

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §50.139. The commission adopts the rule *without change* as published in the November 18, 2011, issue of the *Texas Register* (36 TexReg 7764) and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

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

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

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

The change to TWC, §5.115(b) provides that state agencies receiving notice under this particular subsection may comment on, but not contest, the issuance of a permit or license issued by the commission. TWC, §5.115(b) lists the general powers and duties of

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

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

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

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

HB 2694, §10.03: Discovery

HB 2694, §10.03 adds new TWC, §5.315 which provides that in a contested case hearing held by SOAH that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony. Further, this section clarifies that water and sewer ratemaking proceedings are exempt from this requirement.

HB 2694, §10.05(b)

HB 2694, §10.05(b) states that the changes in law made in HB 2694, Article 10 apply to proceedings before SOAH that are pending or filed on or after September 1, 2011. Therefore, the changes in HB 2694, §§10.02 - 10.04 will apply to these contested case hearings.

Rule Amendments

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

HB 2694, §§10.02, 10.04, and 10.05(b) is implemented through amendments to §80.17, Burden of Proof; §80.108, Executive Director Party Status in Permit Hearings; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.131, Interlocutory Appeals and Certified Questions; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meetings.

HB 2694, §10.03 and §10.05(b) are implemented through the amendment to §80.151, Discovery Generally.

Section Discussion

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

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendment to Chapter 50 is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The amendment is procedural in nature and no fiscal impact is expected if the amendment is adopted. Therefore, this rulemaking action does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a

delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the amendment to Chapter 50 is developed to implement HB 2694. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically authorized under the specific sections listed in the Statutory Authority sections listed elsewhere in this preamble.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the amendment and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The amendment is procedural in nature, and therefore promulgation and enforcement of the rulemaking will not burden private real property.

The amendment does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5).

Consistency with the Coastal Management Program

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

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received on the CMP.

Public Comment

The commission held a public hearing on December 12, 2011. The comment period closed on December 19, 2011 for the three chapters that were opened for comment as part of this rulemaking project. The commission received comments from Caddo Lake

Institute (Caddo Lake), Texas Chapter of the Coastal Conservation Association (CCA), General Land Office and School Land Board (GLO/SLB), National Wildlife Federation and the Lone Star Chapter of the Sierra Club (NWF/Sierra), Office of Public Interest Counsel of the Texas Commission on Environmental Quality (OPIC), Texas Chemical Council (TCC), Texas Parks and Wildlife Department (TPWD), Lone Star Chapter of the Solid Waste Association of North America (TxSWANA), Texas Wildlife Association (TWA), and the University of Texas System (UT). TCC supported the proposed changes. TxSWANA supported the proposed changes to §80.151, but suggested adding additional preamble language regarding that rule. Caddo Lake disagreed with the proposed changes to rules regarding the role of a state agency and discovery, and recommended changes to these rules. OPIC generally agreed with the proposed changes to the rules regarding executive director participation as a party, and suggested change to a section not open for comment. However, OPIC did not concur with the proposed changes to rules regarding the role of a state agency and discovery. All other commenters generally disagreed with the proposed rules regarding the role of a state agency and suggested withdrawal of or changes to the proposed rules.

Response to Comments

TCC supports the limitation of a state agency to contest TCEQ permits when that agency is not the permit applicant, stating it is a waste of valuable state resources since TCEQ must make a final determination that the permit application meets all administrative, technical, and regulatory requirements. TCC stated that excessive challenges to permits

through the contested case hearing process significantly delays permit issuance and stymies economic growth and business development in Texas.

The commission appreciates the support. No changes were made in response to this comment.

OPIC commented that its review of case law suggests that the amendment to TWC, §5.115(b) may be unconstitutional, and therefore there may be significant legal risk with the proposed rules. To remedy its concern over the constitutionality of prohibiting state agencies from contesting the issuance of a permit, OPIC recommends that the commission interpret that amended TWC, §5.115(b) does not apply to situations where the state acts as a property owner and would otherwise be deemed an "affected person" under the factors in current commission rules. Additionally, OPIC recommends that the rules be revised to draw a distinction between state agencies acting in their role as property owners, and those acting pursuant to their general authority. Specifically, state agency participation should be restricted only when acting under general authority but not when acting as a property owner.

In support of its concern and suggested language, OPIC discussed case law regarding the legislature's lack of power to restrict the constitutionally-derived rights of the state, state agencies, or its political subdivisions. Further, OPIC stated that Texas Constitution,

Article XVI, §59(a) declares the state's interest in land and water "public rights and duties" and, therefore, stated that it can be argued that §59 creates a constitutionally protected property right for the state. According to OPIC's interpretation of the Constitution and case law, the limitation on a state agency's participation in contested case hearings in the statute may interfere with the state's property rights to such a degree as to present a constitutional problem.

The commission acknowledges this comment. The commission presumes the statute is constitutional because, according to the Code Construction Act, Texas Government Code, §311.021, it is presumed that when the legislature enacts a statute it intends that the statute complies with the Texas constitution. A statute is presumed constitutional unless declared unconstitutional by a court of competent jurisdiction and that decision becomes final. OPIC is recommending an interpretation that is not supported by the language of the statute. To distinguish whether an agency is acting pursuant to general authority or as property owner would be difficult to implement and would require significant interpretation. There is nothing in the statutory language or the legislative intent to support such an approach. These rules do not impact the constitutionally derived rights of state agencies. There are no procedural due process rights with regard to permits, and there is no right to a specific process, particularly to a

contested case hearing. Further, while the authority cited for commenters' assertions are set forth in the Texas Constitution, such as Texas Constitution, Article XVI, §59a and Article XIV, §1, these sections do not create a right to a special process for the agencies. In fact, no such special provision is made in statute either. "Unless the rights or duties of the agency are expressly provided in the constitution or by statute, case law provides that agencies do not have rights accorded to individuals such as due process or equal protection. Municipal corporations and other government subdivisions derive their existence and powers from legislative enactments and are subject to legislative control and supremacy. Consequently, they cannot use the sword of the due-process-of-law and other provisions of Article I to invalidate the laws that govern them" (See *McGregor v. Clawson*, 506 S.W.2d 922, 929 (Tex. Civ. App. - Waco 1974, no writ); *Boyett v. Calvert*, 467 S.W.2d 205, 210 (Tex. Civ. App. - Austin 1971, writ ref'd, n.r.e.)). No changes were made in response to the comments.

GLO/SLB commented that because the statutory language of TWC, §5.115(b) is ambiguous in a way that could jeopardize the ability of the state's executive agencies to perform their legal duties and property stewardship, the commission is urged to obtain an opinion from the Texas Attorney General before the final adoption of the rules implementing this statute.

The commission acknowledges the comment. The commission has determined that the statute is not ambiguous, and is proposing adoption of these rules based on its interpretation of the statute. The purpose of an Attorney General Opinion is to obtain clarity on the meaning of the law. The commission is provided the authority to interpret the statutes under its jurisdiction, and has determined the statute is not ambiguous; therefore, it has determined it is not necessary to request an opinion. No changes were made in response to this comment.

Caddo Lake opposes the rules, stating that they go well beyond what is required under the bill with regard to the extending the rules to water rights, the scope of the possible interpretation of what constitutes a state agency, and the failure to provide reasonable alternatives for needed input from state agencies. Based on this, the commission should withdraw the proposed rules and begin a new process, working with state agencies to develop a new proposal. NWF/Sierra commented that the commission should not pursue rulemaking to implement TWC, §5.115(b), and should not do so at the time without further meetings and discussions to explore the implications of doing so.

NWF/Sierra commented that the limitations on state agency participation in these rules are inconsistent with existing law and exceed the scope of the amended TWC, §5.115(b), and the commission should either not pursue rulemaking on this statutory change or

should only adopt rules that reference the specific statutory language used by the legislature. UT stated that the rule package as drafted goes far beyond the revisions needed to implement the statutory change and does not adequately address ambiguities created by the legislature. CCA requested that the commission withdraw the proposed changes to §55.103 and §80.109, as well as any other rules which reference those sections because they are not authorized by statute.

