upon Notice of Receipt of Application, which in certain cases is not required.

The commission agrees with this comment that such a provision may not satisfy the requirements of 40 CFR §51.161, which requires the state to provide opportunities for public comment on the information submitted in the application. The adopted rule under §55.152(a)(1) and (2) now specifies that the end of the public comment period is tied to notice requirements of §39.419, relating to Notice of Application and Preliminary Decision, in addition to §39.418, relating to Notice of Receipt of Application and Intent to Obtain Permit. In addition, new language has been added under subsection (b) which states that “The public comment period shall automatically be extended to the close of any public meeting.” Also, clarifications have been adopted as follows: addition of the word “Period” to the title of §55.152, so that the title reads “Public Comment

Period;” corresponding deletion of the phrase “Public comment period” which was at the beginning of the proposed section.

Henry, Lowerre commented under §55.152 that there is no factual basis for limiting the comment period to 30 days. The commenter expressed an opinion that this provision implies that the commission is not seriously encouraging public participation through the comment period, that the commission knows that for complex applications more than 30 days for public comment is often needed, and that the executive director can determine when more than 30 days is appropriate and set a comment period which is reasonable. The commenter suggested that §55.152(a) should be revised to include the following language: “Public comments must be filed with the chief clerk within the period of time specified in the notice or any extended comment period. The executive director shall establish the period for public comment. For complex cases, a sufficient comment period shall be provided to allow effective participation. As a general guideline, the public comment period shall not be less than 30 days, except when as a general guideline the time period shall end:”

The commenter also suggested adding a new paragraph at the end of the section to read as follows:

“Extensions of the public comment period. The executive director or the commission may extend the deadline to file public comments. A request to extend the deadline may be filed separately or with the comments. A request should be filed before the deadline indicated in the notice. A request that is filed before the deadline must provide a valid justification for the extension of the deadline. If a request to

extend the deadline is filed after the deadline in the notice, the request must provide good cause for the extension and for the failure to file the request before the deadline.”

The commission agrees in part with this comment. The period for public comment is determined when the notices are published as well as date(s) of any public meeting(s). The rule has been revised by adding new subsection (a)(7) to allow the executive director authority to grant extensions of time to file public comment for good cause. The commission believes that the existing public comment periods are sufficient for a person to submit comments, but recognizes that there may be certain situations in which an extension would benefit the public participation process. This allows the executive director greater flexibility to address extensions on public comment periods on any application when needed, rather than just for complex applications. However, the commission further declines to make changes to the proposal to include a procedure for requesting extensions. The suggested procedures add an unnecessary level of complexity both for persons requesting extensions and the executive director.

The commission points out that HB 801 and these adopted rules encourage early public participation in the environmental permitting process and are intended to streamline the contested case hearing process by encouraging public participation early in the process while technical review of an application is conducted. For example, an applicant is required to publish Notice of Receipt of Application and Intent to Obtain Permit and, for many applications, Notice of the Application and Preliminary Decision. The applicant must also place a copy of the application

and the executive director’s preliminary decision at a public place in the county and the executive director is authorized to hold public meetings. The executive director is also required to prepare responses to relevant and material public comment received during the public comment period, and file the responses with the chief clerk. The commission further notes that HB 801, by adding TWC §5.552(f) and §5.554, and THSC §382.056(e) and (k), is clear that public meetings may be held during the public comment period. Because public meetings may also be held after the close of the public comment periods listed in §55.152, subsection (b) has been added which provides that the public comment period shall automatically be extended to the close of any public meeting.

TI commented under §55.152 that the end of the public comment period should be precise to avoid any uncertainty as to the timeliness of public comments. TI and Baker & Botts suggested that §55.152(a)(4) and (5) be revised to eliminate the phrase “no less than.”

The commission agrees to delete the phrase “no less than” in adopted §55.152(a)(3) and (4). Note that these paragraphs were proposed as (4) and (5). The commission notes, however, that in some instances the time period may be extended due to scheduling of public meetings as provided under new subsection (b), which is adopted to read as follows: “The public comment period shall automatically be extended to the close of any public meeting.”

Baker & Botts commented that the reference to Class 3 Modifications in proposed §55.152(a)(4) (adopted as §55.152(a)(3)) should be deleted because the only notice that is required is set out in §305.69(d)(2).

The commission has made no changes in response to this comment. The commission believes it is appropriate for HB 801 notice requirements to apply to Class 3 modifications of solid waste permits because under existing rules an opportunity to request a contested case hearing is available for those applications. HB 801 did not expand or restrict the universe of applications for which a contested case hearing is available. The commission notes that the Notice of Application and Intent to Obtain Permit, in §39.418, has been substituted for the existing notice of modification in §305.69(d)(2). Although §305.69(d)(2) provides for a notice of modification early in the modification process, the commission has determined that the provision is satisfied by the new Notice of Receipt of Application and Intent to Obtain Permit. Section 55.152(a)(3) correctly includes the reference to these actions.

§55.154

The adopted amendments to Chapter 55 create new §55.154, relating to Public Meetings. This new section will address public meetings on applications subject to TWC, Chapter 26 or 27 or THSC, Chapter 361 or 382 declared administratively complete on or after September 1, 1999. In accordance with the requirements of HB 801 amending TWC 5.552(f), and THSC §382.056(e) adopted §55.154(b) provides that during technical review of an application, the applicant, in cooperation with the executive

director, may hold a public meeting in the county affected by the application. The language in §55.154(c)(1) has also been revised to incorporate the provisions of the HB 801, new TWC §5.554 and THSC §382.056(k), that the executive director shall hold a public meeting when there is substantial public interest in activity proposed under the application. The adopted section retains the provisions from §55.25 that public meetings are not contested case hearings under the Administrative Procedure Act (APA).

Jenkins & Gilchrist commented that §55.154(c) should be revised to make clear, consistent with HB 801, that a public meeting must be held if the executive director determines that there is a substantial degree of public interest in the application. This change would be accomplished with the addition of the phrase “the executive director determines that” at the beginning of §55.154(c)(1). The commenter also suggested substituting the word “if” for “when” under §55.154(c); deleting the phrase “at the request of” at the beginning of §55.154(c)(2) and adding the phrase “requests that such a public meeting be held” at the end of this paragraph; and inserting the phrase “such a meeting is otherwise” between “when” and “required” under §55.154(c)(3).

The commission agrees in part with this comment. The commission believes that the adopted revision more accurately implements the requirements of HB 801, and that the editorial changes make the rule easier to understand. Therefore, the suggested revisions have been incorporated into the adopted rule, except the suggested phrase “such a meeting” has been clarified to “a public meeting”.

The PIC commented that, if a public hearing has not been held in the local area, SOAH judges should accept public comment at the preliminary hearing. The executive director should not, however, be required to respond to a comment received after the close of the comment period. The PIC suggested that this proposal could be set forth in Chapter 55, Subchapter E.

The commission has made no change in response to this comment. To reflect the intent of HB 801, the commission wishes to distinguish between the public comment process and the hearing process. Under HB 801, the public comment process ends before the start of the contested case hearing process. The commission notes that, under HB 801, two public notices will be provided (i.e, at administrative completeness and after technical review, except that there may be only one notice for certain air applications). Public comment will be solicited, and the executive director will consider all comments before reaching a decision on the application. Public meetings may also be held to receive additional comment. Indeed, under §55.154(c), if there is a significant or substantial degree of public interest in an application, the agency is required to hold a public meeting. Thus, where there is a high level of interest in an application, the public will have the opportunity to provide public comment in the area where they live. Further, by requiring that all comments be submitted during the comment period, the commission ensures that all comments will receive a written response from the executive director. The executive director will prepare a response to the comments, which will be distributed to the commenters. This is the end of the public comment process. Those who are not satisfied by the Executive Director's Response to comment may request reconsideration or a contested case hearing.

Jenkins & Gilchrist commented that §55.154(d) should be revised to delete the requirement that the applicant attend any public meeting held by the executive director or Office of Public Assistance because the commission lacks statutory authority to require the applicant to attend such a meeting.

The commission does not believe that it lacks statutory authority to require an applicant to attend a public meeting held by the executive director or the Office of Public Assistance. HB 801 enacted TWC §5.554 and THSC §382.056(k) which require the executive director to hold a public meeting on an application under certain circumstances. The purpose of a public meeting is to provide the public information about an application and to allow the public to provide comment on the application. In order to provide the public with complete information about an application, and to answer their questions about the application in the most efficient and convenient manner, the presence of the applicant is necessary to address those aspects of the application and project that are more appropriately addressed by the applicant or that may be beyond the executive director's knowledge. This is particularly true when the public meeting is held before technical review is complete. The commission notes that under §5.102 of the TWC, it has the powers to perform any acts whether specifically authorized by the TWC or other law or implied by the TWC or other law, necessary and convenient to the exercise of its jurisdiction and powers by the TWC or other laws. Therefore, no changes have been made to the proposal in this regard.

§55.156

Adopted new §55.156, concerning Public Comment Processing, provides that the executive director, the applicant, the PIC and the office of alternative dispute resolution shall receive copies of all documents submitted on an application. Adopted §55.156(b)(1) requires the executive director to prepare a response to all relevant and material or significant comments received during the comment period, whether or not the comment was withdrawn. Requiring a response to relevant and material or significant comments is intended to satisfy not only the requirements for the executive director to respond to comments under HB 801, but also existing requirements for federally delegated programs that require the agency to respond to significant public comment. In addition, the rule language has been changed to clarify that the response to comments will not only specify any changes to the provisions of the draft permit, but also how the comments were otherwise considered during the review of the application.

Adopted §55.156(b)(2) provides that the executive director may call a public meeting in response to comments. Section 55.156(b)(3) requires the executive director's response to comments be filed with the chief clerk as soon as practical, no later than 60 days after the comment period ends. The commission intends that, in most cases, the executive director will file the response to comments earlier than 60 days. Nonetheless, the executive director needs flexibility for those times the commission has received a voluminous number of applications and comments which need to be processed within a relatively short time, in order to ensure that the responses are thorough. The requirement of existing §55.25(b)(1)(A), that the response to comments be "made available to the public" is not included

because this requirement is satisfied by making the comments available in the chief clerk's office under new §55.156(b)(3). Section 55.156(c) also requires the chief clerk to mail the response to comments.

The requirement for the commission to adopt the executive director's response to comments or prepare its own response is contained in §50.117(f) of this title (relating to Commission Action).

Adopted §55.156(c) requires that, after the executive director's response to comments has been filed, the chief clerk shall transmit the executive director's decision, the response to comments and instructions for requesting reconsideration or hearing to the applicant, persons who submitted comments, other persons on the mailing list, persons who submitted hearing requests in response to the Notice of Receipt of Application and Intent to Obtain Permit for an air application, the Office of Public Interest Counsel, and the Office of Public Assistance. This transmittal requirement is consistent with the requirements of HB 801.

Adopted §55.156(d) sets out the statements which must be included in the instructions sent out under §39.420(a), regarding how to request a contested case hearing, which includes 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; that a contested case hearing request must include the requestor's location relative to the proposed facility or activity; 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; 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 that if a comment is withdrawn in writing by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, by the person filing the comment, issues raised solely in such a withdrawn comment cannot be the basis of a hearing request.

The PIC seeks clarification that, for all air, waste, and water applications, public comment received pursuant to §55.152 in response to both a Notice of Receipt of Application and Intent to Obtain a Permit, and Notice of Application and Preliminary Decision will be processed under the procedures of §55.156. Public comment should be processed unless it is received late. All comments which are not late should be processed under §55.156, even if received prior to the beginning of the "official" comment period following the Notice of Application and Preliminary Decision.

The commission agrees in part with this comment, but disagrees with the implication that there is an "official" comment period which begins following the Notice of Application and Preliminary Decision. The comment period begins after the Notice of Receipt of Application and Intent to Obtain Permit. Comments received after the application is received and before the end of the "official" comment period will be considered.

Brown McCarroll suggested that, rather than the proposed language, §55.156(b)(2) regarding public comment processing read as follows: “The executive director may call and conduct public meetings under 55.154 of this title (relating to Public Meetings), in response to public comment”

The commission agrees with this comment and has made the change as suggested for the purpose of clarity.

Jenkins & Gilchrist commented that §55.156(b)(3) should be revised to shorten the time within which the executive director must file a response to public comments from 60 days after the end of the public comment period to 45 days after the end of the public comment period, because 60 days seems like an inordinately long time given that the executive director can begin responding to comments prior to the end of the public comment period and given that many comments are form letters that raise the same issues repeatedly.

The commission notes that §55.156(b)(3) actually requires the executive director to prepare and file responses to public comment within the shortest practical time after the comment period ends, not to exceed 60 days. Nonetheless, the commission believes that it will not always be feasible for the executive director to meet a deadline of 45 days following the close of the comment period, particularly because with this adoption, the executive director will be required to prepare responses to comments for a greater number of applications than before the implementation of HB 801. Further, the executive director should be afforded the needed flexibility for those times when

the commission has received a voluminous number of comments which need to be processed in a relatively short period of time. Therefore, no changes have been made to the rule in this regard.

Brown McCarroll stated that the chief clerk should be required to mail the notice of the executive director's decision and response, under §55.156(c), and not "otherwise transmit" the notice, in order to be consistent with proposed rule §50.133(b). The commenter recommended that the phrase "or otherwise transmit" be deleted from §55.156(c).

The commission agrees with the comment regarding the two rules being consistent, but believes the chief clerk needs to have the flexibility of otherwise transmitting documents. Further, HB 801 uses the term "transmit." Therefore, to maintain consistency with this subsection, the following phrase "shall mail or otherwise transmit notice of the action" is included under §50.133(b) in order to provide this flexibility, and no changes have been made to Chapter 55 in response to this comment.

The commission added §55.156(d), to clarify what information must be included in the instructions sent under §39.420 of this title (relating to Transmittal of the Executive Director's Comments and Decision).

§55.200

To conform to HB 801, adopted §55.200 provides that Subchapter F (Requests for Reconsideration or Contested Case Hearing) applies only to applications under Chapter 26 or 27, TWC or Chapter 361 or 382, THSC, which are declared administratively complete on or after September 1, 1999.