OPIC commented that the rules improperly limit the participation of state agencies with specific statutory authority to participate in contested case hearings on water rights applications. OPIC cited to the Code Construction Act which provides that unless the general, later enacted statute demonstrates a manifest intent to repeal other conflicting sections of the code, the specific provision will act as an exception to the general rule.

GLO/SLB commented that the commission has gone beyond the proper interpretation of amended TWC, §5.115(b) by proposing an unnecessarily broad reading of the limitation on state agencies. The rules appear to exclude every state agency (other than river authorities) from participating in a contested case hearing, even if the issuance of an air, water, or waste disposal permit would have direct effects on real property interests of the State of Texas represented by such agencies. Similarly, TWA commented that the rules overstep the authority provided under HB 2694 by excluding state agencies, even if those agencies are the owners of property affected by the permits, or

agencies with specific jurisdiction over matters impacted by permits, including those agencies with specific statutory authority regarding water rights applications.

The commission disagrees that the rules go beyond the changes to TWC, §5.115(b) and therefore declines to withdraw the proposed rules that implement the statute. State agencies are given wide latitude to interpret the statutes in their jurisdiction, therefore, the commission determined that it would be appropriate to carry out its interpretation of TWC, §5.115(b) via rulemaking. As discussed elsewhere in this preamble, the commission's interpretation is supported by application of the Code Construction Act, Texas Government Code, Chapter 311 to the statutes under its jurisdiction. No changes were made in response to these comments.

TPWD recommended that the commission not adopt the proposed amendments to §§50.139, 55.103, 55.201(e) and (h), 55.203(b), 55.256(b) and 80.109(b)(5) - (7) because HB 2694 does not include a requirement to adopt rules to implement the changes to §5.115(b). In addition, these rule changes are not necessary because the commission can consider state agency participation on a case by case basis, which would allow for the development of an administrative record for potential appeal by the protesting state agency.

The commission respectfully disagrees with this comment, and no changes have been made to the rules. The commission determined that it would be appropriate to document its interpretation of TWC, §5.115(b) via rulemaking. TWC, §5.115(b) does not provide a mechanism for the commission to consider state agency participation on a case by case basis; the statute unambiguously states that state agencies may not contest the issuance of a permit or license. It would be contrary to the plain meaning of the statute if the commission was to evaluate state agency participation on a case by case basis, and, therefore, no evaluation criteria were included in the proposed rules. Additionally, the administrative record on appeal includes the executive director's response to comments, so any concerns raised by a state agency in comments to TCEQ are documented.

Caddo Lake commented that these rules, taken together, have been drawn as blanket prohibitions on state agencies to take steps they believe are needed to protect their interests and responsibilities. The rights of state agencies as property owners and the duties of state agencies to protect state resources are clear under the Texas Constitution and other Texas laws. Any effort to limit these rights and responsibilities should be read narrowly to protect the state's interests. In some cases, the implementation of HB 2694

is being proposed in a fashion that creates direct conflicts with other state laws, instead of seeking ways to implement the goals of the different laws.

TPWD commented that the changes to TWC, §5.115(b), must be construed in a manner consistent with the Code Construction Act, which presumes that the legislature intends that the entire statute is to be effective, intends a just and reasonable result, and intends the public interest is favored over any private interests, and this is also true even if TWC, §5.115(b) applies to water right applications. The Code Construction Act also provides that words and phrases shall be read in context and construed according to the rules of grammar and common usage, and that courts should read the statute as a whole and interprets it in order to give effect to every part. No sentence, clause, or word should be rendered superfluous, and interpreting should aim to harmonize conflicting provisions. There is no manifest intent that the general provision prevail over the specific, and that HB2694 does not express any intent to address, change, or repeal TWC, §11.132 and §11.147 or Texas Parks and Wildlife Code, §12.0011(b) and §12.024(c), and both provide independent authority for TPWD to be a party to water right applications and to present evidence to the TCEQ. These statutes remain in effect and TCEQ should not repeal these by implication. If statutes can be harmonized, and effect given to each when so considered, there is no repeal by implication. These specific statutes control over the general TWC, §5.115(b).

CCA opposes the amendments to §55.103 and §80.109. The rules effectively amend TWC, §5.115(a) to exclude state agencies from the definition of affected persons, although HB 2694 did not change subsection (a). CCA and NWF/Sierra commented that the new text in TWC, §5.115(b) does not say that a state agency may not request or participate in a contested case hearing, or provide evidence on permit terms that would protect state resources. Rather, it only states that an agency "may not contest the issuance of a permit," which is that it may not argue that the commission should not issue a permit on any terms or seek to overturn a commission-approved permit. CCA commented that this interpretation is consistent with other relevant statutes because statutes should be construed to harmonize with other relevant laws, if possible. NWF/Sierra commented that the rules create unnecessary conflicts with existing statutes.

CCA states that the proposed rules effectively repeal TWC, §11.147(f) and Texas Parks and Wildlife Code, §12.024(c), and amend TWC, §5.115(a). CCA commented that these sections have not been repealed or amended and cited case law for its comment that repeal or amendment of statutes by implication is disfavored, and that unless an older statute is explicitly repealed or amended by a new law, the old law and the new law should be harmonized, if possible. CCA states that, in this case, there is an interpretation that harmonizes the old and new statutes. NWF/Sierra commented that the rules unnecessarily create a direct conflict with TWC, §11.147(f) and Texas Parks and Wildlife

Code, §12.024(c), and cannot co-exist with those statutes which provide that TPWD and Texas Water Development Board (TWDB) are, when so requested, full parties in hearings regarding water rights applications. The result is that if these agencies are denied full party status, then those statutes would be rendered meaningless.

NWF/Sierra also stated that a harmonized interpretation is necessary in order to be consistent with the commission's existing rules for notice of water rights permits and amendment applications.

NWF/Sierra concluded that TCEQ has put itself in the untenable position of implying the repeal of various existing statutes and implying authority to limit the actions of sister state agencies, including actions that those agencies have been legislatively directed to perform. NWF/Sierra commented that the commission should not infer a grant of rulemaking authority from the legislature that would place TCEQ in the position of deciding that statutes expressly granting participation rights to other state agencies have been implicitly repealed. NWF/Sierra states that actual statutory language used by the legislature controls in interpreting legislation, and, in this instance, in determining what permits or licenses the limitation applies to and the nature of that limitation.

No change has been made in the rules in response to these comments. The commission has determined that the amended TWC, §5.115(b) is clear and unambiguous, and therefore state agencies, other than river authorities,

are prohibited from contesting the issuance of a permit or license. This is implemented by adopting rules that do not allow any participation by these agencies in requesting a hearing; participating as a party as an affected person or statutory party; or filing a motion to overturn, request for reconsideration, or motion for rehearing regarding any permit or license by the TCEQ. Any difference in opinion regarding a term or condition in a draft permit is considered to be contesting the issuance of that permit. Because the draft permit is prepared by the commission staff and generally agreed upon by applicants prior to notice, state agencies who are applicants can be parties to any contested cases regarding those applications.

The amendment to TWC, §5.115(b) provide that a state agency that receives notice under this subsection may submit comments to the commission in response to this notice. Notably the legislature did not provide the commission with any statutory text that suggests criteria should be established for when state agencies could be a party, other than as a commenter. Therefore, if the commission allowed state agencies to be parties to contest some applications, then this portion of the amendment would be rendered meaningless.

To determine whether the legislature intended for state agencies to not be able to appeal, every word, phrase, and expression must be read as if it were deliberately chosen. The first part of the language says that state agencies may submit comments but may not contest. If they could also participate in a contested case hearing, the legislature would have said that since they enumerated the ways in which state agencies could participate in the process. If they intended the phrase "may not contest" to mean only that they "may not appeal," they would have said so and would not have needed to state that state agencies may submit comments.

In addition to the plain language analysis, the commission also considered other provisions of the Code Construction Act. The rules of statutory construction provide that when the plain language of a statute does not clearly convey the legislature's intent, additional construction aids may be relied upon, such as the objective of the law, the legislative history, the consequences of a particular construction, the administrative construction of the statute, and its caption or preamble (See Tex. Gov't Code Ann. §311.023 (West 2005); Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 867 - 68 (Tex.2009)). The prohibition on state agencies contesting the issuance of a permit or license was originally proposed in HB 3037, 82nd Legislature, (2011); however, HB 3037 did not include the

exclusion for river authorities that is found in the language adopted in HB 2694. Because the legislature considered the provision prohibiting all state agencies from contesting the issuance of a permit or license, but then rejected that in favor of adding the sole exclusion of river authorities, it is clear that the legislature intended the term "state agency" to include all agencies other than river authorities.

Moreover, the commission finds that the objective of the amended TWC, §5.115(b) is to limit the participation of state agencies in contested case hearings in order to promote judicious use of state resources. This legislation was enacted during a year in which all state agencies were facing budget cuts. The testimony from the floor debate makes it clear that the legislature was against state agencies using limited state resources to oppose each other. See House Journal, 82nd, at 2037 (April 20, 2011). Additionally, a bill analysis for HB 3037 in which the changes to contested case hearings originally resided, before it was merged into HB 2694, provides "*w*hen a contested case is referred to the SOAH by TCEQ at the end of a *lengthy and inclusive public participation process*, an administrative law judge presides over the hearing and considers evidence in the form of sworn witness testimony and documents presented as exhibits. Interested parties note that legislation is needed to facilitate the

permitting process *to prevent a waste of state resources* by modifying the contested case process for environmental permitting." (See Committee Substitute House Bill 3037 (emphasis added)).

In addition, the history of the statutes provides additional support for the commission's interpretation of the applicability of TWC, §5.115. The TWC was enacted by House Bill 343 in 1971. TWC, Chapter 5, entitled Water Rights, set forth the policies and procedures for the operation of what was then the Texas Water Rights Commission. TWC, §5.131 from that enactment, entitled Notice of Hearing, provided "*i*f accepted for filing by the commission, if required by law, the commission shall set a hearing date and issue appropriate notice." Chapter 11 was also enacted by HB 343 but it pertained at that time to the TWDB.

In 1977, the TWC was amended by Senate Bill (SB) 1139, which was known as the Water Reorganization Act. The Act created the Department of Water Resources which assumed the rights and duties of the Texas Water Rights Commission (among other major water agency reorganizations). New TWC, Chapter 5 retained the general provisions for the newly created agency and the text set forth above concerning notice was relocated to TWC, §5.179(b). Under SB 1139, the TWDB provisions were moved to TWC, Chapter 5. The

specific detailed provisions for water rights were relocated to TWC, Chapter 11. New TWC, §11.132, entitled "Notice of Hearing," prescribed specific elements to be contained in a notice for a water rights matter.

In 1985, the legislature enacted SB 249 which contained new TWC, §5.114 and §5.115. Those sections amended and replaced TWC, §5.179. TWC, §5.115 was entitled "Notice of Application." In addition to the notice of application provision, SB 249 also enacted many other provisions under TWC, Chapter 5, Subchapter D which are clearly and necessarily applicable to all applications filed with the agency: application filing instructions in TWC, §5.114 and §5.116 concerning hearings, TWC, §5.119 which requires the commission to be knowledgeable concerning the use, storage, conservation of water, and TWC, §5.120 which requires the commission to administer the law so as to promote the judicious use of water. Just as the legislature created the former Texas Water Commission, now TCEQ, to serve as the "umbrella agency" for environmental permitting matters, (Bill Analysis, Committee Substitute House Bill 2694), TWC, Chapter 5 serves as the umbrella chapter for laws affecting the entirety of the agency's programs. Amending TWC, Chapter 5 with the intent to apply to all of the agency's permitting programs is an efficient and effective way to implement a comprehensive change.

The wording of the statute is clear in that it limits participation by all state agencies, except river authorities. The legislature considered whether any entities should be exempted from this limitation when it excluded river authorities. If the legislature had wanted to exclude additional entities such as the TPWD or TWDB, or institutions of higher education, it would have done so. The commission finds that its rules provide a reasonable construction of the statute that is consistent with the legislature's intent. "We should read every word, phrase, and expression in a statute as if it were deliberately chosen, and presume the words excluded from the statute are done so purposefully." (See *Gables Realty Ltd. P'ship v. Travis Cent. Appraisal Dist.*, 81 S.W.3d 869, 873 (Tex. App. - Austin 2002, pet. denied); *City of Austin v. Quick*, 930 S.W.2d 678, 687 (Tex. App. - Austin 1996) (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981)), *aff'd*, 7 S.W.3d 109 (Tex. 1999); See also 2A Norman J. Singer, *Sutherland Statutory Construction* §47.25 (6th ed. 2000) (stating that there is generally an inference that omissions from a statute are intentional)). It is presumed that the legislature was aware of the background law and acted with reference to it (See *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex.1990)). In ascertaining the scope of an agency's authority, we give great weight to the contemporaneous construction of a statute by the administrative agency charged with its enforcement (See *Tarrant Appraisal*

Dist. v. Moore, 845 S.W.2d 820, 823 (Tex. 1993)). If the meaning of a statute is doubtful or ambiguous, we will give serious consideration to the construction given it by the governmental body charged with its enforcement or administration (See City of Austin v. Hyde Park Baptist Church, 152 S.W.3d 162, 166 (Tex. App.-Austin 2004, no pet.)).

If TPWD has been the primary agency that has contested permit applications, then there is no purpose for the legislature to prohibit other agencies from participation but allow participation by the primary one that has contested permit applications. Construction of a statute must be consistent with its underlying purpose and the policies it promotes (See Northwestern Nat. County Mut. Ins. Co. v. Rodriguez (App. 4 Dist. 2000) 18 S.W.3d 718, review denied).

Caddo Lake commented that the commission misinterpreted the changes to TWC, §5.115 by applying them to water rights applications. That is because those applications are subject to notice under TWC, §11.132, and because no notice of administrative completeness of an application is provided for water right applications under TWC, §5.115. Caddo Lake recommended that the rules should be re-opened to make it clear that TWC, §5.115 does not apply to water rights decisions made under TWC, Chapter 11.

OPIC commented that commission rules make clear that notices of water rights applications are not issued under TWC, §5.115(b), but instead pursuant to TWC, §11.132, citing the commission's most recent changes to its water rights notice rules in 2009.

OPIC specifically noted that TWC, §5.115(b) was not included as part of the statutory authority in that rulemaking, and therefore linking notice of water rights applications to TWC, §5.115(b), the proposed rules creates a significant inconsistency in the commission's rules. OPIC's position is that there is no manifest intent to repeal TWC, §11.147(f) or Texas Parks and Wildlife Code, §12.024(c) in the amended TWC, §5.115 or its legislative history. OPIC concluded that the limitation on state agency participation in hearings does not apply to water rights applications based on its application of the Code Construction Act. The discussion recorded on the House floor between Representatives Anchia and Chisum, which appears to include water rights, is insufficient to provide a manifest intent to repeal by implication when the plain language of the statute demonstrates a different result. OPIC recommends that the commission eliminate the applicability to water rights applications.

NWF/Sierra commented that the limitation on state agency participation would apply to permits or licenses for which notice is controlled by TWC, §5.115(b), those for which notices are issued at the time of determination of administrative completeness.

Accordingly, the limitation does not apply to water rights permitting matters, for which notice is not controlled by TWC, §5.115(b). The notice for water rights permits and

amendments is controlled by TWC, §11.132, and issued only at the time of technical completeness. The agency determination predates HB 2694, and therefore if the legislature intended to apply the limitation to participation by state agencies in water rights matters, it could have included a reference to TWC, §11.132 in the bill. However, the legislature expressly limited the restriction to notice provided pursuant to TWC, §5.115(b).