Brown, Potts commented that requests for reconsideration are not appropriate for registrations, and suggested that registrations issued under Chapter 312 should be exempt from Chapter 55, Subchapter F.

The commission agrees with this comment that sludge registrations issued under Chapter 312 are not subject to contested case hearings and should not be subject to requests for reconsideration.

This is because Chapter 312 already provides for the opportunity to challenge the executive director's issuance of sludge registration with a motion for reconsideration of the executive director's decision as provided by §50.139 of this title (relating to Motion to Overturn Executive Director's Decision). This chapter does not apply to Chapter 312 sludge registrations because the procedures for public participation for sludge registrations are set out in Chapter 312. HB 801 is not intended to expand or restrict the types of commission actions for which public notice, an opportunity for public comment and an opportunity for hearing are provided. In addition, § 55.1 was amended to include new subsection (d) to specify which applications are not subject to Chapter 55.

Brown McCarroll suggested revisions to §55.200 which provide clarity to the sentence structure and would read as follows: “This subchapter applies only to applications filed under Texas Water Code, Chapter 26 or 27 or Texas Health and Safety Code, Chapter 361 or 382 in which the permit application is declared administratively complete on or after September 1, 1999.”

The commission agrees that §55.200 needs additional clarity and has made revisions to that section that are not exactly the same as the comment but do provide additional clarity. The section now reads as follows: “This subchapter applies only to applications filed under Texas Water Code, Chapter 26 or 27 or Texas Health and Safety Code, Chapter 361 or 382 that are declared administratively complete on or after September 1, 1999.”

§55.201

Adopted new §55.201, which parallels current §55.21, provides the procedures for filing requests for reconsideration and contested case hearing. Adopted subsection (a) requires that requests for reconsideration or hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director’s decision and response to comments, rather than 20 days after, as proposed. Thirty days is more appropriate than 20 days because under the new HB 801 process, hearing requests must be more detailed and contain a complete list of issues under §55.201(d)(4). The new 30 day deadline provides more time to request a contested case hearing than as proposed in order to allow requestors sufficient time to provide the required information in a hearing request. Section 55.21(b) sets forth who may request a contested case hearing. The new rule does not include an

equivalent to §55.21(a)(5), which gives legislators from the general area of a proposed facility the ability to request hearings on certain air applications, because under THSC §382.056(g) such hearing requests are no longer authorized. Adopted §55.201(c) states that a request for a contested case hearing by an affected person must be in writing, must be timely filed, and cannot be based on an issue that was raised in a public comment that was withdrawn in writing prior to the filing of the executive director's response to comment by the person filing the comment, as the commission believes that once a public comment is so withdrawn, it is reasonable to not allow the issues raised in the withdrawn public comment to be the basis for a request for a contested case hearing by another person. The commission believes that only current, live disputed issues of fact should be the basis of a referral to SOAH.

In contrast to existing §55.21(c)(1) (now §55.21(d)(1)), adopted new §55.201(d)(1) requires that requestors now provide their fax numbers, where possible, in addition to the other information previously required to be provided with a hearing request. This will enable the TNRCC to more quickly provide information to the requestors. Consistent with new statutory requirements for limiting the issues that may be referred to hearing, new §55.201(d)(4) requires a hearing request to list the relevant and material issues which were raised during the public comment period and that form the basis of the request, and states that requestors should specify the factual basis for any disagreement with specific responses in the executive director's response to comments.

Adopted § 55.201(e) provides that any person may file a request for reconsideration within the period allowed under § 55.201(a). Section 55.201(e) further sets forth the requirements for a request for

reconsideration, including the requirement that the requestor must expressly state that the person is requesting reconsideration of the executive director's decision and the reasons for the request. Section 55.201(e) is necessary because HB 801, by adding TWC §5.556 and THSC §382.056(n), provides for requests for reconsideration, in addition to requests for contested case hearing.

Adopted §55.201(f), which restates adopted §55.21(f) (former 55.21(e)), provides that documents filed with the chief clerk before the public comment deadline that do not specifically request a contested case hearing or reconsideration will be treated as public comment. This requirement will ensure that all timely filed public comments are addressed in the executive director's response.

Adopted §55.201(g) further provides that late filed requests for reconsideration, as well as late filed public comments and requests for hearing, shall be placed in the file, but not processed. This requirement is consistent with the overall goal of HB 801 to encourage early public participation and the commission's goal to streamline agency processes.

Adopted §55.201(h) provides that a person who did not participate in earlier phases of the public participation process may only seek commission review of the final permit to the extent of differences between the draft permit and the final permit. This provision is similar to 40 CFR §124.19, regarding appeal of certain federal permits, which provides that any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft permit to the final permit decision. The commission believes this

limitation is appropriate for such persons who were previously given an opportunity to participate and did not do so. However, it is also appropriate to allow for commission review of changes from draft permit to final permit because persons may not have participated earlier in the process in reliance on the terms of the draft permit. Therefore, if the draft permit has changed, they should be allowed the opportunity to participate in the process, albeit in a limited manner. Since publication, the rule has been revised to list more specifically the circumstances where there is a limited right to seek a motion for rehearing versus a motion to overturn. The rule has been revised to state that the limitations of §55.201(h) do not apply to the applicant, the executive director, the public interest counsel, or persons who have not received required notice. In addition, the commission clarified in §55.201(h) that the hearing held under Chapter 80 of this title (relating to Contested Case Hearings) refers to a contested case hearing rather than the generic term public hearing.

Adopted §55.201(i)(1) and (2), which restates existing §55.21(g), provides that there is no right to a contested case hearing on an application for a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title, or a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title. Section 55.201(i)(3) implements statutory provisions under SB 766, THSC §382.0561(a) and SB 7, Texas Utilities Code §39.264, and THSC §382.056(g) under HB 801, that provide that there is no right to a contested case hearing for an air permit application for an initial issuance of a voluntary emission reduction permit or an electric generating facility permit; for permits issued under Chapter 122; or for an amendment, modification or renewal of an air permit that will not increase emissions or result in the emission of a new contaminant unless specific compliance

history issues exist. Section 55.201(i)(4) provides that there is no right to a contested case hearing for hazardous waste permit renewals under §305.65(a)(8). Furthermore, §55.201(i)(5) implements HB 1479 regarding limitations on the availability of contested case hearings on certain permit amendments or renewals under Chapter 26, TWC.

§55.201 and §55.203

Brown McCarroll suggested grammatical and clarifying changes to §55.201 regarding the filing and processing of requests for reconsideration or contested case hearing and to §55.203 regarding determination of affected person, to ensure consistency with §50.139(b).

The commission agrees that these changes will make the rule easier to understand. Therefore, changes have been made to the proposal to incorporate the suggested language. Under §55.201(a), these include sentence structure and wording changes resulting in the following language: “A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director’s decision and response to comments and provides instructions for requesting that the commission reconsider the executive director’s decision or hold a contested case hearing.” Under §55.203(c), the changes to the proposal made in response to this comment are the addition of the following phrase at the beginning of the subsection: “In determining whether a person is an affected person, all.” Also, under §55.203(c)(4), “of the person” is added just after “safety,” and “on the” is added just prior to “use of property.”

§55.201

Henry, Lowerre commented on §55.201(a), suggesting that this subsection needs to include the following language concerning deadline for a request for reconsideration or for a contested case hearing: “The executive director or the commission may extend the deadline for a request for reconsideration or for a contested case hearing. A request to extend the deadline may be filed separately. A request should be filed before the deadline indicated in the notice. A request that is filed before the deadline must provide a valid justification for the extension of the deadline. If a request to extend the deadline is filed after the deadline in the notice for filing, the request must provide good cause for the extension and for the failure to file the request before the deadline.”

The commission has made no change in response to the comment. The commission notes that §55.201(g)(2) allows for extensions by the commission for filing contested case hearing requests or requests for reconsideration without including specific time limits. The commission declines to delegate the authority to the executive director to extend the time for requests because this would impermissibly place the executive director in the role of a decisionmaker in a contested matter. The commission believes that the 30 day period for filing hearing requests or requests for reconsideration with the possibility that the commission may extend the deadline is sufficient because it provides the commission the discretion to provide additional time if necessary. Therefore, there is no need to grant further extension authority to the executive director.

Henry, Lowerre commented on §55.201, stating that HB 801 did not and should not limit requests for hearings or reconsideration to persons who filed “timely” comments. The commenter provided examples, including for air permits: that there may be several people who submitted comments and who then form an organization (a different person) to request a hearing; or that one person may submit comments for a large unidentified group in the community, and some other person who was part of that group may seek the hearing. For water, UIC, and waste permits, the commenter provided examples, including: that a person may file a request for hearing while preparing comments, but file the comments late; where someone else has filed similar comments; and two people working together, where, to be efficient and work within the deadlines, one files comments and another files the request for hearing.

The commission agrees in part and disagrees in part with this comment. HB 801 sets out the requirements for a valid hearing request, which includes that it must be based on issues that were raised during the comment period. HB 801 does not specify that the issues must have been raised by the same person requesting a hearing. Therefore, there is no restriction in the rules that requires the commenter and the hearing requestor to be the same person. With regard to timeliness, HB 801 requires that issues referred to SOAH must have been raised during the public comment period. Therefore, it is appropriate for the rules to include a requirement that the public comment that the issue in the hearing request is based upon must have been timely filed and not subsequently withdrawn by the commenter prior to the filing of the Executive Director’s Response to Comment.

TI and Baker & Botts commented that §55.201 appears to allow persons who did not comment on relevant and material issues within the comment period to submit valid hearing requests. They suggest that only persons who submitted timely comments raising a relevant and material issue within the public comment period should be allowed to request a contested case hearing.

The commission has made no change in response to the comment. As noted in the response to the comment from Exxon Chemical discussed later in this preamble, HB 801 does not explicitly limit the persons who may request a hearing to only those that submitted timely public comment. The statute only limits the issues to be considered in a hearing to those issues that are relevant and material, were raised during the public comment period, and involve disputed questions of fact. Therefore, the rules are consistent with the statutory text.

Exxon Chemical commented that, in order to lodge a valid hearing request, a requestor should be required by commission rules to have raised a relevant and material issue within the public comment period. Exxon Chemical stated that such a rule would go a long way to ensure that meaningful public participation occurs during the processing of a permit application and not after the process is nearly complete.

The commission has made no change in response to the comment. HB 801 does not explicitly limit the persons who may be granted a hearing to persons who raised issues during the comment period. The statute only expressly requires that a hearing requestor be an affected person. HB

801 amended TWC §5.115(a) and THSC §382.056 to delete a provision that allows the commission to deny a hearing request if the request is not reasonable or supported by competent evidence. No statutory language was added to impose further limitations on standing. In addition, HB 801 did not make any corresponding amendments to any of the organic statutes governing commission actions on applications. For example, TWC §26.028 provides that, except as otherwise provided, the commission on request of any affected person shall hold a public hearing on a permit application. Limiting the opportunity for a contested case hearing to only those persons who provided early comment would add a substantive requirement that does not currently explicitly exist in statute. Further, a review of the legislative history of the bill shows important substantive differences between earlier versions of the bill and the bill as enacted. The filed version of the bill contained a specific provision (§5.557, Section 1 of the bill) that limited judicial review of the commission's decision on a permit application to either the applicant or an affected person who commented during the public comment period. However, the provision restricting an appeal to only those persons participating in the comment process was not one that was retained in the bill as enacted. Therefore, while imposing a limitation to participation in public comment on the permit was at one time considered, this provision was not included in the bill as passed. Because the statute addresses only the issues for a hearing, the rules are consistent with the statutory text.

The PIC commented that 30 days, rather than 20 days, should be allowed for the filing of a request for hearing following the chief clerk's mailing of the executive director's decision, response to comments and instructions for requesting reconsideration or a contested case hearing. The PIC noted that under

the current rules the time period for filing a request ends 30 days after the last publication of notice of application. A person seeing the notice would have 27 days to deposit the request in the mail; allowing 3 days for delivery by mail. However, under §55.201(a) and (c) as proposed, a request for contested case hearing would have to be filed 20 days after the chief clerk's mailing of the executive director's decision. Therefore, the proposed rules allow for only approximately 14 days to prepare a request, allowing 3 days for delivery of the chief clerk's mailing and 3 days for the request to arrive at the chief clerk's office. The PIC believes this limited amount of time is insufficient to allow for the preparation of a valid hearing request required to identify relevant and material disputed issues of fact.

The commission agrees that additional time may be necessary for sufficient review of executive director's preliminary decision and response to comments to determine whether to file a request for reconsideration or a request for a contested case hearing. Additionally, the commission recognizes that because of the new HB 801 requirements to delineate the issues on which a hearing is requested, requestors may need some additional time to prepare a well considered request. Consequently, the commission has modified the rule to require that a request for a contested case hearing or reconsideration must be filed within 30 days instead of 20 days.

TI and Baker & Botts suggested that §55.201(d)(4) be revised to require all hearing requests, even those filed in response to an initial notice for an air permit application, list all issues of fact that form the basis of the protestant's concerns. Otherwise, a protestant could substantially delay a project by the

mere filing of a one sentence hearing request without the identification of issues that should be resolved during the permitting process.

The commission agrees in part with this comment. The commission notes that under proposed §55.201(d)(4), a hearing request must list all issues of fact that are the basis of the hearing request. Hearing requests filed in response to Notice of Receipt of Application and Intent to Obtain Permit for air applications may include only the information that is required by that notice, specified in §39.411(b) (10)(B)(i)-(iv). Under §39.411(b)(10)(B)(iv), the notice includes a statement that only relevant and material issues raised during the comment period can be considered if a contested case hearing request is granted. Section 55.201(d)(4) further states that requestors should specify any of the executive director's responses to comments that the requestor disputes and provide the factual basis of this dispute. Therefore, HB 801's requirement for specifying the factual issues in dispute is satisfied because requestors are required to state the specific basis for their request for hearing. Moreover, pursuant to the requirements of HB 801 (TWC §5.556(d) and THSC §382.056(n)) and §50.115 and §55.211 of this title, the commission will only refer to hearing disputed issues of fact that were raised during the comment period and that are relevant and material to the decision on the application. These requirements are implemented by these rules. Therefore, no changes have been made to the proposal in this regard.