TPWD commented that the commission's interpretation of TWC, §5.115(b) is inconsistent with settled statutory construction law. This statute only applies to notice issued under this subsection, and not to notice issued pursuant to other statutes. TPWD acknowledges the legislature's limitation on state agencies, but the limitation is narrow in scope. Specifically, the statute does not apply to state agency participation in water right application proceedings. This is because notice of these is under TWC, §11.132, as implemented in §295.151. When the commission amended this rule in 2009, TWC, §5.115(b) was not included in the "Statutory Authority" section of the preamble. Further, no notice of administrative completeness of an application is provided for water right applications, and TWC, §5.115(b) concerns only those applications noticed for administrative completeness. Therefore, TWC, §5.115(b) does not apply and the commission should revise the proposed rules to clearly exempt these applications from the implementation of TWC, §5.115(b).

NWF/Sierra commented that the commission is proposing to interpret TWC, §5.115(b) two different ways at the same time. The proposed rules interpret it as controlling notice of applications for new or amended water rights, and also interpreted as not controlling for applications for new or amended water rights in §295.151. This inconsistent interpretation is, on its face, arbitrary and capricious. Further, the commission has already determined that notice of these applications would be given at time of technical completeness pursuant to TWC, §11.132, rather than at time of administrative completeness pursuant to TWC, §5.115(b). Therefore, the rules implementing should be revised to make them inapplicable to water rights permitting matters. NWF/Sierra recommends that if the commission adopts any rules, those rules should not apply to water rights matters noticed under TWC, §11.132, and should only address restrictions on the ability of state agencies to contest the actual issuance of permits or licenses to which the rules apply.

TPWD commented that it disagrees with TCEQ's interpretation that TWC, §5.115(b) applies to water right applications and that it acts as a complete bar to state agency participation in contested cases. TPWD also stated that no rules are necessary to implement this statutory change, or, in the alternative, that simplified rules implementing a narrow interpretation of TWC, §5.115(b) can be adopted. This is because the proposed rules improperly expand the application of this subsection.

TWC, §5.115(b) provides "at the time an application for a permit or license under this code is filed with the executive director and is administratively complete, the commission shall give notice of the application." There is no limitation on the types of programs that are subject to that provision. The statement added by HB 2694 that begins "a state agency that receives notice under this subsection" refers to that same notice of application. The clause "under this subsection" is not intended to create a subset of notices that are sent "under this code," but rather to simply reference the notice that is the subject of the first sentence of TWC, §5.115(b). The scope of TWC, §5.115(b) as amended by HB 2694 is unchanged and still covers all notices of application sent under the code, including water rights.

Excluding water rights permitting matters from the rules on the basis that there exists a separate detailed statute regarding notice of application, could lead to exclusion of all other major permit programs at the agency on the same basis. Detailed notice requirements exist for water quality, waste permitting, and underground injection control permits in TWC, §5.552.

Similarly, air permitting applications are subject to TWC, §382.056.

Additionally, TWC, §401.114 provides notice requirements for radioactive material licenses. As discussed elsewhere herein, all applications are subject to TWC, Chapter 5 and in particular, TWC, §5.115. To find otherwise

would result in an interpretation that there are no applications subject to the statute. "We also should not adopt a construction that would render a law or provision absurd or meaningless." (See *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex.1987); *Mueller v. Beamalloy*, 994 S.W.2d 855, 860 (Tex. App. - Houston {1st Dist.} 1999, no pet.)) Further, as discussed elsewhere in this preamble, the history of the statute shows that the legislature intended this to apply to the permitting programs of the commission.

The Texas Administrative Procedure and Practice Act (APA), Texas Government Code, Chapter 2001 provides that the notice of a proposed rule must include a statement of the statutory authority under which the rule is proposed to be adopted and include a concise explanation of the particular statutory provision under which the rule is proposed. Texas Government Code, §2001.024. In 2009, the commission conducted rulemaking to change commission notice practice by delaying issuance of the notice until after the declaration of technical completion of an application in order to enhance public participation, which included the statutory authority for the rulemaking (See 34 TexReg 4834, 4836-37 (July 24, 2009). The fact that the commission did not cite to TWC, §5.115 in that rulemaking does not negate the applicability of TWC, §5.115 to water rights permitting matters. The

2009 rulemaking was undertaken because the general public benefits from a notice of technical completeness, which occurs after a draft permit has been prepared. This in no way diminishes notice of administrative completeness, in fact, the notice of technical completeness includes the date on which the application was declared administratively complete.

As set forth elsewhere in this preamble, TWC, §5.115 applies to all commission permit applications, including water rights. Because the statutory authority and obligation existed prior to the commission rulemaking in 2009, absent a legislative change, it still exists after such rulemaking. Additional support that TWC, §5.115 applies to water rights applications is the fact that the 2009 rulemaking incorporated the "affected person" definition from Chapter 55 rules, and the statutory basis for the definition resides in TWC, §5.115.

TPWD commented that the commission did not propose any definition of "contest the issuance;" common usage and plain language supports an interpretation that a state agency cannot request the TCEQ to forgo issuance, i.e., request denial, of a permit, and therefore all other rights of a state agency as an affected person are preserved, including the right to participate in a contested case hearing to offer relevant evidence and

argument related to the subject permit, two things that the legislature chose not to include in HB 2694.

OPIC and UT commented that the proposal expands the limitation on state agency participation beyond the scope by improperly applying TWC, §5.115(b) to motions to overturn and requests for reconsideration, since neither procedural mechanism necessarily contests the issuance of a permit, as well as motions for rehearing. These mechanisms may be used to request additional conditions on a permit prior to issuance and are also required steps for preserving a right to judicial review under the exhaustion of administrative remedies doctrine and commission rules. Further, the discussion on the House floor between Representatives Anchia and Chisum refers to state agencies "going to court," not intra-agency review procedures. NWF/Sierra recommends that the rules should not be applied to the ability to file a motion for rehearing or a motion to overturn. UT also commented that the commission should encourage any person, including a state agency, to bring matters to its attention so that it can correct staff errors, and motions to overturn are often the way that public comments are brought to the attention of the commission if the commenter believes the executive director has failed to adequately consider those comments. GLO/SLB suggested language be added to §50.139 that would allow the GLO and the SLB to file a motion to overturn.

TPWD commented that although the statutory construction of the amendment must be based on the actual words of TWC, §5.115(b), the discussion on the House floor between Representatives Anchia and Chisum can also be harmonized with the statute in several ways. Their discussion of state agencies "going to court against one another" could be intended to refer to district and appellate court litigation, not participation in administrative actions. Alternatively, if this intended to mean agencies that are in hearing "*against* one another" then the exchange can be harmonized with the text "may not contest the issuance of a permit or license." A state agency may be a party without contesting the issuance of permit, such as to ensure that the resources under the agency's jurisdiction are protected through the contested case process. Further, an agency cannot be "involved" in a permit that is contested without the right to be admitted as a party to the contested case hearing.

TPWD commented that the statute only applies to contesting the issuance of a permit, but does not prohibit an agency from seeking additional or different conditions in a permit. The commission's proposed changes to rules in Chapters 50, 55, and 80 go beyond the plain language "issuance of a permit or license," resulting in unnecessarily and unreasonably restricting state agency participation in permit proceedings.

No change has been made in the rules in response to these comments. The commission has determined that the amended TWC, §5.115(b) is clear and

unambiguous, and therefore state agencies, other than river authorities, are prohibited from contesting the issuance of a permit or license. This is implemented by adopting rules that do not allow any participation by these agencies in requesting a hearing; participating as a party as an affected person or statutory party; or filing a motion to overturn, request for reconsideration, or motion for rehearing regarding any permit or license by the TCEQ. Any difference in opinion regarding a term or condition in a draft permit is considered to be contesting the issuance of that permit. The draft permit is prepared based on the agency staff's technical review and any comments received up until that point in the process. Because the draft permit is prepared by the commission staff and generally agreed upon by applicants prior to notice, state agencies who are applicants can be parties to any contested cases regarding those applications. Comments can also be submitted in response to the notice of technical completeness and draft permit.

The amendment to TWC, §5.115(b) provide that a state agency that receives notice under this subsection may submit comments to the commission in response to this notice. Notably the legislature did not provide the commission with any statutory text that suggests criteria should be established for when state agencies could be a party, rather than only a

commenter. Therefore, if the commission allowed state agencies to be parties to contest some applications, then this portion of the amendment would be rendered meaningless.