Henry, Lowerre commented that §55.201(d)(4) should be revised to indicate that issues of law can also be a basis for a hearing request and a contested case under HB 801.

The commission has made no change to the proposal in response to this comment. Issues of law may not be an independent basis for a hearing request and a contested case under HB 801 (TWC §5.556(d)). Under HB 801, in order for the commission to refer a matter to SOAH there must be a disputed issue of fact, or a mixed issue of law and fact, on a relevant and material issue. If there is only a dispute over a pure issue of law, the commission has the authority to decide that issue. The commission notes, however, that an issue of law may be sent to SOAH for hearing if the commission determines that it would be in the public interest to do so. In order to facilitate the commission's determination of the number and scope of issues to be referred to hearing, the commission has revised §55.201(d)(4) to specify that a person requesting a hearing should also include any disputed issues of law or policy.

Henry, Lowerre commented that §55.201(g) should be revised to provide that if a request is filed after the deadline or extended deadline, the chief clerk shall provide a copy of the request to the executive director, the commission, the PIC, the applicant and anyone seeking a hearing or reconsideration. The commenter also stated the opinion that the overall goal of HB 801 and related laws for public participation is to assure good decisions by government agencies, and that HB 801 does not justify or suggest that the commission should ignore significant issues, simply because they were raised one day

late. The commenter also expressed an opinion that, if deadlines for applicants were treated this way, there would be very few applications reaching the approval process.

The commission has made no change in response to the comment. Since the commission is not acting on late filed requests, there is no need to distribute the documents to other persons.

However, these late filed documents are placed in the application file, which is maintained by the chief clerk and are available for public inspection. With regard to the commenter's issue concerning lateness, the commission notes that a goal of HB 801 is also to focus on the issues in a timely manner. Consequently, deadlines are included to provide certainty of what the issues are. However, it should also be noted that §55.201(g)(2) does provide the opportunity to request an extension of the deadline for requests for reconsideration and requests for contested case hearing. With regard to the commenter's statement concerning deadlines for applicants, the commission notes that this is beyond the scope of this rulemaking. Therefore, no changes have been made to the proposal in response to these comments because the procedure for processing applications, including any deadlines applicable to applications, are contained in Chapter 281 of this title (relating to Applications Processing).

Baker & Botts commented that §55.201(i) should be amended to identify all other applications processed by the TNRCC for which there is no right to a public hearing, including: the matters identified in Sections 50.145, 55.251(g), voluntary permit transfers under §305.64, applications under Chapter 122 (relating to Federal Operating Permits), applications under Chapter 116, subchapter F

(relating to Standard Permits), registrations under Chapter 106 (except for concrete batch plants specified in section 39.403(b)(10), applications for initial issuance of voluntary reduction permits under section 382.0519 of the THSC and initial issuance of electric generating facility permits under §39.264 of the Texas Utilities Code, registrations of storage tanks under Sections 334.7 and 334.127, registrations of certain solid waste activities that are exempt from permit requirements under Sections 330.4 and 335.2, and registrations of certain municipal solid waste activities under Sections 361.0681 and 361.111 of the THSC. The partial listing in the proposal will lead to arguments by protestants that all other agency authorizations are subject to the opportunity for contested case hearings.

The commission agrees with the concern expressed in this comment and has revised the rule to be similar to the revised language in §50.113. The revised language clarifies that §55.201(i) is intended to cover all actions where no opportunity for contested case hearing is provided by law. This change incorporates existing limits on opportunities for contested case hearings and clarifies the applicability of this section. In addition, the commission has corrected a typographical error under §55.201(i)(4) by changing the incorrect reference, “§305.631(a)(8)” to “§305.65(a)(8).”

Jenkins & Gilchrist commented that §55.201(i)(5)(D) is a sentence fragment that does not follow the same format as subparagraphs (A) through (C) and (E). Therefore, §55.201(i)(5)(D) should be revised to make the wording consistent with the format set out in the other subparagraphs of subsection (i)(5).

The commission has made no change in response to this comment. The corrected proposal, as published in the August 20, 1999 version of the *Texas Register* at 24 TexReg 6572, contains a revision of the originally published proposal, with the addition of the phrase “has been received” at the end of this subparagraph (D). The word “received” has been changed to “given” in this adoption, in order for the provision to read better. Also, the commission notes that formatting revisions have been incorporated in the aforementioned correction publication under subparagraph (E), so that it reads as follows: “the applicant’s compliance history for the previous five years raises no issues regarding the applicant’s ability to comply with a material term of the permit.” Further clarifying corrections are made under this adoption, including under §55.201(i), the addition of “contested case” just before “hearing;” under §55.201(i)(3), the addition of “application for the following” just after “permit;” under §55.201(i)(3), the addition of subparagraphs (A) and (B) which read as follows: “initial issuance of a voluntary emission reduction permit or an electric generating facility permit” and “permits issued under Chapter 122 of this title; or,” respectively.

Henry, Lowerre commented under §55.201 that a subsection (j) should be added to read: “If there is no right to a hearing on an application, the commission may refer the matter to SOAH for a hearing if warranted in the public interest.”

The commission has made no changes in response to this comment because this provision is already set forth in the rules. Under §55.211(d), the commission already has the authority to refer an application to SOAH if it determines that a hearing would be in the public interest.

§55.203

Adopted new §55.203, concerning Determination of Affected Person, retains the requirements of existing §55.29 regarding the determination of whether a hearing requestor is determined to be an affected person with a personal justiciable interest concerning an application. Under HB 801, a person requesting a hearing is still required to demonstrate that the person is an affected person with a personal justiciable interest in order for the request to be granted.

§55.205

Adopted new §55.205, concerning Request by Group or Association, contains the same requirements for evaluating hearing requests by groups or associations set forth in existing §55.23 which are based on associational standing requirements set out by the Texas Supreme Court in *Texas Association of Business v. Texas Air Control Board*, 852 SW2d 440 (Tex. 1993).

§55.206

Proposed new §55.206, concerning Determination of Relevant and Material Issues, is withdrawn from consideration because the commission has decided not to define the terms “relevant and material”. The specific meaning of the phrase “relevant and material” will vary from case to case to reflect the peculiar

facts of the particular permit at issue and of the statutes and rules applicable to that permit. Thus, the commission declines at this point to define the phrase either by definition or by example since without experience implementing HB 801 with regard to a variety of permits, its definition or set of examples could be unnecessarily narrow or broad. The commission will revisit this issue at a later date.

Jenkins & Gilchrist commented that §55.206 appears to appropriately address the factors to be considered in determining whether an issue is “relevant and material” when the executive director is determining the issues raised in public comment for which he should file a response under §5.555(a) of the TWC. The commenter noted, however, that the decision by the commission as to which issues are “relevant and material” to its decision on any particular application for purposes of referring an application to SOAH will necessarily be a case-specific determination based on the rules, policies and facts specific to the particular application. The commenter states that the proposed definitions of “relevant issues” and “material issues” in §55.206 should be limited to the determination by the executive director of relevant and material issues for the purpose of responding to public comments. In addition, commenter suggested that a more appropriate definition of “material issue” for purposes of the commission’s determination of which issues should be referred to SOAH is “those issues for which the development of an evidentiary record is deemed necessary by the Commission for the purposes of the Commission making a decision on the application.”

The commission has made no change in response to the comment. There should not be two different definitions of “relevant and material.” HB 801 uses the phrase “relevant and material”

in both contexts, and does not make any distinction in the meaning of the term between those two contexts. Therefore, there is no indication in the statute that the phrase “relevant and material” have two different meanings. In addition, the commission has decided not to define the terms “relevant and material.” The specific meaning of the phrase “relevant and material” will vary from case to case to reflect the peculiar facts of the particular permit at issue and of the statutes and rules applicable to that permit. Thus, the commission declines at this point to define the phrase either by definition or by example since without experience implementing HB 801 with regard to a variety of permits, its definition or set of examples could be unnecessarily narrow or broad. The commission will revisit this issue at a later date.

Brown McCarroll noted the proposed standards for determining whether an issue is “material” or “relevant” are generally adequate and commented that the rules do not need to provide more elaborate definitions or explanations, but expressed the belief that the commission could provide guidance by describing examples of the application of the standards in the adoption preamble. The commenter proposed grammatical revisions to the first sentence in §55.206.

The commission is not implementing the suggested grammar changes because this proposed section is being withdrawn. In addition, the commission has decided not to define the terms “relevant and material.” The specific meaning of the phrase “relevant and material” will vary from case to case to reflect the peculiar facts of the particular permit at issue and of the statutes and rules applicable to that permit. Thus, the commission declines at this point to define the

phrase either by definition or by example since without experience implementing HB 801 with regard to a variety of permits, its definition or set of examples could be unnecessarily narrow or broad. The commission will revisit this issue at a later date.

Henry, Lowerre commented that §55.206 should not attempt to define “relevant” or “material” because to do so creates limits not intended or provided for in HB 801. Lowerre stated the terms clearly mean what they do in court.

The commission agrees that the definition for “relevant and material” should be deleted. The commission has decided not to define the terms “relevant and material”. The specific meaning of the phrase “relevant and material” will vary from case to case to reflect the peculiar facts of the particular permit at issue and of the statutes and rules applicable to that permit. Thus, the commission declines at this point to define the phrase either by definition or by example since without experience implementing HB 801 with regard to a variety of permits, its definition or set of examples could be unnecessarily narrow or broad. The commission will revisit this issue at a later date.

Thompson & Knight suggested that the commission revise §55.206 to include a definition of “disputed issue of fact,” and commented that only discrete factual issues are to be the subject of referral to a contested case hearing. The commenter stated that the commission should explain that a “disputed issue” is a discrete factual issue associated with the proposed project or activity, and that the rules

should make clear that generalized objections to air pollution or potential threats to ground or surface water or personal perceptions or concerns which fail to identify a disputed factual issue will not be considered.

The commission agrees that generalized objections are inconsistent with the requirements of HB 801. Although the commission has not adopted the comment suggested by the commenter, in response to another comment the commission has amended §55.211(b)(3)(A)(i) which requires the commission to specify the number and scope of specific factual issues to be referred to SOAH. This change addresses the commenter’s concern about general issues.

LSS suggested that the commission concentrate on defining “disputed issue of fact” because only then can legislative intent that only an actual controversy be referred to SOAH be given effect. LSS believes a definition of “disputed issue of fact” is more critical than providing a definition of “relevant and material” as proposed in §55.206.

The commission agrees that HB 801 requires that the commission should only send an issue to hearing when the issue involves a disputed question of fact (unless the commission otherwise finds it would be in the public interest to hold a hearing). The commission declines to define the phrase “disputed issue of fact”. The commission believes a determination of whether an issue involves a disputed question of fact can be made on the basis of the public comment, requests for reconsideration and requests for contested case hearing received on an application. In response to

another comment, the commission has amended §55.211(b)(3)(A)(i) which requires the commission to specify the number and scope of specific factual issues to be referred to SOAH. This change will further ensure that only issues involving an actual controversy or dispute will be referred to SOAH.

Thompson & Knight suggested that the commission revise the definition of “material issue” in §55.206 to state clearly the significance of such an issue to the decision of the commission. The following language was suggested: “A material issue is one that relates to an ultimate statutory finding required to be considered for the commission to act upon an application and which is substantial and important that if accepted by the commission it would make a difference in the outcome of the commission’s consideration of the permit.”

The commission has made no change in response to the comment. The commission does not agree with the suggestions by the commenter regarding clarification of “material issue,” because it believes that the suggested changes do little to clarify the term, and may introduce ambiguity instead. The specific meaning of the phrase “relevant and material” will vary from case to case to reflect the peculiar facts of the particular permit at issue and of the statutes and rules applicable to that permit. Thus, the commission declines at this point to define the phrase either by definition or by example since without experience implementing HB 801 with regard to a variety of permits, its definition or set of examples could be unnecessarily narrow or broad. The commission will revisit this issue at a later date.

Thompson & Knight suggested that the commission revise §55.206 as the language “within the scope of” within the proposed meaning of “relevant issue” is too vague. The commenter suggested that the phrase “within the scope of” be replaced with the phrase “is related to or bears directly upon.”

The commission has made no change in response to the comment. The commission has decided not to define the terms “relevant and material.” The specific meaning of the phrase “relevant and material” will vary from case to case to reflect the peculiar facts of the particular permit at issue and of the statutes and rules applicable to that permit. Thus, the commission declines at this point to define the phrase either by definition or by example since without experience implementing HB 801 with regard to a variety of permits, its definition or set of examples could be unnecessarily narrow or broad. The commission will revisit this issue at a later date.

Baker and Botts suggested that the definition of a relevant issue in §55.206 should be further restricted in accordance with the scope limitations of §50.115.

The commission has made no change in response to the comment. The commission has decided not to define the terms “relevant and material.” The specific meaning of the phrase “relevant and material” will vary from case to case to reflect the peculiar facts of the particular permit at issue and of the statutes and rules applicable to that permit. Thus, the commission declines at this point to define the phrase either by definition or by example since without experience

implementing HB 801 with regard to a variety of permits, its definition or set of examples could be unnecessarily narrow or broad. The commission will revisit this issue at a later date.

§55.209

Adopted new §55.209, concerning Processing Requests for Reconsideration and Contested Case Hearing, includes subsection (a), also in existing §55.26(a), which provides that §55.209 and §55.211 procedures apply only to timely filed hearing requests. Unlike existing §55.26, new §55.209 does not require the executive director to file a statement that technical review is complete to trigger the solicitation of hearing requests. Under HB 801, the executive director completes technical review before the issuance of the Notice of Application and Preliminary Decision. Hearing requests are solicited after transmittal of the Executive Director's Response to Comment and Preliminary Decision.