To determine whether the legislature intended for state agencies to not be able to appeal, every word, phrase and expression must be read as if it were deliberately chosen. The first part of the language says that state agencies may submit comments but may not contest. If they could also participate in a contested case hearing, the legislature would have said that since they enumerated the ways in which state agencies could participate in the process. If they intended the phrase "may not contest" to mean only that they "may not appeal," they would have said so and would not have needed to state that state agencies may submit comments.

COMMENTS: GLO/SLB commented that the commission's overly broad interpretation of the term "state agency" should in no way affect the ability of the GLO or the SLB to contest the issuance of a TCEQ permit or license because these two particular agencies are not state agencies that receive notice under TWC, §5.115(b). Rather, these agencies receive notice under TWC, §5.115(c), and subsections (d) - (g) provide further detailed notice requirements for notice to GLO and SLB. The proposed rules do not consider

these other subsections which were unchanged by HB 2694 or any other act of the 82nd Legislature, 2011, and the commission may not adopt rules that nullify pre-existing law without a clear indication of that intent from the legislature. OPIC commented that amended TWC, §5.115(b) does not govern notice of applications that will affect permanent school fund lands. Rather, that notice is governed by TWC, §5.115(c), and the proposal should be revised to eliminate the application of TWC, §5.115(b) to agencies that own or manage permanent school fund land.

When TWC, §5.115(c) was added in 1993 by SB 964, it was intended to enhance the existing notice in TWC, §5.115(b) and to ensure its delivery to the appropriate person at the GLO. Two statements in TWC, §5.115 underscore this point. First, subsection (f) adds two elements to the list of notice elements already set forth in subsection (e) which are required elements for all TWC, §5.115 notices. Accordingly, a notice for an application affecting permanent school fund land must contain the five items in subsection (e) which are required for all notices and the two additional items in subsection (f) which pertain specifically to SLB notices. Additionally, subsection (g) provides that a formal action or ruling "made without the notice required by this section is voidable by the School Land Board." These two statements demonstrate that the drafters viewed the

various provisions concerning notice throughout the entire TWC, §5.115 as pertaining to the same instrument.

Caddo Lake commented that "state agency" is not defined in HB 2694 or anywhere else in the TWC, nor any case law, that could be relied upon for these rules. Caddo Lake cited to the definitions in the APA and the Public Information Act, Chapters 2001 and 552, respectively, of the Texas Government Code. Caddo Lake recommended that the rules should be re-opened to include a definition, stating a preference as the definition in the APA. GLO/SLB commented that without a specific definition of "state agency," the meaning of the term in the statute is ambiguous. GLO/SLB also stated that the commission's failure to define the term potentially thwarts the proprietary rights and legal duties imposed on certain state agencies by forbidding their participation in the contest of a commission permit or license. GLO/SLB suggested a specific definition be added to §55.103, and that the GLO and the SLB be excluded in §50.139, just as that rule provides an exception for river authorities.

GLO/SLB commented that the categorical exclusion of each and every entity that can be called a "state agency" from contesting a permit or licensing application is overkill. The commission should use the Texas Government Code, §311.023, in the Code Construction Act, to interpret TWC, §5.115(b) and conclude that the statute is ambiguous on its face. GLO/SLB suggested a more specific and crafted definition of "state agency" should be

provided in the rules.

OPIC recommended that the executive director comprehensively evaluate what agencies are covered by the rule and provide a specific definition of "state agency." NWF/Sierra commented that the scope of the term "state agency" is far from clear, and nothing in the proposed rules provides any guidance on the universe of state agencies that would be subject to the proposed rules. The proposed rules create conflict with TWC, §6.189, which deals with TWDB. Finally, NWF/Sierra also stated that the proposed rules fail to provide reasonable notice to the entities potentially affected by the proposed amendment to §80.109.

No change has been made in the rules in response to these comments. The commission declines to define "'state agency" to exclude institutions of higher education or any other state agency, because the legislature excluded only river authorities when it enacted the statute. Although the commission has determined that the meaning is clear, the rules of statutory construction provide that when the plain language of a statute does not clearly convey the legislature's intent, additional construction aids may be relied upon, such as the objective of the law, the legislative history, the consequences of a particular construction, the administrative construction of the statute, and its caption or preamble (See Tex. Gov't Code Ann. §311.023 (West 2005); *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290

S.W.3d 863, 867-68 (Tex.2009)). The prohibition on state agencies contesting the issuance of a permit or license was originally proposed in HB 3037, 82nd Legislature, 2011; however, HB 3037 did not include the exclusion for river authorities that is found in the language adopted in HB 2694. Because the legislature considered the provision prohibiting all state agencies from contesting the issuance of a permit or license, but then rejected that in favor of adding the sole exclusion of river authorities, it is clear that the legislature intended the term "state agency" to include all agencies other than river authorities.

Moreover, the commission finds that the objective of the amended TWC, §5.115(b) is to limit the participation of state agencies in contested case hearings in order to promote judicious use of state resources. This legislation was enacted during a year in which all state agencies were facing budget cuts. The testimony from the floor debate makes it clear that the legislature was against state agencies using limited state resources to oppose each other. See House Journal, 82nd Legislature, 2011, at 2037 (April 20, 2011). Additionally, a bill analysis from HB 3037, the bill in which the changes to contested case hearings originally resided, before it was merged into HB 2694, provides "{w}hen a contested case is referred to the SOAH by TCEQ at the end of a *lengthy and inclusive public participation*

process, an administrative law judge presides over the hearing and considers evidence in the form of sworn witness testimony and documents presented as exhibits. Interested parties note that legislation is needed to facilitate the permitting process to prevent a waste of state resources by modifying the contested case process for environmental permitting." (See Committee Substitute House Bill 3037 (emphasis added)).

UT commented that the term "state agency" is undefined in TWC, §5.115 and does not explicitly include "institutions of higher education." UT requested the commission clarify that institutions of higher education are not included in the definition of "state agency" for the purposes of amended TWC, §5.115(b), and delete unnecessary restrictions on the ability of governmental entities to participate in commission decision making. UT supports this comment by stating that had the legislature intended to include institutions of higher education, the statute would have so provided, citing an Attorney General Opinion which states that the term "state agency" by common usage does not include an institution of higher education. UT commented that if the commission concludes that the intent of the language added to TWC, §5.115(b) was added to prevent a state agency from requesting a contested case proceeding, then UT suggested that this interpretation can be accomplished by adding text to §55.201(b)(4) that states that the term "state agency" does not include an institution of higher education.

No change in the rules was made in response to this comment. The commission finds that the legislature intended to include institutions of higher education. Of the 110 or so statutory definitions identified by TCEQ, many contain the phrase "institutions of higher education," for two different purposes, to expressly include it and to expressly exclude it. Numerous other entity types appearing in the various statutory definitions of state agency received similar treatment, in many cases an entity was specifically mentioned in order to expressly include it and in many cases an entity was named in order to exclude it from the definition. This supports the conclusion that if the legislature had intended to exclude institutions of higher education, it would have expressly done so. "We should read every word, phrase, and expression in a statute as if it were deliberately chosen, and presume the words excluded from the statute are done so purposefully." (See *Gables Realty Ltd. P'ship v. Travis Cent. Appraisal Dist.*, 81 S.W.3d 869, 873 (Tex. App. - Austin 2002, pet. denied); *City of Austin v. Quick*, 930 S.W.2d 678, 687 (Tex. App. - Austin 1996) (citing *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981)), *aff'd*, 7 S.W.3d 109 (Tex. 1999); See also 2A Norman J. Singer, *Sutherland Statutory Construction* §47.25 (6th ed. 2000) (stating that there is generally an inference that omissions from a statute are intentional)).