New §55.209(b), also in existing §55.26(c), provides that timely filed requests for reconsideration or contested case hearing shall be referred to alternative dispute resolution and also scheduled for a commission meeting approximately 44 days after the final deadline to request reconsideration or hearing. This adds 4 days to the proposed time period of 40 days due to the additional time provided for requestors to file replies to responses in §55.209(g) and additional time for commission review of hearing requests. Accordingly, the time periods in §§55.209(b)-(d), and (g) have been adjusted accordingly. It should be noted that with respect to applications for air permits, there is an initial opportunity to request a hearing in response to the Notice of Receipt of Application and Intent to Obtain Permit. However, if a request for contested case hearing is filed at that point in the process, triggering

the requirement, under the HB 801 amendments to §382.056(g) THSC, that a notice of the executive director's preliminary decision be given following technical review, the final opportunity to request reconsideration or hearing occurs after the chief clerk mails notice of the executive director's decision. Section 55.209(b) reflects that after the final deadline to submit requests for reconsideration or a contested case hearing, the chief clerk shall begin to process the requests by referring them to alternative dispute resolution and scheduling them for a commission meeting. Accordingly, the equivalent of existing §55.26(c)(2)(B), providing that the request deadline may follow technical review, is not included because the final hearing request deadline will always occur after technical review has been completed and the Notice of Application and Preliminary Decision has been issued.

Section 55.209(b)(2) further provides that, if only requests for reconsideration are filed and the commission has delegated its authority to act on the request to the general counsel, the requests will be scheduled for consideration only if the general counsel directs the chief clerk to do so.

New §55.209(c) mirrors existing §55.26(d), but is amended to require the chief clerk to mail notice of the commission's agenda at which the request for reconsideration or hearing will be considered to "requestors," including persons who timely submitted either requests for reconsideration or requests for hearing and all persons who commented in a timely manner. This notice will be sent 35 days before the first meeting at which the request will be considered. This adds five days to the proposed time period, but has been changed to incorporate the additional days to the hearing request response and reply timeline to ensure that the deadline will generally fall on a weekday. The 35-day time period is part of

the changes to the overall time period in §55.209(b)-(d) and (g). Adopted §39.421 states that the chief clerk will send out notice of commission's agenda at which the request for reconsideration or hearing will be considered "no later" than 30 days before the meeting. While this provision is different, it does not conflict with §55.209(c). However, in order to minimize confusion, the chief clerk will adhere to the 35-day timeline.

New 55.209(d), containing requirements similar to existing §55.26(e), requires the filing of responses to both requests for reconsideration and requests for hearing no later than 23 days before the commission meeting. This is three days longer than the proposed time period of 20 days, but carries forward the existing two week time period for requestors for reconsideration or contested case hearings to file a reply as provided for in §55.26(f). The 35-day time period is part of the changes to the overall time period in §55.209(b)-(d) and (g).

Under §55.209(e), responses to hearing requests must address whether the requestor is an affected person and must identify which issues raised in the hearing request involve disputed issues of fact raised during the comment period which are relevant and material to the decision on the application, and whether the person who filed the comment raising the issues on which hearing is sought withdrew the comment in writing prior to the filing of the executive director's response to comment. This requirement is intended to facilitate the commission's ability to determine whether existing (i.e., not withdrawn) relevant and material issues of fact have been raised which may be referred to hearing under HB 801 requirements.

Subsection 55.209(f) provides that responses to requests for reconsideration should address the issues raised in the request.

New §55.209(g) differs from existing §55.26(f) in that the new subsection provides that requestors who requested either reconsideration or hearing may file a reply to responses filed on their request no later than nine days before the commission agenda when their request will be considered, rather than ten days before agenda as proposed, and rather than by the existing deadline of six days before agenda. This time period has been changed to allow the commission sufficient time to consider all filings in order to specify the number and scope of issues, if any, to be referred to State Office of Administrative Hearings (SOAH) in accordance with HB 801. This change together with the changes to the time periods in §§55.209(b)-(d) allows two weeks for replies to responses to hearing requests and ensures that the deadlines will generally fall on a weekday.

Under adopted §55.209(h), an application may be referred directly to SOAH only if the participants have agreed to the number and scope of the issues subject to hearing and the maximum expected duration of the hearing. This limitation on the commission's ability to refer an application directly to SOAH is because of the HB 801 requirement in TWC §5.556(e) that the commission limit the number and scope of issues before any referral to SOAH.

Brown McCarroll found the proposed procedures for handling requests for reconsideration of the executive director's decision in §55.209 cumbersome and difficult to follow. The commenter suggested that all rules related to these requests (§§50.139, 55.209 and 55.211) be reorganized into one provision.

The commission has made no change in response to this comment. The motion for reconsideration process published in §50.139, now renamed Motion to Overturn the Executive Director's Decision, is similar to the process and mirrors the motion for reconsideration mechanism described in §50.39. Section 50.139 concerning Motion to Overturn the Executive Director's Decision will apply to applications declared administratively complete on or after September 1, 1999, whereas, §50.39 covers applications declared administratively complete before September 1, 1999. Motions to Overturn the Executive Director's Decision are mechanisms designed to address a final action (e.g., issuance of a permit) taken by the executive director in uncontested matters. Requests for reconsideration under HB 801 are mechanisms available to the public during the permitting process to request that the commission reconsider the executive director's decision prior to issuance of the permit. That is, under HB 801, interested members of the public may not only request a hearing, they may also request that the commission reconsider the executive director's decision made in response to comment. The request for reconsideration, like the request for hearing occurs in those matters that are contested by the public. Because requests for reconsideration are different from motions for reconsideration (now renamed motions to overturn to eliminate confusion), the commission believes that reorganizing the processes related to these

into one provision would confuse the process. Therefore, no change has been made in response to this comment.

The PIC suggests that requests for reconsideration, as well as requests for contested case hearings, be set for commission consideration. The PIC states that these two types of requests are referred to collectively in the statute, but without distinction as to how they come before the commission and this may cause a false impression for the public who may perceive that these avenues of protest carry equal procedural rights. Alternatively, the following language is suggested: “A request for reconsideration seeks commission review of the determination of the executive director on the application without a contested case hearing. A request for reconsideration will be scheduled for a commission meeting only if requested by the general counsel. If the general counsel does not ask the chief clerk to set the request for reconsideration for commission consideration within 20 days after the deadline for submitting a request for reconsideration, the request is denied. A timely filed request for contested case hearing will be scheduled for a commission meeting as required under §55.209(b)(2).”

The commission has reconsidered §55.209 in light of this comment and has made significant changes from the proposal. However, the changes are not exactly as proposed by the PIC. As the commission begins the implementation of HB 801, the commission wants to consider the requests for reconsideration. This rule will allow the delegation by resolution at a later date if the commission determines that the general counsel should make the decision as to whether requests for reconsideration should be set on the commission’s agenda.

The PIC requests clarification on §55.209(a). The rule provides that only “timely” filed requests will be processed. But, “premature” requests filed before the deadline should also be considered timely for purposes of being processed under §55.209.

The commission agrees that clarification may be necessary. If a hearing request is submitted at any time after the Notice of Receipt of Application and Intent to Obtain Permit, but before the final deadline for requesting a hearing, the commission will consider the request as a timely request for hearing.

Brown McCarroll requested that a deadline for action on requests for contested case hearing on HB 801 applications be established, similar to the overall final deadline for action of 45 days applicable on a Motion to Overturn under §50.139.

The commission has made no change in response to this comment. Brown McCarroll is correct in its understanding that the rules as proposed, like existing rules, do not contain this sort of deadline for action on contested case hearing requests. However, it should be noted that the rules contemplate that all requests for contested case hearing will be scheduled for commission consideration (where they can be granted or denied), or they will be granted by virtue of the fact that the executive director or the applicant will request a direct referral and the parties have agreed to the number and scope of the issues as well as the maximum expected duration of the hearing as provided for in §55.209(h). While there is no overall deadline for action on hearing

requests, the process ensures that hearing requests will be acted on as provided in §55.211 and the processing time frames set forth in §55.209(b) -(d) and (g) provide further assurance hearing requests will be timely considered. The commission believes that these intermediate processing time frames are sufficient to ensure timely processing and that establishing an overall time frame for actions on hearing requests would not be appropriate given the significant differences in the nature and complexity of the matters that come before the commission for decision. Therefore, no changes have been made to the proposal in this regard.

Henry, Lowerre suggested revising §55.209(b)(2) to eliminate the phrase suggesting that the general counsel determines whether the Commission shall consider a request for reconsideration. The commenter notes the Commissioners are the decision makers and should decide whether or not they want to hear a matter and the Commissioners need to know of the requests. The commenter believes the process will be viewed as only a bureaucratic step, without real meaning, as it is currently drafted, and that the change may affect delegation of federal programs. The commenter also notes it would appear that the final decision makers must make such decisions.

The commission has made certain changes in response to this comment. The rule has been revised to provide for the commission to delegate by resolution to the general counsel the decision of whether requests for reconsideration should be set on the commission's agenda. This authority is not delegated at this time because as the commission begins the implementation of HB 801, the commission wants to consider the requests for reconsideration. This rule will allow the delegation

by resolution at a later date if the commission determines that the general counsel should make the decision as to whether requests for reconsideration should be set on the commission's agenda. The requests for reconsideration were created by HB 801 and are not a part of the public participation process of any federally delegated program.

Brown McCarroll noted that the scheduling procedures established in §55.209(c) requires an adjustment to be workable and proposes to move §55.211(f) to §55.209(c). As proposed, the timeline for the chief clerk to set a request for reconsideration on an agenda (i.e., 40 days) is incompatible with the time frame allowed for the general counsel to decide if a request for reconsideration should be set on the agenda (i.e., 20 days). It is also incompatible with the time frame of 30 days notice of a commission setting of a request for reconsideration to the applicant, the executive director, the PIC and requestors.

The commission has not moved §55.211(f) to §55.209(c), because the commission has considered the adequacy of the time periods specified in §§55.209(b)(2), (c), (d) and (g) and revised them so that sufficient time is allowed for the process in a matter which may become a contested matter if hearing requests are granted. Specifically, §55.209(b)(2) has been changed from approximately 40 days to approximately 44 days to allow sufficient time for the chief clerk to prepare the notice required by subsection (c). Section 55.209(c) has been changed to require the chief clerk to mail notice at least 35 days, rather than 30 days, before the commission meeting, to provide adequate time for the applicant, executive director and public interest counsel to submit responses to the requests. This provision has been modified to indicate mailed notice of commission agenda to

consider hearing requests or requests for reconsideration will also be sent to persons who commented in a timely manner. Adopted §39.421 contains a similar requirement to that in §55.209(c). Finally, subsection (g) has been changed to allow requestors time to submit written replies to a response to request for reconsideration from ten days to nine days before the commission agenda, which results in replies generally due on a Monday. The entire process is only approximately four days longer than the process currently in place at the commission. In addition, proposed §55.211(f) has been deleted, thus eliminating that time requirement. This time frame is no longer needed because the general counsel will no longer be setting requests for reconsideration for commission meeting until that delegation is made by the commission. Accordingly, proposed §55.211(g) has been renumbered as §55.211(f).

Henry, Lowerre commented that the changes in the time period to file a reply to response to hearing requests from six days to ten days prior to agenda in §55.209(g) is a significant change and the existing time period of 14 days is often not adequate and because the agenda date is set, there is no opportunity for an extension.

The commission has made a change in response to this comment, increasing the time period for replies from 10 days to 14 days. The deadline of ten days prior to commission agenda meeting in §55.209(g) has been changed to nine days prior to commission agenda meeting. This change, together with the changes to the time periods in §55.209(b)-(d), allows the commission sufficient time to review replies to response to hearing request and ensures that the due date for replies will

generally fall on a Monday. The deadline of 20 days prior to commission agenda meeting in §55.209(d) has been changed to 23 days prior to commission agenda meeting to reinstate the existing 14 day period for requestors to prepare and file replies to responses.

§55.211

Adopted new §55.211, concerning Commission Action on Requests for Reconsideration and Contested Case Hearing, is renamed to include requests for reconsideration, as well as requests for a contested case hearing. The amended section describes actions the commission may take after evaluating requests for a contested case hearing. Paralleling existing §55.27, new §55.211(a) provides that commission consideration of public comment, executive director's response to comment as well as consideration of requests for reconsideration and contested case hearing, are not contested cases subject to the APA. Because HB 801 now provides for an opportunity to file requests for reconsideration, §55.211(b)(1) provides that the commission may grant or deny any request for reconsideration and that these decisions are not subject to the APA. Section 55.211(b)(2) remains unchanged from the proposal and provides that if a hearing request does not meet the requirements of this chapter, the commission may act on the application.

This adoption does not include an equivalent of §55.27(a)(2), which states that the commission may refer an application to public meeting to develop comment before taking action on hearing requests. The new procedures now incorporated into Chapter 55 provide for increased opportunities for public comment before the time when hearing requests would be set for commission consideration. In

addition, to reflect the intent of HB 801, the commission wishes to distinguish between the public comment process and the contested case hearing process. The public comment process and the contested case hearing process are two separate phases of the permitting process.

Under adopted §55.211(b)(3), if a hearing request does meet the requirements of this chapter, the commission will further determine if the request raises disputed issues of fact that were raised during the comment period, and that were not withdrawn in writing by the person filing the comment prior to the filing of the executive director's response to comment. Under adopted §55.211(b)(3)(A), if disputed issues of fact are raised, the commission will limit the scope and number of issues to be referred to hearing, specify the maximum expected duration of the hearing and direct the chief clerk to refer the issue to the SOAH for a hearing. This provision implements new HB 801 requirements (TWC §5.556(d) and (e) and THSC §382.056(n)) for referring applications to SOAH.

Adopted §55.211(b)(3)(B) further provides that the commission may make a decision on the issues and take action on the application if the request raises only disputed issues of law or policy.

Adopted §55.211(b)(4) allows commission discretion to refer a hearing request to SOAH on the sole issue of whether the hearing requestor is an affected person. However, SOAH may not proceed with a contested case hearing unless and until the number and scope of the issues subject to hearing and the maximum expected duration of the hearing have been specified by the commission or by the agreement

of the parties. This complies with the HB 801, TWC 5.556, requirement that the commission limit the number and scope of issues.