COMMENT: GLO/SLB commented that the commission's proposed rules result in needless ambiguity by not acknowledging the specific rights of notice to the SLB and the GLO when actions may affect the permanent school fund lands. GLO/SLB and UT stated that the total ban on participation nullifies provisions of the Texas Constitution and other state laws that specifically require certain state agencies to own and manage real property of the state and to protect the natural resources of the state. Given the significant adverse effects that a commission permit or license decision could have on state-owned property and natural resources, a state agency with a proprietary interest or protective duty should have the ability to object in a contested case hearing in the same manner as a private landowner or trustee.

No changes were made in response to this comment. GLO/SLB's comments cite to the Texas Constitution and the Texas Parks and Wildlife Code as examples of law that require certain state agencies to own and manage real property. With regard to Texas Constitution, Article XIV, §1, this section provides for the creation of the "General Land Office in the State, which shall be at the seat of government, where all land titles which have emanated or may hereafter emanate from the State shall be registered, except those titles the registration of which may be prohibited by this Constitution. It shall be the duty of the Legislature at the earliest practicable time to make the Land Office self sustaining, and from time to

time the Legislature may establish such subordinate offices as may be deemed necessary." The commission does not agree that this provision prevails over the specific contested case hearing participation limitations added to TWC, §5.115(b) because there is no reference to any duty to protect state lands or natural resources in Article 14, §1. And, even if the constitution included a reference to such a duty, there is no right to a specific process including the right to be a party in a contested case hearing.

In fact, no such special provision is made in statute either. "Unless the rights or duties of the agency are expressly provided in the constitution or by statute, case law provides that agencies do not have rights accorded to individuals such as due process or equal protection. Municipal corporations and other government subdivisions derive their existence and powers from legislative enactments and are subject to legislative control and supremacy. Consequently, they cannot use the sword of the due-process-of-law and other provisions of Article I to invalidate the laws that govern them." (See *McGregor v. Clawson*, 506 S.W.2d 922, 929 (Tex. Civ. App. - Waco 1974, no writ); *Boyett v. Calvert*, 467 S.W.2d 205, 210 (Tex. Civ. App. - Austin 1971, writ ref'd n.r.e.)).

Texas Parks and Wildlife Code, §11.071, provides TPWD with the authority

to protect the surface estate of department lands (including state parks, wildlife management areas, and natural areas) or to protect human health or property by regulating the use of these department lands for oil, gas, and other mineral recovery and associated activities. This section does not authorize TPWD to protect the lands from activities that are not on TPWD land.

TPWD commented that the proposed rules that implement TWC, §5.115(b) could have a significant impact on the ability of TPWD to carry out its statutory obligations. The proposed rules disenfranchise TPWD as a property owner by eliminating its right to protect its public property from potential harm.

The commission respectfully disagrees, and no changes have been made to the rules in response to this comment. TPWD must raise its concerns to TCEQ in a detailed manner so that the TCEQ can fully comprehend and be aware of the importance of the issues before it acts. HB 3391, §7, the TPWD's Sunset Bill (81st Legislature, 2009) amended Texas Parks and Wildlife Code, §12.0011 by adding new subsections (c) and (d). Those subsections require agencies with statewide jurisdiction, including TCEQ, to provide a written response to TPWD's written comments that consist of recommendations and informational comments. The statute provides that

TCEQ's responses should address modifications or other actions taken in response to TPWD's comments, or provide TCEQ's rationale for disagreeing with the recommendations or comments. The statute further provides that TCEQ must provide a written response within 90 days of an action or decision of TCEQ. In response to this statutory change, TCEQ and TPWD agreed, as memorialized in a letter dated December 12, 2009, from Mark R. Vickery, P.G., Executive Director of TCEQ to Carter Smith, Executive Director of TPWD, that TCEQ will provide written responses within 90 days to TPWD when comments are made on TPWD letterhead and a written response is requested. The letter included a list of 11 examples of types of TCEQ actions for which there will be a response to any TPWD comments. As this letter contemplates, if TPWD provides comments to the TCEQ, then TPWD has carried out its obligations and therefore is not disenfranchised with regard to its duty to protect property for which TPWD is charged with protecting through TCEQ's permitting processes.

TPWD commented that although the proposed rules retain the provision that a state agency may participate in a contested case hearing as an applicant, the rules should be revised to allow state agencies to also participate when they are affected as property owners and agencies with jurisdiction over matters affected by permits. For example, TPWD has an obligation to preserve and protect the publicly-owned properties under its

jurisdiction, including state parks, state natural areas, and state historic sites. Under the proposed rules, TPWD would lose the ability to protect the state's public property from the adverse impacts of an activity authorized by a permit issued by TCEQ. By administrative rule, TCEQ impermissibly overreaches by denial of due process in administrative hearings by disenfranchising TPWD as a property owner by eliminating the opportunity to offer evidence, submit arguments, or otherwise participate in cases that may impact TPWD's properties, the economies that rely on those properties, and the health, safety, and enjoyment of the visitors to these properties.

NWF/Sierra commented that the commission should determine what rights other agencies have to protect publicly-owned resources entrusted to the care of those agencies.

UT commented that UT has the duty to protect the health and welfare of the staff and students and significant property interests in the property upon which they are located. This includes the System's role as trustee for more than two million acres of Permanent University Fund (PUF) land in West Texas. Those locations, and the inhabitants of and the significant research activities conducted at those locations, can be significantly and adversely affected by the commission's environmental permitting decisions. UT cited two examples of it providing comments regarding applications that could affect UT. First, UT submitted comments regarding an air permit application to expand a

rendering plant adjacent to property operated by the M. D. Anderson Cancer Center to assure that it could participate in any contested case hearing to ensure that the permit would meet all statutory and regulatory requirements. The second case was for an application to locate a municipal sludge composting and landfill facility adjacent to PUF acreage. UT has constitutional duties to manage the PUF trust lands, and cannot be inhibited in fulfilling those duties, absent clear and unequivocal legislative direction. There is no evidence in the legislative record that the legislature had any intent to deprive UT from fully participating in commission decision making in order to carry out its constitutional mandate to protect PUF Lands and maximize revenue for support of both the UT and Texas A&M University, and UT staff must have the ability to insure that the ultimate commission decision is based on the most sound of facts, science and land use compatibility findings.

OPIC hypothesized that a facility located near state property could interfere with use and enjoyment of that property and could create a nuisance or trespass. OPIC further stated that it is easy to envision applicants siting facilities near public lands to avoid costs and potential delays associated with the contested case hearing process.

No changes were made in response to these comments. State agencies continue to be able to participate in the TCEQ permitting process by submitting comments that will be timely considered and responded to in

the TCEQ permitting process. TCEQ has a duty to issue permits that are protective of human health and welfare. The change in status of a state agency in contested cases was made by the legislature. Additionally, there are no procedural due process rights with regard to permits, and there is no right to a specific process for a contested case hearing. Regardless, the changes in procedures and adoption of rules by the TCEQ do not restrict state agencies from upholding their statutory duties to protect property and fulfill other statutory duties.

As part of the application review process, TCEQ staff considers whether an applicant's proposed location and activities could interfere with use and enjoyment of that property or could create a nuisance or trespass. Although such a hypothetical situation is possible, the commission's observation is that applicants do not select a location primarily because it is near public lands so that the applicant could avoid costs and potential delays associated with the contested case hearing process. This is because applicants are limited as to land available, and because investment decisions consider a multitude of factors, including availability of transportation resources, proximity to customers and suppliers, and available financing.

UT commented that the commission is overstepping its authority by preventing the participation of a state agency in a contested case proceeding that was requested by another affected person. The state agency may not be contesting the issuance of the permit in the proceeding but rather may be offering valuable insight into how the permit should be strengthened to better serve the public interest. UT states that the proposed changes to §80.109(b)(5) - (7) should be deleted. TPWD commented that because TWC, §11.132 and §11.147 or Texas Parks and Wildlife Code, §12.024(c) provide independent authority for TPWD to be a party to water right applications and to present evidence to the TCEQ, these statutes remain in effect and TCEQ should not repeal these by implication. No process is required for TCEQ to determine whether TPWD is an affected person entitled to party status. TCEQ should therefore retain §80.109(b)(6) and (7) so that TPWD and TWDB can remain as statutory parties in water right proceedings on their own request.