The new adopted sections do not include the existing §55.27(b)(2)(A) and (B) requirements that a hearing request from an affected person may be granted only when deemed reasonable and supported by competent evidence because these determinations are no longer required by §5.115(a), TWC, amended by HB 801. The adopted amendment also does not include the requirement of existing §55.27(b)(3) to hold a hearing on air permits when requested by legislators representing the general area because this requirement has been removed from §382.056(g), THSC.

Adopted §55.211(c) gives the conditions under which a request for a contested case hearing shall be granted, including: 1) the request is made by the applicant or the executive director; or 2) the request is made by an affected person; 3) the request raises disputed issues of fact that were raised during the comment period and were not withdrawn in writing by the person filing the comment prior to the filing of the executive director's response to comment; 4) the request is timely filed with the chief clerk; the request is pursuant to opportunity for hearing authorized by law; and 6) the request complies with the requirements under §55.201, relating to requests for reconsideration or contested case hearing.

As required by HB 801 (TWC §5.556(f) and THSC §382.056(o)), adopted §55.211(d)(1) retains the commission's ability to refer an application to SOAH where there is no valid hearing request, if the commission determines that a hearing would be in the public interest. New §55.211(d)(2) also allows

the commission to refer an application for amendment, modification or renewal of an air permit to hearing based on a determination that the applicant's compliance history constitutes a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, as authorized by THSC §382.056(o).

New §55.211(d)(3) further allows the commission to refer to hearing an application for renewal of a hazardous waste permit subject to §305.65(a)(8) if the applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit, as authorized by HB 801, THSC §361.088. In addition, new §55.211(d)(4) allows the commission to refer to hearing an application for renewal or amendment of a wastewater discharge permit if the applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit, as authorized by HB 1479, TWC §26.028(d)(4). These provisions of §55.211(d)(3) and §55.211(d)(4) implement the provisions of HB 801 and HB 1479, respectively, relating to the commission's ability to refer these matters to SOAH based on compliance history concerns, notwithstanding the fact that such renewals or modifications are not otherwise subject to contested case hearings.

The existing §55.27(e), concerning a commission determination as to the applicability of the freeze rules of Chapter 80, Subchapter E, is not included in this section. The freeze rules allow an administrative law judge to limit the issues and the scope of complex proceedings. In light of the commission's ability to limit the issues referred to hearing under §5.556, TWC and this adopted

Chapter 55, former §55.27(e) is not needed. The freeze rules were repealed because HB 801 accomplishes the same objective of the freeze rules which was to streamline the hearing process. To retain the freeze rules would unnecessarily complicate the hearing process because those rules would have to be overlaid onto the HB 801 process. Under adopted §55.211(e), commission decisions on requests for reconsideration, requests for contested case hearing and the referral of an issue are interlocutory. Likewise, §80.4(c)(16) allows the administrative law judge presiding over a contested case hearing referred from the commission to consider an issue which was not included in the commission's referral, when the issues are material, are supported by evidence, and there are good reasons for failure to supply available information regarding the issues during the public comment period. Adopted §55.211(f), which continues to provide that a party has 20 days to file a motion for rehearing after being notified of the denial of a hearing request, now provides that a party or attorney of record is presumed notified on the third day after the date that the final decision or order is mailed by first class mail, in conformity with §2001.142(c), Texas Government Code.

Adopted §55.211(g) provides that if all hearing requestors whose requests for a contested case hearing were granted with regard to an issue, withdraw in writing their hearing requests with regard to the issue before notice of the contested case hearing, the scope of the hearing no longer includes that issue except as authorized under §80.4(c)(16) which allows the judge to consider additional issues beyond the list referred by the commission under certain conditions. This subsection will encourage settlement and provide a mechanism for parties to resolve disputed issues of fact as early in the process as possible.

There is no need for a section that is equivalent to existing §55.31, concerning Determination of Reasonableness of Hearing Request, because §5.115(a), TWC, has been amended to no longer require a determination of reasonableness in taking action on hearing requests with respect to applications declared administratively complete on or after September 1, 1999. The reasonableness standard was repealed by HB 801.

Jenkins & Gilchrist commented that §55.211(a) contains a typographical error, in that the word “cases” should be changed to the word “case.”

The commission agrees with this comment. The correction was made in the August 20, 1999 publication of the *Texas Register* at 24 TexReg 6572. In addition, the commission has restructured Subsection (a) in this adoption by reformatting those matters that are not contested cases under the APA, into paragraphs (1) - (4).

Brown McCarroll noted that §55.211 could be improved and simplified by cross referencing to §50.115 which governs the scope of contested case hearings and proposes revisions to §55.211(b)(3).

The commission has made no change in response to the comment. The commission notes that while the proposed change may eliminate some duplication, the commission believes the proposed structure is simpler than using extensive cross-references because the criteria for making the determination on public comment, executive director response to comment, request for

reconsideration or contested case hearing are placed in this one provision, §55.211. This structure will make it easier for the reader to follow and apply. Therefore, no changes have been made to the proposal in this regard.

Henry, Lowerre commented under §55.211(b)(3)(A) that this subparagraph needs to recognize the need to include a disputed issue of law as a basis for a hearing.

The commission has made no changes in response to this comment. There is no basis to require the commission determine that there is a disputed issue of law when acting on requests for contested case hearings. TWC §5.556(d) requires that the commission refer disputed issues of fact to the State Office of Administrative Hearing raised during the comment period that are relevant and material. The commission may act on an issue of law, as specified in §55.211(b)(3)(B). If the commission decides that a hearing should be held regarding a mixed issue of law and fact, the commission may refer the matter to SOAH.

Jenkins & Gilchrist commented that, in order to make §55.211(b)(3)(A)(i) consistent with the requirements of HB 801, it should be revised to read as follows: “specify the number and scope of the specific factual issues to be referred to SOAH.”

The commission has made some changes in response to this comment. The commission agrees that adding the words “to be referred to SOAH” more closely tracks the language in §5.556(e)(1) of

the TWC enacted by HB 801. However, the commission disagrees that adding the words “specific factual” before the word “issues” is necessary to be consistent with the requirements of HB 801.

Subsection §5.556(e)(1) of the TWC says “issues” rather than “specific factual issues.”

Nevertheless, for the purposes of clarity, the commission has changed the proposal at §55.211(b)(3)(A)(i) to read as follows: “specify the number and scope of the specific factual issues to be referred to SOAH.”

Jenkins & Gilchrist commented that §55.211(b)(3)(B), which provides that the commission may make a decision on the issues and act on the application without referring the matter to SOAH if a hearing request raises only disputed issues of law, should be revised to allow such commission action if the hearing request only raises disputed issues of law or policy. The commenter suggested that the aforementioned subparagraph should be revised to add the phrase “or policy” after the word “law,” to read as follows: “If the request raises only disputed issues of law or policy, make a decision on the issues and act on the application; or.”

The commission believes that the proposed revision is appropriate. Under §5.556(d) of the TWC, enacted by HB 801, the commission may not refer an issue to SOAH for a hearing unless it determines, among other things, that the issue involves a disputed question of fact. If a disputed issue only involves an issue of policy without any underlying disputed questions of fact, then under HB 801 the commission should decide the issue without referring the matter to SOAH. Therefore, changes have been made to the proposal as suggested by the commenter.

Jenkins & Gilchrist commented that in order to make the first portion of §55.211(b)(4) consistent with the format of subparagraphs (1) through (3), it should be revised to read as follows: “direct the Chief Clerk to refer the hearing request to SOAH.”

The commission agrees that the requested change should be made for grammatical purposes and has included the change in the adopted rule by deleting the proposed phrase “the commission may” at the beginning of the subparagraph.

Henry, Lowerre commented under §55.211(b)(4) that the provision for a hearing solely on the hearing request should be eliminated, and provided a copy of a letter from the commission’s Office of General Counsel to Mr. Lowerre dated March 13, 1997, in which the Office of General Counsel did not disagree that this process causes delays, and stated that “The common practice now is to refer to SOAH for the judge to make the assessment on hearing requests, certify questions if necessary and otherwise proceed to a hearing on the merits of the application if one is found to be warranted.”

The commission has made no change in response to the comment. The commission believes that this is an option that should be retained. This option allows for the development of an independent factual record to assist the commission in determining whether hearing requests should be granted.

Jenkins & Gilchrist commented that §55.211(c)(2) should be expanded to indicate that a hearing request by an affected person will be granted only if the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application.

The suggested language has already been included as a correction which has been made in the August 20, 1999 publication of the *Texas Register* at 24 TexReg 6572. The correction is adopted, and with the addition of the word "commission's" just prior to "decision," and the language that reads "that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment," §55.211(c)(2)(A) now reads as follows: "raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application." The commission notes that the adopted revision implements the requirements of HB 801, specifically new §5.556(d) of the TWC. This subsection states that the commission may not refer an issue to SOAH for a hearing unless the commission determines that the issue involves a disputed question of fact, was raised during the public comment period, and is relevant and material to the decision on the application.

TI and Baker & Botts suggested that the reference to §55.251 in §55.211(c)(2)(A) should actually reference §55.201. The commenters stated that an administrative law judge should be required to consider the commission's prior denial of a hearing request in his or her designation of parties.

In response to this comment, the commission notes that the reference to §55.251 was an error which was removed in the correction which was published in the *Texas Register* on August 20, 1999 at 24 TexReg 6572. The corrected version rewords proposed subparagraph (A) to read: “raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director’s response to comment, and that are relevant and material to the commission’s decision on the application.” In order to reinstate the originally intended language concerning compliance with certain requirements, the commission adopts new subparagraph (D) which reads as follows: “complies with the requirements of §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing).” The commission finds no prescriptive, strict standing requirements under HB 801 for requiring an administrative law judge to consider the commission’s prior denial of a hearing request in his or her designation of parties, and thus has made no change in response to this comment in this regard. The admission of parties to a proceeding once the commission has referred a matter to SOAH and a hearing has already been set is not related to the standards used by the commission to grant a hearing request. Therefore, the commission does not believe that it would be appropriate to limit the administrative law judge’s designation of parties in the manner suggested by the commenter. Other than the

aforementioned changes to the proposal under §55.211(c)(2)(A) and (D), the commission has made no further change to the proposal in response to this comment since there is no basis on which to require a SOAH judge to consider the commission's prior denial of a hearing request when designating parties.

Brown McCarroll expressed concern about the cross reference in §55.211(c)(2)(A) to §55.251, a provision in a separate Subchapter G. More specifically, the concern expressed was that Subchapter G applies to applications different from those covered by Subchapter F.

In response to this comment, the commission notes that the reference to §55.251 was an error removed in the correction which was published in the *Texas Register* on August 20, 1999 at 24 TexReg 6572. The corrected version rewords proposed subparagraph (A) to read “raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application.” In order to reinstate the originally intended language concerning compliance with certain requirements, the commission adopts new subparagraph (D) which reads as follows: “complies with the requirements of §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing).”

Jenkins & Gilchrist commented that §55.211(d)(2) and (3) should be revised for grammatical reasons to begin with the phrase “the application is for.”

The commission agrees with this comment and changes have been made to the proposal accordingly. In addition, the commission has made a grammatical correction in (3) by replacing the word “an” with the words “and the” before the reference to applicant’s compliance history. In addition, the commission has corrected a typographical error under §55.211(d)(3) by changing the incorrect reference, “§305.631(a)(8)” to “§305.65(a)(8).”

Jenkins & Gilchrist commented that in §55.211(e) the phrase “request for referral of an issue for hearing” is a new type of request not addressed elsewhere in the rules and only serves to add ambiguity to the rules. Therefore, the commenter suggested that the phrase “request for referral of an issue for hearing” should be deleted from §55.211(e).

In response, the commission agrees with this comment and has deleted the phrase “request for referral of an issue for hearing.” The phrase “request for referral of an issue for hearing” in the rule is not a separate type of request authorized by HB 801. The commission does not intend that such a request be separate and apart from the request for hearing.

Under §55.211(e), Brown McCarroll commented that §55.211(e) could provide more clearly that the commission's refusal to certify an issue for contested case hearing is interlocutory and, therefore, not

immediately appealable, by persons who are parties to the contested case hearing on other issues; they must wait and file motions for rehearing, if still desired, and then appeal (if desired) after the trial of the contested case hearing and the commission's issuance of its final order.

The commission has made no change to the rule in response to this comment. In response to another comment, the commission has deleted language describing “request for referral of an issue for hearing” and noted that such a request is not separate and apart from the request for hearing. Since both the issues identified in a referral to SOAH, and those not included in the referral originated in the request for contested case hearing, a person who is party to the contested case hearing cannot appeal the “issue” without appealing the entire case.

Brown McCarroll suggested a grammatical change to §55.211(e) to make it clear that the rule concerns the granting of a request for a contested case hearing.

The commission agrees that the rule would be clearer if revised and has added the phrase “request for a contested case” between “If a” and “hearing.”

Brown McCarroll suggested that §55.211(g) be revised to eliminate the language prohibiting an early filing of a motion for rehearing because there is no authority or reason to prohibit such a filing.

The commission agrees with this comment that there is no authority or reason to prohibit the early filing of a motion for rehearing. Therefore, the rule has been revised by deleting the phrase “no earlier than, and” from the second sentence of adopted §55.211(f) (proposed as §55.211(g)).

Brown, Potts commented that in no set of circumstances would public participation and agency resources be benefitted by filing both a request for reconsideration and a motion for reconsideration for registrations issued by the executive director. The commenter stated that the request for reconsideration is not appropriate for a registration. The commenter further commented that §55.211(g) provides that if a request for reconsideration is denied by the commission, then the next step is a motion for rehearing. Commenter stated that there is no provision for filing a motion for reconsideration, except in response to a final executive director action as provided in §312.13(e). Finally, the commenter concluded that because a request for reconsideration should not apply to a final decision of the executive director, issuance, amendment, or renewal of a registration by the executive director under §312.13 should be expressly excluded from Chapter 55 applicability.