The commission respectfully disagrees and has made no changes to the rules in response to these comments. The issue is not whether a hearing request is made by a state agency or anyone else, but rather whether state agencies can be a party if a contested case hearing is held. As discussed elsewhere in this preamble, the commission interprets the change to TWC, §5.115(b) to change the status of state agencies who previously were considered to be statutory parties, and therefore the commission declines

to retain the current text in §80.109(5) - (7). In response to the comment that agencies can provide valuable insight, the opportunity to comment remains. Although the commission has not conducted a thorough review of its records to determine how often state agencies have submitted comments for pending applications, the commission found no recent records that indicated that non-applicant state agencies have participated as parties in contested case hearings at TCEQ, with the exception of TPWD.

UT commented that the commission should not make the proposed amendment to §55.103 because HB 2694 did not amend TWC, §5.115(a), which defines who may be and "affected person." While the new language of TWC, §5.115(b) may have been intended to prevent a state agency from suing the commission in district court to challenge the commission's issuance of a permit, it does not unambiguously state that a state agency may not participate in proceedings concerning applications for permits prior to their issuance and certainly does not state that state agencies are not "affected persons."

The commission understands that the legislature did not amend TWC, §5.115(a) in HB 2694. However, because party status is obtained either as a statutory party or as an affected person, the commission addressed both possibilities in this rulemaking to fully implement the state agency

prohibition added to TWC, §5.115(b). Therefore, the commission adopted the proposed amendment to the definition of "affected person" in §55.103.

COMMENT: CCA commented that the statutory rights of TPWD and other agencies to provide the commission with valuable evidence in contested cases do not result in any unseemly disputes between state agencies. This is because the commission retains the exclusive authority to grant or deny a permit based on that evidence, and prohibition on state agencies to contest the issuance of a permit protects that authority. UT commented that the contested case process serves a valuable function by assuring the commission that it has the facts, science, and the rigorously examined regulatory framework with which to make the soundest permitting decisions possible.

No changes were made to the rules in response to these comments.

Although state agencies have provided evidence in contested cases in the past, state agencies have not historically participated in the TCEQ's contested case process as parties unless they are the applicant, with the exception of TPWD in water right application cases. Further, while TPWD has only participated in a small percentage of the hearings for water rights applications, TPWD typically provides comment on applications. HB 2694 limited the statutory rights of TPWD to be a commenter, rather than a party (except as an applicant.) However, as discussed elsewhere, state agencies

are not restricted in participating in the public comment process, and TCEQ and TPWD have established a formal process for submittal of and responses to comments as discussed elsewhere in this preamble. Finally, the executive director's restored participation as a mandatory party can serve to provide the commission the facts, science, and the rigorously examined regulatory framework with which to make the soundest permitting decisions possible.

CCA commented that, as a practical matter, the proposed rules deprive the commission of valuable evidence that can be used to craft permit conditions that adequately protect state resources, such as evidence from TPWD regarding the effect on the health of streams, bays, and estuaries in a contested case hearing on water right or water quality applications. And, other agencies are prohibited from introducing evidence on permit conditions that may be required to protect the particular state-owned lands for which those agencies are responsible. CCA and UT commission commented that decisions in contested cases must be based on evidence presented at the hearing and therefore comments are not a substitute for evidence.

No changes were made to the rules in response to these comments.

Regarding TPWD, see discussion elsewhere in this preamble regarding the enhanced comment process established by HB 3391 (81st Legislature,

2009). Additionally, TWC, §11.147(g) specifically provides that regardless of whether TPWD is a party in a water right proceeding, the commission is required to assess the impact of new appropriations on in-stream flows and inflows to bays and estuaries (and in some cases habitat) and add special conditions to the permit to maintain in-stream flows and inflows to bays and estuaries regardless of whether TPWD participates as a party.

Regarding the changing role of all state agencies under the statute and these rules, technical requirements in commission rules and standard permit provisions have not changed under this rulemaking. They are designed to be protective of human health, safety and the environment. They do not authorize the creation of a nuisance condition or allow a permittee to damage property. In addition to the right to provide comments, a state agency still has the right to file a complaint with the commission if it concludes that property entrusted to its care is being impacted by an activity under the commission's jurisdiction.

UT commented that the commission should make explicit how state agency comments will be considered in its decision making.

The commission has made no changes in response to this comment. The commission's existing rules in Chapter 39 for public notice of applications

require that mailed and published notices include the procedures for providing comment on the application. In addition, notices of water right applications include text on how comments can be submitted to the TCEQ. For permitting programs subject to HB 801 (76th Legislature, 1999), the executive director responds in writing to all public comments received. For water rights applications, the TCEQ responds to comments for which a public meeting is held, as well as to TPWD comments. If a state agency or any other commenter raises an issue that the executive director did not consider, or was not aware of when the permit was drafted, the executive director may modify the permit to address the issue. The commission's comment response process is established in commission rules, §55.152 and §55.156. In addition, the commission and TPWD have developed a specific process for submittal and responses to TPWD's comments on various types of applications, which is discussed in further detail elsewhere in this preamble.

With regard to its statutory rights, duties, and obligations to protect valuable public resources, TPWD commented that it is the state agency charged with protecting the state's fish and wildlife resources. Specifically, Texas Parks and Wildlife Code, §12.011(b) was cited, and it states that TPWD is allowed to seek restoration for impacts to or loss of

fish and wildlife resources through presentation of evidence to the agency responsible for permitting.

The commission finds that the rules implementing the change in status of state agencies in the contested case hearing process do not impact TPWD's ability to seek restoration for impacts to or loss of fish and wildlife resources. The inclusion of the word "restoration" indicates that the rights given to TPWD are in response to an event or action, not prior to issuance of a permit by TCEQ to someone who may engage in an activity that impacts these resources. Looking at the entirety of Texas Parks and Wildlife Code, §12.0011(b)(1) - (4) indicates that TPWD has the responsibility for protecting the state's fish and wildlife resources in four ways, three of which pertain to providing recommendations to other agencies for protection of these resources. As discussed in another response, TCEQ and TPWD have agreed on a process for implementing the requirements of Texas Parks and Wildlife Code, §12.0011(b), and therefore no changes have been made in response to this comment.

TPWD commented that the protection of both state parks and fish and wildlife resources are also important to the Texas economy, and provided data to support its comment.

TPWD concluded that the proposed rules would impact TPWD's ability to protect these

important parts of the Texas economy, and this result is not required or authorized by TWC, §5.115. This statute does not provide TCEQ the authority to restrict the statutory jurisdiction, duties, and responsibilities of TPWD through adoption of administrative rules.

The commission respectfully disagrees with this comment. TCEQ appreciates the importance of protection of natural resources to the Texas economy. TCEQ also protects these natural resources by conducting permitting and enforcement of activities that affect air and water quality, and waste disposal to minimize the possibility of any adverse impact to the environment. The adoption of these procedural rules regarding contested case hearings, together with the process for consideration of comments by TPWD in the permitting process, does not restrict the statutory jurisdiction, duties, and responsibilities of TPWD or any other state agency responsible for protection of natural resources. The comment process was specifically authorized by the legislature, and TCEQ has a robust comment and response process for comments made by TPWD and other state agencies. See discussion elsewhere in this preamble regarding TCEQ's obligation to ensure that TWC, §11.147 requirements are still met regardless of whether TPWD is a party.

UT commented that it is ironic that, in this rulemaking, the commission is repealing the previously ill-considered limitation on participation by the commission's own executive director in its contested case proceeding, while at the same time proposing to implement an over-broad and unnecessary set of limitations on state agencies not required by the narrow wording of amended TWC, §5.115(b). Limiting party participation impairs the commission's decision making ability, as the commission has already experienced when the executive director did not participate in hearings. The commission should use that experience and not apply limitations on state agency participation in circumstances that are neither required nor authorized.