The commission agrees that sludge registrations issued under Chapter 312 are not subject to contested case hearings and should not be subject to requests for reconsideration because they are not subject to the requirements of HB 801. Also, Chapter 312 already provides for the opportunity to challenge the executive director’s issuance of sludge registrations with a motion for reconsideration. Therefore, the commission has added §55.1(d)(1) and §55.101(g)(1) which exclude sludge registrations and notifications under Chapter 312 from the requirements of

Chapter 55. In addition, the commission has exempted from the requirements of Chapter 55 certain other applications for which there is no right to contested case hearing (or which are governed by other procedural requirements). This includes applications for authorization, other than those for individual permits, under Chapter 321 and registration and notification applications for composting facilities, under Chapter 332.

§55.250

Adopted new Subchapter G applies to applications other than applications under TWC, Chapter 26 or 27, THSC, Chapter 361 or 382, TWC Chapter 13, or TWC §11.036, §11.041, or §12.013. The procedures for providing comment and requesting hearings for applications filed under TWC Chapter 13 or TWC §11.036, §11.041, or §12.013 are set forth in 30 TAC Chapter 291. Adopted §55.250 specifies that this subchapter will apply only to such applications declared administratively complete on or after September 1, 1999. The adopted subchapter retains the same comment and hearing request procedures as exist under current rules, with minor modifications.

Brown McCarroll suggested that Subchapter G should not be adopted because procedural rules governing utility cases are established in Chapter 291 of the commission's rules. In the event the suggestion is not accepted, they suggest language revising §55.250 to make clear that the section is not applicable to utility cases.

In response to this comment and as discussed earlier in this preamble, the commission has adopted revisions to §55.101(g)(5) to exclude utility cases from Subchapter G. Applications filed under TWC Chapter 13, and TWC §11.036, §11.041, or §12.013 are not to be governed by Chapter 55 and, consequently, §55.255(d) as published in the proposal was not adopted. The commission is adopting Subchapter G because, as explained under §55.1, relating to applicability, Subchapter G covers other non-801 applications declared administratively complete on or after September 1, 1999, such as water right applications, radioactive material license applications, district creation, standby fee and impact fee applications.

§55.251

Adopted §55.251, concerning Requests for Contested Case Hearing, Public Comment, incorporates the requirements of §55.21 except as noted below. The section does not include the provision that legislators from the general area of the proposed facility may request a contested case hearing for applications for certain air permits and authorizations because this provision has been eliminated from §382.056(g), THSC and air permits will be governed by subchapters D-F. Adopted §55.251(b) has deleted §55.21(b) references to comment periods for applications that will now be processed under subchapters D-F since these subchapters cover HB 801 chapter applications. Adopted §55.251(g) does not contain the §55.21(g) references to the fact that there is no right to a hearing regarding certain applications for amendment or modification of permits subject to Chapter 305, Subchapter D of this title because such applications will be processed under proposed subchapters D-F, rather than this Subchapter G. Subsection (g) provides that there is no right to a contested case hearing on an

application for a weather modification permit or license. TWC Chapter 18 does not require evidentiary contested case hearings on these applications. Section 18.081, TWC provides that the commission shall hold at least one public hearing if at least 25 persons request one. The commission has determined that this statute does not require that this hearing be a contested case hearing, but only a public comment hearing.

Henry, Lowerre commented under §55.251, suggesting that this subsection needs to include the following language concerning the deadline for a request for reconsideration or for a contested case hearing: “The executive director or the commission may extend the deadline for a request for reconsideration or for a contested case hearing. A request to extend the deadline may be filed separately. A request should be filed before the deadline indicated in the notice. A request that is filed before the deadline must provide a valid justification for the extension of the deadline. If a request to extend the deadline is filed after the deadline in the notice for filing, the request must provide good cause for the extension and for the failure to file the request before the deadline.”

The commission has made no change in response to the comment. Section 55.251(f)(2) already provides the commission authority to extend the deadline for filing a hearing request. In addition, Subchapter G covers only applications other than applications filed under TWC Chapters 26, and 27 and THSC Chapter 361 and 382 which are covered by HB 801. Therefore, the request for reconsideration procedure does not apply. Thus, no changes have been made to the proposal in response to this comment.

Brown McCarroll found Subchapter G, Chapter 55, to lack focus primarily because the text purports to apply to utility cases, which are governed by the procedural requirements in a more specific chapter, Chapter 291 of this title. The commenter believes Chapter 55, Subchapter G is unnecessary in its application to utility cases, but that if possible, the subchapter should identify which types of applications it does cover. Commenter states that in the event the commission decides to adopt the subchapter in substantially the proposed form, the following four problem areas which should be addressed: (1) the new public comment procedures should not be applicable to utility cases, because utility cases are not subject to the new HB 801 public comment procedures. Section 55.251(f)(1) refers to the Public Comment Processing rule found in Subchapter F, §55.156, but should refer to the Public Comment Processing rule in Subchapter G, §55.253; (2) Section 55.251(a) should indicate that a ratepayer may request a contested case, or should contain a cross reference to Chapter 291; (3) Section 55.251(c)(2) reference to “the requestor’s location and distance relative to the activity that is the subject of the application” is irrelevant to utility proceedings, in which the justiciable interest is established by the mere fact of being a customer of the utility; and (4) Section 55.255(d) impermissibly places the executive director in the role of directing SOAH as to the scope of the proceeding, as well as the timing of the hearing. It would be preferable to indicate that upon referral to SOAH, hearings on utility and miscellaneous cases to which this subsection applies are to be governed by the statute under which they arise, and set a time limit for issuance of the proposal for decision.

The commission agrees with this comment that this subchapter needs to be clearer and that it should not apply to utility cases. The commission notes that the adoption includes revisions to the

applicability language in §55.101(g)(5) discussed earlier in this preamble, which address the commenter's concerns. Also, the commission has revised the proposed language under §55.254(g) to add the following sentence: "An application may only be sent to SOAH under this subsection if the executive director, the applicant, the public interest counsel and all timely hearing requestors agree on a list of issues and a maximum expected duration of the hearing." These actions by the commission address the concerns raised by commenter. Other applications which will be subject to Subchapter G include applications concerning various types of districts and water rights. The four problem areas identified by commenter are eliminated with the adopted revisions to the proposal described herein.

§55.252

Adopted new §55.252, concerning Request by Group or Association, mirrors the requirements of §55.23. The section requires one or more members of the group or association to otherwise have standing to request a hearing in their own right, demonstrate the interests the entity seeks to protect are germane to the organization's purpose and show neither the claim asserted or the relief requested requires the participation of the individual members in the case. The rule allows the executive director, the public interest counsel or the applicant to request that the group explain how it meets these requirements.

§55.253

Adopted §55.253, (Public Comment Processing), incorporates the requirements of §55.25, except as noted below. The requirements of §55.25(b) concerning public comment received on applications for hazardous waste permits, underground injection well permits and Texas Pollutant Discharge Elimination System (TPDES) permits are not included because such applications will now be processed under proposed Subchapters D-F, rather than this Subchapter G.

The commission has revised §55.253(b)(1)(A) and §55.254(b) and (c)(2) for consistency with commission drafting guidelines by replacing the word “should” with “will,” and §55.253(b)(2) by deleting the word “proceeding” because the term does not add meaning to the rule; the term “contested case” is a defined term in the APA.

Jenkins & Gilchrist commented that §55.253(b)(2) should be revised to delete the requirement that the applicant attend any public meeting held by the executive director or Office of Public Assistance because the commission lacks statutory authority to require the applicant to attend such a meeting. In addition, Jenkins & Gilchrist provided examples of situations where this requirement may result in a hardship on an applicant due to their inability to attend a meeting because of illness, or their inadvertent failure to attend a meeting.

The commission has made no change in response to the comment because the commission believes it does have statutory authority to require an applicant to attend a public meeting held by the

executive director or the Office of Public Assistance. Under §5.102 of the TWC, the commission has the powers to perform any acts whether specifically authorized by the TWC or other law or implied by the TWC or other law, necessary and convenient to the exercise of its jurisdiction and powers by the TWC or other laws. The purpose of a public meeting is to provide the public information about an application and to allow the public to provide comment on the application. In order to provide the public complete information about an application and to answer their questions about the application in the most efficient and convenient manner, the presence of the applicant is necessary in order to address those aspects of the application and project that are more appropriately addressed by the applicant. Therefore, no changes have been made to the proposal in this regard.

§55.254

Adopted §55.254, concerning Hearing Request Processing, mirrors the requirements of §55.26, except for §55.254(g). Adopted § 55.254(g) provides that an application may only be sent to SOAH under this subsection if the executive director, the applicant, the public interest counsel and all timely hearing requestors agree on a list of issues and a maximum expected duration of the hearing. This change was required by HB 801 which amended Chapter 2003 of the Texas Government Code which requires a list of issues and maximum duration of the hearing to be sent to SOAH by the commission.

Jenkins & Gilchrist commented that §55.254(d) should be revised to delete the requirement that the Chief Clerk's mailed notice of commission consideration of hearing requests include an explanation of

how the person may submit public comments and that the agency may hold a public meeting, because this information does not appear to be applicable at this stage of the process since at this point the public comment period has expired and hearing requests have been filed. The commenter suggested that this notice should instead explain that responses to hearing requests may be filed under §55.254(e) and that replies may be filed under §55.254(f).

The commission has made no change in response to the comment. Section 55.254(d) applies to applications submitted under statutes that are not subject to HB 801 requirements (such as water rights and water districts), and which are declared administratively complete on or after September 1, 1999. Section 55.254(d) is consistent with existing §55.26(d) which will continue to apply to all applications not subject to HB 801 requirements that were declared administratively complete before September 1, 1999. The requirements under §55.254(d) and §55.26(d) should remain consistent because they apply to applications that are not filed under TWC 26 and 27 and THSC 361 and 382, and therefore are not subject to HB 801.

§55.255

Adopted §55.255, concerning Commission Action on Hearing Request, incorporates the requirements of §55.27 except as noted in this paragraph. Under the adopted section, the commission shall determine whether hearing requests have been filed which satisfy the requirements of this subchapter. Adopted §55.255(a)(2) has been added to the proposed rules to provide the commission an option to refer an application to public meeting for development of public comment before taking action on an

application because there is no other opportunity for public comment before commission consideration of hearing requests for matters that come under Subchapter G. In specifying the circumstances when a hearing request from an affected person shall be granted by the commission, adopted §55.255(b)(2) has deleted the requirements of §55.27(b)(2)(A)-(B) that the request must be reasonable and supported by competent evidence. Under the HB 801 amendments to §5.115, TWC, determinations of reasonableness and competent evidence will no longer be required in determining the validity of hearing requests on applications declared administratively complete on or after September 1, 1999, in all programs.

This subsection has also deleted the requirement in §55.27 that the commission grant a hearing request on an air quality permit by a legislator from the general area of the facility because this requirement has been eliminated from §382.056(g), THSC and §55.255 is not applicable to air permit applications.

Proposed §55.255(d) is not adopted because Subchapter G does not apply to applications filed under TWC Chapter 13, and TWC §11.036, §11.041, or §12.013. These matters are not subject to Subchapter G because the provisions in 30 TAC Chapter 291 specifically set forth the procedure for providing comment and requesting hearings and HB 801 does not apply to these applications.

Subchapter G will apply to other applications such as water rights, districts creation, standby and impact fees applications, and radioactive material license applications.

Jenkins & Gilchrist commented that §55.255(a)(3) should be revised to make it consistent with current §80.5(b) of the commission's rules and §2003.047 of the Texas Government Code, which require that the commission provide the administrative law judge with a list of issues or areas that are to be

addressed in the contested case hearing. Specifically, the commenter proposed that §55.255(a)(3) should be revised to read: “direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the request meets the requirements of this subchapter. The referral may also direct SOAH to proceed with a hearing on the application on the issues contained in the referral if the judge finds that a hearing request meets the requirements of this chapter. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the Administrative Procedure Act, Texas Government Code, Chapter 2001.”

In response to this comment, the commission notes that §80.5 of commission rules already requires the commission to provide the administrative law judge a list of issues or areas that must be addressed in the hearing. Therefore, no changes have been made to the proposal in this regard.

Jenkins & Gilchrist commented that the second sentence of §55.255(e) should be revised by inserting the word “under” between the words “party” and “§80.109.”

In response to this comment, the commission notes that the revision has already been included as a correction which has been made in the August 20, 1999 publication of the *Texas Register* at 24 TexReg 6572.

Baker & Botts provided comment to §55.255(f) as follows: “See comment to Section 55.211 above.”

Those comments stated that an administrative law judge should be required to consider the commission’s denial of the hearing request in the designation of parties.

The commission has made no change in response to the comment. As noted in the response to this comment under the section discussing comments to §55.211(c)(2)(A) earlier in this preamble, the commission finds no prescriptive strict standing requirements under HB 801 for requiring an administrative law judge to consider the commission’s prior denial of a hearing request in his or her designation of parties, and thus does not agree with that part of the comment. The admission of parties to a proceeding once the commission has referred a matter to SOAH and a hearing has already been set is not related to the standards used by the commission to grant a hearing request. Therefore, the commission does not believe that it would be appropriate to limit the administrative law judges’s designation of parties in the manner suggested by the commenter.

§55.256

Adopted new §55.256, concerning Determination of Affected Person, mirrors the language in §55.29.

The section contains the definition of an affected person, acknowledges that governmental entities can meet the definition of affected person and lists some of the factors that can be considered when a determination of affected person is being made.

STATUTORY AUTHORITY

The amended section is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.110, which establishes the office of general counsel and the duties of the general counsel; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.041, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641 which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air quality; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's

authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.062, which establishes the commission's authority to adopt rules for certain air authorizations; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.142, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

The amended section implements TWC, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, 26.023, and 26.028, and §§361.088, 382.051, 382.05191, 382.05192, 382.05196, 382.056, 382.057, 382.058, and 382.062 of the THSC, and §2001.142 and §2003.0437 of the TGC.

CHAPTER 55 - REQUESTS FOR RECONSIDERATION AND CONTESTED CASE

HEARINGS; PUBLIC COMMENT

SUBCHAPTER A : APPLICABILITY AND DEFINITIONS

§55.1

§55.1. Applicability.