The commission acknowledges the comment, but no changes were made to the rules in response to this comment. The policy changes regarding participation of the executive director and state agencies in HB 2694, Article 10 were established by the legislature. This rulemaking implements both of those changes. The legislature is presumed to understand the effects that statutes will have when implemented by the appropriate state agencies. While HB 2694 clarifies that the executive director's role is a more active one than under the statutes in effect during the past ten years. HB 2694 also provides that a state agency's role is to provide comments, which are also an important part of the process. The changes made by HB 2694, Article 10 may not in fact be "ironic," but can reasonably be viewed as a deliberate

effort by the legislature to balance limited state resources while preserving the contested case hearing process.

TWA commented that the rules will impact private landowners who may be affected by the permit or water right permitting and impact their ability to coordinate with state agencies and participate effectively in the process.

No changes were made to the rules in response to this comment. TWA does not explain the way in which a state agency would help or coordinate with private landowners in a contested case hearing in which individual's property could be affected. However, the limitations on state agencies in these amended rules do not affect private landowners' ability to participate in the contested case hearing process. Additionally, under certain circumstances OPIC may participate in a contested case hearing, which may help a private landowner more effectively participate in the contested case hearing process.

NWF/Sierra commented that the fiscal notes for the proposed rules are incomplete and inadequate, and fail to consider the fiscal implications to units of state government of depriving them of the ability to protect property interests entrusted to their care.

In addition to the discussion elsewhere regarding property interests of state agencies, the commission responds that it respectfully disagrees with this comment. The commenters did not identify any specific fiscal implications that they think would exist if these rules are adopted, and therefore provided no basis for their statement that the fiscal note was incomplete and inadequate. Further, while other commenters expressed concern about protection of state property interests, none provided any comments that identified any issues with the fiscal note.

As stated in the fiscal note, historically state agencies have not participated as parties in contested case hearings, and the primary one that has participated, TPWD, only did so in a small number of water right permit application hearings. The right of state agencies to provide comments on an application still exists under the statute and the rules as amended. TPWD, in particular, has a well-defined process for presenting its comments to the commission, as discussed elsewhere in this preamble. Technical requirements in commission rules and established permit provisions have not changed under this rulemaking. They are designed to be protective of human health, safety, and the environment. They do not authorize the creation of a nuisance or allow a permittee to damage property. Additionally, both TCEQ and TPWD are charged with protecting the state's

natural resources. Pursuant to TWC, §11.147(g), regarding water rights permits, regardless of whether TPWD participates as a party, the commission is required to assess the impact of new appropriations on in-stream flows and inflows to bays and estuaries (and in some cases habitat) and add special conditions to the permit to maintain in-stream flows and inflows to bays and estuaries. Finally, a state agency's right to file a complaint with the commission if it believes property entrusted to its care was being impacted by a facility under the commission's jurisdiction, is unchanged.

Caddo Lake recommended that if these rules are adopted to limit any state agency participation in contested case hearings, the commission should provide a second comment period for state agencies so they have the opportunity to comment on any significant changes in the application that occur after the draft permit is issued and on any changes in the draft permit, stating that this could be done after the proposal for decision issued.

No changes were made to the rules in response to this comment. Because a proposal for decision is issued at the conclusion of the contested case hearing, the commission is bound by the record from the hearing, and therefore no additional comment period at that point in the timeline is

appropriate nor is available under the commission's rules. A commission action on a permit is final at the end of the period for filing a motion for rehearing, or if a motion for rehearing is submitted, on the date of the order overruling the motion for rehearing or on the date the motion for rehearing is overruled by operation of law, §80.273. Once a permit is final, any change to a term, condition, or provision of the permit requires compliance with a process for changes to the permit, such as an amendment under §305.62, or, for air quality permits, under §116.116.

Caddo Lake recommended that if the commission does not adopt the second comment period, the commission should allow state agencies to participate in hearings as neutral parties to provide input on such changes or amendments.

No change was made in response to this comment. The commission has determined TWC, §5.115(b) prohibits any participation in the contested case hearing process by a state agency, other than as the applicant. The commission has also determined that while a party may be independent, a party can never be completely neutral. Any type of participation would either be in support of or in opposition to conditions in or issuance of a draft permit. If the state agency is in support of the permit, its position can be thoroughly presented by the applicant. If the state agency is in

opposition to the permit, the statute prohibits its participation.

UT commented that the commission should not extend the new statutory language to permits or licenses issued under the Texas Health and Safety Code (air, industrial solid and hazardous waste, and low level radioactive waste).

The commission respectfully disagrees and has made no change in response to this comment. As generally discussed elsewhere in this preamble, the commission already interprets TWC, Chapter 5, which includes TWC, §5.115(b), as applicable to these other permitting and licensing programs. The commission acknowledges that the various chapters in the Texas Health and Safety Code contain additional requirements regarding public participation, which may impact state agencies. However, the TCEQ was created by the legislature to serve as the "umbrella agency" for environmental permitting matters and thus TWC, §5.115(b) is applicable to the permitting programs in the Texas Health and Safety Code.

Caddo Lake recommended that the rules should be re-opened to make it clear that TWC, §5.115 does not apply to decisions on permits and licenses for radioactive materials under Texas Health and Safety Code, Chapter 401.

The commission respectfully disagrees and has made no changes to the rules in response to this comment. TWC, §5.115 provides a uniform standard for participating in a contested case hearing in the air, waste, and water programs consolidated at the TCEQ's predecessor agency, the Texas Natural Resource Conservation Commission, and reflects the commission's traditional standard for participation in a contested case hearing. This uniform standard has been extended to the radioactive material licensing program since it was transferred to the TCEQ.

In 2007, the legislature transferred the entirety of authority to issue radioactive material storage, processing, and disposal licenses to TCEQ in SB 1604, which amended Texas Health and Safety Code, §401.114(a), as follows: "{b}efore the commission grants or renews a license to process or dispose of low-level radioactive waste from other persons, the commission shall give notice and shall provide an opportunity for a public hearing in the manner provided by the commission's formal hearing procedure and Chapter 2001, Government Code."

The formal hearing procedure for TCEQ is found in Chapter 55, Subchapter G as promulgated under TWC, §5.115 and other sections in the TWC. This rule has been in effect since TWC, §5.115(a) was established in 1995 in SB

1546 subsequent in time to the codification of the definition of "person affected" in Texas Health and Safety Code, §401.003. Since the enactment of SB 1604 in 2007, TCEQ has consistently maintained that the "affected person" standard in TWC, §5.115 and commission rule applies to radioactive material licenses. While TWC, Chapter 401 does offer a definition of "person affected," the applicable rules for making the determination of whether a hearing request should be granted are found in the current procedural rules applicable to radioactive material licenses in §§55.251(c), 55.252 and 55.256(c).

Caddo Lake commented that the commission should advise the United States Environmental Protection Agency (EPA) of the proposed changes to make sure EPA will not reevaluate the authorizations EPA has provided to Texas for air, water, waste, and injection well permitting programs.

The commission acknowledges the comment. All of TCEQ's rules, from pending rule proposals to adopted rules, are on TCEQ's Web site at: http://www.tceq.texas.gov/rules/rules_rulemaking.html. Additionally, all proposed and adopted rules are published in the *Texas Register*. EPA may comment on any rule during the comment period. Several of the Memorandum of Agreements, including those regarding the Underground

Injection Control Program and the Texas Pollutant Elimination System program, between the EPA and TCEQ require that the TCEQ provide the EPA with a timely opportunity for meaningful involvement and input in developing rules. Similarly, EPA is afforded notice and comment opportunity for rules that are proposed as revisions to the State Implementation Plan. The EPA is afforded this opportunity during the comment period. These rules are not a basis for the air quality permitting program approvals or the State Implementation Plan, and the rules are not part of the State Implementation Plan. The commission has no reason to expect that this rulemaking will trigger any reevaluation of the approved programs by EPA since no comments were submitted by EPA regarding this rulemaking project.

SUBCHAPTER G: ACTION BY THE EXECUTIVE DIRECTOR

§50.139

Statutory Authority

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

Additionally, the amendment is adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011. The amendment is also adopted under Texas Government Code, Chapter 311.

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

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

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

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

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

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

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

(f) Disposition of motion.

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

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

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