(a) This chapter is divided into subchapters, each of which governs only certain specific types of applications. This subchapter and Subchapter B of this chapter (relating to Hearing Requests, Public Comment) describe the hearing request and comment procedures which will continue to apply to applications declared administratively complete before September 1, 1999. Subchapter D of this chapter (relating to Applicability and Definitions) describes the applications that will be subject to Subchapters E, F, and G of this title (relating to Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications). Subchapters E and F of this chapter establish public comment, public meeting, request for reconsideration and contested case hearing procedures that apply to applications filed under Texas Water Code, Chapters 26 and 27 and Texas Health and Safety Code, Chapters 361 and 382 that are declared administratively complete on or after September 1, 1999. Subchapter G of this chapter addresses requests for contested case hearing and public comment procedures on applications filed under other statutory provisions that are declared administratively

complete on or after September 1, 1999, except applications filed under Texas Water Code, Chapter 13 and §§11.036, 11.041 and 12.013.

(b) Hearing requests and comments regarding any permit application that is declared administratively complete before September 1, 1999 are subject to this subchapter and Subchapter B of this chapter.

(c) This subchapter and Subchapter B of this chapter do not apply to hearing requests on:

(1) applications for emergency or temporary orders;

(2) applications for temporary or term permits for water rights;

(3) air quality exemptions from permitting under Chapter 106 of this title (relating to Exemptions from Permitting) except for construction of concrete batch plants which are not temporarily located contiguous or adjacent to a public works project; and

(4) applications for weather modification licenses or permits under Texas Water Code, Chapter 18.

(d) This subchapter and Subchapter B of this chapter do not apply to:

(1) applications for sludge registrations and notifications under Chapter 312 of this title (relating to Sludge Use, Disposal and Transportation);

(2) applications for authorization under Chapter 321 of this title (relating to Control of Certain Activities by Rule) except for applications for individual permits under Subchapter B of that chapter;

(3) applications for registrations under Chapter 330 of this title (relating to Municipal Solid Waste);

(4) applications for registrations and notifications under Chapter 332 of this title (relating to Composting);

(5) applications under Chapter 122 of this title (relating to Federal Operating Permits);

(6) air quality standard permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); and

(7) applications where the opportunity for a contested case hearing does not exist under the law.

SUBCHAPTER B : HEARING REQUESTS, PUBLIC COMMENT

§55.21

STATUTORY AUTHORITY

The amended section is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.041, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve

certain applications for waste water discharge, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641 which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air quality; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0516, which

establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.062, which establishes the commission's authority to adopt rules for certain air authorizations; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.142, which provides a time period for presumed notification by a state agency; and

§2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

The amended section implements TWC, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, 26.023, and 26.028, and §§361.088, 382.051, 382.05191, 382.05192, 382.05196, 382.056, 382.057, 382.058, and 382.062 of the THSC, and §2001.142 and §2003.0437 of the TGC.

§55.21. Requests for Contested Case Hearings, Public Comment.

(a) Applicability. This subchapter applies to hearing requests and public comments on applications that are declared administratively complete before September 1, 1999.

(b) Hearing Requests. The following may request a contested case hearing under this chapter:

- (1) the commission;
- (2) the executive director;
- (3) the applicant;

(4) affected persons, when authorized by law; and

(5) for applications for air quality permits, or standard exemptions required to provide public notice, a legislator from the general area of the proposed facility.

(c) Form of Request. A request for a contested case hearing by an affected person must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (d) of this section.

(d) Requirements for Request. A hearing request must substantially comply with the following:

(1) give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor

believes he or she will be affected by the activity in a manner not common to members of the general public;

(3) request a contested case hearing; and

(4) provide any other information specified in the public notice of application.

(e) Deadline for hearing requests; public comment period. A hearing request must be filed with the chief clerk within the time period specified in the notice. The public comment period shall also end at the end of this time period. The time period shall end 30 days after the last publication of the notice of application, except that the time period shall end:

(1) 60 days after the last publication of the notice of a Class 3 modification of a solid waste permit under the TSWDA;

(2) 30 days after last publication for a new permit or permit amendment under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(3) 15 days after the last publication for a permit renewal or standard exemption for a concrete plant under Chapter 116 of this title;

(4) ten days after the mailing of notice of the application for the transfer of a permit;

(5) no less than 30 days after the last publication of the notice of draft permit for an application for a municipal solid waste permit or to amend, extend, or renew such a permit;

(6) no less than 30 days after the last publication of the notice of draft permit for an application for an industrial waste facility permit or to amend, extend, or renew such a permit;

(7) no less than 45 days after the last publication of the notice of draft permit for an application for a hazardous waste facility permit or to amend, extend, or renew such a permit;

(8) no less than 30 days after the last publication of the notice of draft permit for an application for a wastewater discharge permit except as provided in paragraph (9) of this subsection;

(9) no less than ten days after the mailing of the notice of draft permit for an application to amend a wastewater discharge permit where the application is to improve the quality of waste authorized to be discharged and does not seek to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge;

(10) no less than 30 days after the last publication of the notice of draft permit for an application for an injection well permit or to amend, extend, or renew such a permit;

(11) no less than 30 days after the mailing of the notice of draft production area authorization under Chapter 331 of this title (relating to Underground Injection Control); or

(12) the time specified in commission rules for other specific types of application.

(f) Public Comment. Documents that are filed with the chief clerk that comment on an application but that do not request a hearing will be treated as public comment.

(g) Late Filed Hearing Requests and Public Comment, Extensions.

(1) A hearing request or public comment shall be processed under §55.26 of this title (relating to Hearing Request Processing) or under §55.25 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline for hearing requests and public comment. The chief clerk shall accept a hearing request or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the file for the application.

(2) The commission may extend the time allowed for filing a hearing request.

(h) No Right to Hearing.

(1) There is no right to a hearing on an application for a minor amendment of a permit or a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits).

(2) There is no right to a contested case hearing on applications for weather modification licenses or permits under Texas Water Code, Chapter 18.

SUBCHAPTER D : APPLICABILITY AND DEFINITIONS

§55.101, §55.103

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.041, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve

certain applications for waste water discharge, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641 which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §361.088, which establishes the commission's authority to amend, extend, or renew a permit, and provide opportunity for hearing and public meeting; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air quality; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under

the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05194, which establishes the commission's authority to issue multiple plant permits; §382.05195, which establishes the commission's authority to issue standard permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.062, which establishes the commission's authority to adopt rules for certain air authorizations; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

The new sections implement TWC, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, 26.023, and 26.028, and §§361.088, 382.051, 382.05191, 382.05192, 382.05194, 382.05195, 382.05196, 382.056, 382.057, 382.058, and 382.062 of the THSC, and §2001.142 and §2003.0437 of the TGC.

§55.101. Applicability.

(a) Subchapters D-G of this chapter (relating to Applicability and Definitions; Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications) apply to permit applications that are declared administratively complete on or after September 1, 1999, as specified below.

(b) Subchapters D-G of this chapter apply to public comments, public meetings, hearing requests, and requests for reconsideration.

(c) Subchapters D-F of this chapter apply only to applications filed under Texas Water Code, Chapters 26 and 27, and Texas Health and Safety Code, Chapters 361 and 382.

(d) Subchapter G of this chapter applies to all applications other than those listed in §55.101(e) and other than those filed under Texas Water Code, Chapters 26 and 27, and Texas Health and Safety Code, Chapters 361 and 382.

(e) Subchapters D-F of this chapter apply to applications for amendment, modification, or renewal of air quality permits that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may not seek further public comment or hold a public hearing under the procedures provided by §39.419 of this title (relating to Notice of Application and Preliminary Decision), §55.156 of this title (relating to Public Comment Processing), and Subchapter F of this chapter for such applications. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(f) Subchapters D-G of this chapter do not apply to hearing requests related to:

- (1) applications for emergency or temporary orders;

(2) applications for temporary or term permits for water rights;

(3) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Exemptions from Permitting) except for construction of concrete batch plants which are not temporarily located contiguous or adjacent to a public works project;

(4) applications for weather modification licenses or permits under Texas Water Code, Chapter 18; and

(5) applications where the opportunity for a contested case hearing does not exist under other laws.

(g) Subchapters D-G of this chapter do not apply to:

(1) applications for sludge registrations and notifications under Chapter 312 of this title (relating to Sludge Use, Disposal and Transportation);

(2) applications for authorization under Chapter 321 of this title (relating to Control of certain Activities by Rule) except for applications for individual permits under Subchapter B of that chapter;

(3) applications for registrations under Chapter 330 of this title (relating to Municipal Solid Waste);

(4) applications for registrations and notifications under Chapter 332 of this title (relating to Composting);

(5) applications under Texas Water Code, Chapter 13 and Texas Water Code, §§11.036, 11.041, or 12.013. The executive director shall review hearing requests concerning applications filed under these provisions, determine the sufficiency of hearing requests under standards specified by law and may refer the application to the chief clerk for hearing processing. The maximum expected duration of a hearing on an application referred to SOAH under this provision shall be no longer than one year from the first day of the preliminary hearing, unless otherwise directed by the commission. The issues to be considered in a SOAH hearing on an application subject to this provision are all those issues that are material and relevant under the law;

(6) applications under Chapter 122 of this title (relating to Federal Operating Permits);

(7) applications for initial issuance of voluntary emissions reduction permits under Texas Health and Safety Code, §382.0519.

(8) applications for initial issuance of permits for electric generating facility permits under Texas Utilities Code, §39.264;

(9) air quality standard permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(10) applications for multiple plant permits under Texas Health and Safety Code, §382.05194; and

(11) applications where the opportunity for a contested case hearing does not exist under other laws.

§55.103. Definitions.

The following words and terms, when used in Subchapters D-G of this chapter (relating to Applicability and Definitions; Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications) shall have the following meanings.

Affected person - A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to

members of the general public does not qualify as a personal justiciable interest. The determination of whether a person is affected shall be governed by §55.203 of this title (relating to Determination of Affected Person), or, if applicable under §55.256 of this title (relating to Determination of Affected Person).

SUBCHAPTER E : PUBLIC COMMENT AND PUBLIC MEETINGS

§§55.150, 55.152, 55.154, 55.156

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.041, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's authority for water quality standards; §26.028, which establishes the commission's authority to approve

certain applications for waste water discharge, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641 which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §361.088, which establishes the commission's authority to amend, extend, or renew a permit, and provide opportunity for hearing and public meeting; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air quality; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under

the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05194, which establishes the commission's authority to issue multiple plant permits; §382.05195, which establishes the commission's authority to issue standard permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.062, which establishes the commission's authority to adopt rules for certain air authorizations; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

The new sections implement TWC, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, 26.023, and 26.028, and §§361.088, 382.051, 382.05191, 382.05192, 382.05194, 382.05195, 382.05196, 382.056, 382.057, 382.058, and 382.062 of the THSC, and §2001.42 and §2003.0437 of the TGC.

§55.150. Applicability.

This subchapter applies only to applications filed under Texas Water Code, Chapter 26 or 27 or Texas Health and Safety Code, Chapter 361 or 382 that are declared administratively complete on or after September 1, 1999.

§55.152. Public Comment Period.

(a) Public comments must be filed with the chief clerk within the time period specified in the notice. The public comment period shall end 30 days after the last publication of the Notice of Application and Preliminary Decision, except that the time period shall end:

(1) 30 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), or 30 days after Notice of Application and Preliminary Decision if a second notice is required under §39.419 of this title (relating to Notice of Application and Preliminary Decision), for an air application not otherwise specified in this section;

(2) 15 days after the last publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title, or 30 days after Notice of Application and Preliminary Decision if a second notice is required under §39.419 of this title, for a permit renewal under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification) or a concrete batch plant exemption from permitting or permit by rule under Chapter 106 of this title (relating to Exemptions from Permitting);

(3) 45 days after the last publication of the notice of Application and Preliminary Decision for an application for a hazardous waste facility permit, or to amend, extend, or renew or to

obtain a Class 3 Modification of such a permit, or 30 days after the publication of Notice of Application and Preliminary Decision for Class 3 modifications of non-hazardous industrial solid waste permits;

(4) 30 days after the mailing of the notice of draft production area authorization under Chapter 331 of this title (relating to Underground Injection Control);

(5) the time specified in commission rules for other specific types of applications; or

(6) as extended by the executive director for good cause.

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

§55.154. Public Meetings.

(a) A public meeting is intended for the taking of public comment, and is not a contested case under the APA.

(b) During technical review of the application, the applicant, in cooperation with the executive director, may hold a public meeting in the county in which the facility is located or proposed to be located in order to inform the public about the application and obtain public input.

(c) At any time, the executive director or Office of Public Assistance may hold public meetings. The executive director or Office of Public Assistance shall hold a public meeting if:

(1) the executive director determines that there is a substantial or significant degree of public interest in an application;

(2) a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held; or

(3) when a public meeting is otherwise required by law.

(d) The applicant shall attend any public meeting held by the executive director or Office of Public Assistance. A tape recording or written transcript of the public meeting shall be made available to the public.

(e) Public notice of the meeting shall be given as required by §39.411(d) of this title (relating to Text of Public Notice).

§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)(1)-(4) 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; and

(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.

SUBCHAPTER F : REQUESTS FOR RECONSIDERATION OR CONTESTED CASE

HEARING

§§55.200, 55.201, 55.203, 55.205, 55.209, 55.211

STATUTORY AUTHORITY

The new sections are adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, and THSC, §382.056, which establishes the commission's authority concerning environmental permitting procedures.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §12.013, which establishes the commission's authority to determine water rates; §13.041, which establishes the commission's general authority over water and sewer utilities; §26.011, which establishes the commission's authority over water quality in the state; §26.023, which establishes the commission's

authority for water quality standards; §26.028, which establishes the commission's authority to approve certain applications for waste water discharge, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.

Additionally, relevant sections of the THSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §361.0641 which establishes the requirement for notice to state senator and representative regarding solid and hazardous waste permit applications; §361.0665, which establishes notice requirements for municipal solid waste permits; §361.067, which establishes requirements for notice to other governmental agencies; §361.079, which establishes the commission's authority to adopt rules regarding receipt of permit application and hearing procedures for hazardous industrial solid waste facilities and solid waste facilities; §361.082, which establishes the commission's authority to adopt rules for notice and hearing for hazardous waste permits; §361.088, which establishes the commission's authority to amend, extend, or renew a permit, and provide opportunity for hearing and public meeting; §382.011, which establishes the commission's authority to carry out its responsibilities to control the quality of the state's air; §382.012, which establishes the commission's authority to prepare and develop a general plan for the control of the state's air quality; §382.023 and §382.024, which establishes the commission's authority to issue orders to carry out the purposes of the TCAA; §382.0291, which establishes the commission's authority to hold hearings regarding actions under the TCAA; §382.031, which establishes the commission's authority to require notice of hearings

for actions under the TCAA; §382.017, which establishes the commission's rulemaking authority under the TCAA; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0516, which establishes the requirement for notice to state senator and representative regarding air permit applications; §382.05191, which establishes the commission's authority to establish rules regarding notice for Voluntary Emissions Reduction Permits; §382.05192, which establishes the commission's authority to adopt rules relating to the review and renewal of Voluntary Emissions Reduction Permits; §382.05194, which establishes the commission's authority to issue multiple plant permits; §382.05195, which establishes the commission's authority to issue standard permits; §382.05196, which establishes the commission's authority to adopt rules relating to Permits by Rule; §382.055, which establishes the commission's authority to review and renew preconstruction permits; §382.056, which establishes the commission's authority to adopt rules regarding notice, public comment and hearings; §382.0561, which establishes the commission's authority regarding notice and hearings for federal operating permits; §382.057, which establishes the commission's authority to adopt rules to exempt changes within facilities which will not make a significant contribution of air contaminants; §382.058, which establishes the requirements for notice and hearing requests regarding certain concrete plants; §382.062, which establishes the commission's authority to adopt rules for certain air authorizations; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.114, which establishes the requirement for the commission to provide notice and opportunity for hearings regarding permits for radioactive substances; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.42, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings; and §39.264 of the Texas Utilities Code.

The new sections implement TWC, §§5.551, 5.552, 5.553, 5.554, 5.555, 5.556, 26.023, and 26.028, and §§361.088, 382.051, 382.05191, 382.05192, 382.05194, 382.05195, 382.05196, 382.056, 382.057, 382.058, and 382.062 of the THSC, and §2001.42 and §2003.0437 of the TGC.

§55.200. Applicability.

This subchapter applies only to applications filed under Texas Water Code, Chapter 26 or 27 or Texas Health and Safety Code, Chapter 361 or 382 that are declared administratively complete on or after September 1, 1999.

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to

comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

- (1) the commission;
- (2) the executive director;
- (3) the applicant; and
- (4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, and may not be based on an issue that was 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.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and

(5) provide any other information specified in the public notice of application.

(e) Any person may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration or contested case hearing are as follows:

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file; and

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, and the public interest counsel, who was provided notice as required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this chapter (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this chapter;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits); or

(C) amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(a)(8) of this title (relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit; and

(6) other types of applications where a contested case hearing request has been filed but no opportunity for hearing is provided by law.

§55.203. Determination of Affected Person.

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

§55.205. Request by Group or Association.

(a) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(b) The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a) of this section. The request and reply shall be filed according to the procedure in §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing).

§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.

(h) 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. If a request is filed under this subsection, the commission's scheduled consideration of the hearing request will be canceled. An application may only be sent to SOAH under this subsection if the executive director, the applicant, the public interest counsel and all timely hearing requestors agree on a list of issues and a maximum expected duration of the hearing.

§55.211. Commission Action on Requests for Reconsideration and Contested Case Hearing.

(a) Commission consideration of the following items is not itself a contested case subject to the APA:

- (1) public comment;
- (2) executive director's response to comment;
- (3) request for reconsideration; or

(4) request for contested case hearing.

(b) The commission will evaluate public comment, executive director's response to comment, requests for reconsideration, and requests for contested case hearing and may:

(1) grant or deny the request for reconsideration;

(2) determine that a hearing request does not meet the requirements of this subchapter, and act on the application; or

(3) determine that a hearing request meets the requirements of this subchapter and:

(A) if the request raises disputed issues of fact that were raised during the comment period, that were not 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, and that are relevant and material to the commission's decision on the application:

(i) specify the number and scope of the specific factual issues to be referred to SOAH;

(ii) specify the maximum expected duration of the hearing; and

(iii) direct the chief clerk to refer the issues to SOAH for a hearing; or

(B) if the request raises only disputed issues of law or policy, make a decision on the issues and act on the application; or

(4) direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the requestor is an affected person. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the APA. If the commission determines that a requestor is an affected person, SOAH may proceed with a contested case hearing on the application if either the commission has specified, or the parties have agreed to, the number and scope of the issues and maximum expected duration of the hearing.

(c) A request for a contested case hearing shall be granted if the request is:

(1) made by the applicant or the executive director;

(2) made by an affected person if the request:

(A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the

filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

(B) is timely filed with the chief clerk;

(C) is pursuant to a right to hearing authorized by law; and

(D) complies with the requirements of §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing).

(d) Notwithstanding any other commission rules, the commission may refer an application to SOAH if the commission determines that:

(1) a hearing would be in the public interest; or

(2) the application is for an amendment, modification, or renewal of an air permit under Texas Health and Safety Code, §382.0518 or §382.055 that involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(3) the application is for renewal of a hazardous waste permit, subject to §305.65(a)(8) of this title (relating to Renewal) and the applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit.

(4) the application is for renewal or amendment of a wastewater discharge permit and the applicant's compliance history for the preceding five years raises an issue regarding the applicant's ability to comply with a material term of its permit.

(e) If a request for a contested case hearing is granted, a decision on a request for reconsideration or contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under §80.109 of this title (relating to Designation of Parties) or the issues referred to SOAH under this section. A judge may consider additional issues beyond the list referred by the commission as provided by §80.4(c)(16) of this title (relating to Judges). A person whose request for reconsideration or contested case hearing is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's request for reconsideration or hearing request.

(f) If all requests for reconsideration or contested case hearing are denied, §80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed no more than 20 days after the date the person or attorney of record is notified of the commission's final

decision or order. A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail. If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §361.321 or §382.032, or under the APA.

(g) If all hearing requestors whose requests for a contested case hearing were granted with regard to an issue, withdraw in writing their hearing requests with regard to the issue before issuance of the notice of the contested case hearing, the scope of the hearing no longer includes that issue except as authorized under §80.4(c)(16) of this title (relating to Judges).

**SUBCHAPTER G : REQUESTS FOR CONTESTED CASE HEARING AND PUBLIC
COMMENT ON CERTAIN APPLICATIONS**

§§55.250-55.256

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.013, which establishes the commission's authority over various statutory programs; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.115, which establishes the commission's authority to set rules for notices and for determination of an affected person in contested cases; §5.406 which establishes the commission's authority to adopt rules regarding consolidated permitting; §7.002, which establishes the commission's enforcement authority; §11.133, which authorizes the commission to hold hearings for water rights permits; §35.009, which defines hearing authority for designation of priority groundwater management areas; §36.014, which establishes hearing authority for creation of a groundwater conservation district; §49.011, which establishes notice and hearing requirements on petitions to create a district; §49.231, which sets forth notice and hearing requirements on standby fee applications; and Local Government Code §375.023, which establishes notice and hearing requirements for creation of a municipal management district; and §395.080, which establishes notice and public participation requirements on application for approval to levy impact fees.

Additional relevant sections are Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; §2001.142, which provides a time period for presumed notification by a state agency; and §2003.047, which provides the commission with the authority to determine the disputed issues and adopt rules for the level of discovery for contested case hearings.

The new sections implement §2001.142 and §2003.0437 of the TGC.

§55.250. Applicability.

This subchapter applies to applications filed with the commission except applications filed under Texas Water Code, Chapter 26 or 27, Texas Health and Safety Code, Chapter 361 or 382, Texas Water Code, Chapter 13, or Texas Water Code, §§11.036, 11.041, or 12.013. Any permit application that is declared administratively complete on or after September 1, 1999 is subject to this subchapter.

§55.251. Requests for Contested Case Hearing, Public Comment.

(a) The following may request a contested case hearing under this section:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(b) A request for a contested case hearing by an affected person must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (d) of this section.

(c) A hearing request must substantially comply with the following:

(1) give the name, address, and daytime telephone number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group.

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor

believes he or she will be affected by the activity in a manner not common to members of the general public;

(3) request a contested case hearing; and

(4) provide any other information specified in the public notice of application.

(d) Deadline for hearing requests; public comment period. A hearing request must be filed with the chief clerk within the time period specified in the notice. The public comment period shall also end at the end of this time period. The time period shall end as specified in §55.152 of this title (relating to Public Comment Period).

(e) Documents that are filed with the chief clerk that comment on an application but that do not request a hearing will be treated as public comment.

(f) Late filed hearing requests and public comment, extensions.

(1) A hearing request or public comment shall be processed under §55.254 of this title (relating to Hearing Request Processing) or under §55.253 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline for hearing requests and public comment. The

chief clerk shall accept a hearing request or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the file for the application.

(2) The commission may extend the time allowed for filing a hearing request.

(g) There is no right to a hearing on an application for a weather modification license or permit under Texas Water Code, Chapter 18.

§55.252. Request by Group or Association.

(a) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(b) The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a) of this section. The request and response shall be filed according to the procedure in §55.254 of this title (relating to Hearing Request Processing).

§55.253. Public Comment Processing.

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

(b) The commission may designate an agency office to process public comment under this subsection.

(1) The Office of Public Assistance may evaluate and respond to public comment and hearing requests, when appropriate.

(A) If the application and timely hearing requests are considered by the commission, the designated office will prepare any required response to public comment, no later than ten days before the commission meeting at which the commission will evaluate the hearing requests. The response shall be made available to the public and filed with the chief clerk.

(B) If the application is approved by the executive director under Chapter 50, Subchapter G of this title (relating to Action by the Executive Director), any required response to public comment should be made no later than the time of the executive director's action on the application.

(2) The Office of Public Assistance shall hold a public meeting when there is a significant degree of public interest or when otherwise appropriate to assure adequate public participation. A public meeting is intended for the taking of public comment, and is not a contested case under the APA. The applicant shall attend any such public meeting held by the designated office. When the designated office holds a public meeting it shall respond to public comment either by giving an immediate oral response or by preparing a written response. The response shall be made available to the public.

§55.254. Hearing Request Processing.

(a) The requirements in this section and §55.255 of this title (relating to Commission Action on Hearing Request) apply only to hearing requests that are filed within the time period specified in §55.251(d) of this title (relating to Requests for Contested Case Hearing, Public Comment).

(b) The executive director shall file a statement with the chief clerk indicating that technical review of the application is complete. The executive director will file the statement with the chief clerk either before or after public notice of the application is issued.

(c) After a hearing request is filed and the executive director has filed a statement that technical review of the application is complete, the chief clerk shall process the hearing request by both:

(1) referring the application and hearing request to the alternative dispute resolution director. The alternative dispute resolution director shall try to resolve any dispute between the applicant and the person making the request for hearing; and

(2) scheduling the hearing request for a commission meeting. The chief clerk shall attempt to schedule the request for a commission meeting that will be held approximately 44 days after the later of the following:

(A) the deadline to request a hearing specified in the public notice of the application; or

(B) the date the executive director filed the statement that technical review is complete.

(d) The chief clerk shall mail notice to the applicant, executive director, public interest counsel, and the persons making a timely hearing request at least 35 days before the first meeting at which the commission considers the request. The chief clerk shall explain how the person may submit

public comment to the executive director, describe alternative dispute resolution under commission rules, explain that the agency may hold a public meeting, and explain the requirements of this chapter.

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

(f) The person who filed the hearing request may submit a written reply to a response no later than nine days before the scheduled commission meeting at which the commission will evaluate the hearing request. A reply may also contain additional information responding to the letter by the chief clerk required by subsection (d) of this section. 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.

(g) 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. If a request is filed under this subsection, the commission's scheduled consideration of the hearing request will be canceled. An application may only be sent to SOAH under this subsection if the executive director, the applicant, the public interest counsel and all timely hearing requestors agree on a list of issues and a maximum expected duration of the hearing.

§55.255. Commission Action on Hearing Request.

(a) The determination of the validity of a hearing request is not, in itself, a contested case subject to the APA. The commission will evaluate the hearing request at the scheduled commission meeting, and may:

(1) determine that a hearing request does not meet the requirements of this subchapter, and act on the application;

(2) determine that the hearing request does not meet the requirements of this subchapter, and refer the application to a public meeting to develop public comment before acting on the application;

(3) determine that a hearing request meets the requirements of this subchapter, and direct the chief clerk to refer the application to SOAH for a hearing; or

(4) direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the request meets the requirements of this subchapter. The referral may also direct SOAH to proceed with a hearing on the application if the judge finds that a hearing request meets the requirements of this chapter. If the

commission refers the hearing request to SOAH it shall be processed as a contested case under the APA.

(b) A request for a contested case hearing shall be granted if the request is:

(1) made by the applicant or the executive director;

(2) made by an affected person if the request:

(A) complies with the requirements of §55.251 of this title (relating to Requests for Contested Case Hearing, Public Comment);

(B) is timely filed with the chief clerk; and

(C) is pursuant to a right to hearing authorized by law;

(c) The commission may refer an application to SOAH if there is no hearing request complying with this subchapter, if the commission determines that a hearing would be in the public interest.

(d) A decision on a hearing request is an interlocutory decision on the validity of the request and is not binding on the issue of designation of parties under §80.109 of this title (relating to

Designation of Parties). A person whose hearing request is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's hearing request.

(e) If all hearings request are denied, the procedures contained in §80.272 of this title (relating to Motion for Rehearing) apply. A motion for rehearing in such a case must be filed no earlier than, and no later than 20 days after, the date the person or his attorney of record is notified of the commission's final decision or order on the application. If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable), the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §401.341.

§55.256. Determination of Affected Person

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.

(c) All relevant factors shall be considered, including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.