

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** March 23, 2012

Thru: Bridget C. Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Docket No.: 2011-1249-RUL

Subject: Commission Approval for Adoption Rulemaking
Chapter 50, Action on Applications and Other Authorizations
Chapter 55, Requests for Reconsideration and Contested Case Hearings;
Public Comment;
Chapter 80, Contested Case Hearings
HB 2694 (Article 10): Contested Case Hearings
Rule Project No. 2011-030-080-LS

Background and reason(s) for the rulemaking:

The rulemaking would implement House Bill (HB) 2694, Article 10, Contested Case Hearings, 82nd Legislature, 2011, which amends the Texas Water Code (TWC) by adding new §5.315, amending §5.115(b) and §5.228(c) and (d), and by repealing §5.228(e), which revise the contested case hearing (CCH) process.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

First, the rule amendments will add the limitation of certain state agencies to contest applications for permits or licenses in the air quality, water, and waste programs, unless they are permit applicants. The limitation applies to requesting CCHs or reconsideration by the executive director, as well as appealing the issuance through the administrative process by filing a Motion to Overturn or a Motion for Rehearing.

Second, the amendments would revise the role of the executive director in contested case permit hearings. The specific changes are: a) adding language that states the executive director will always be a party to a CCH; b) deleting language that states the executive director's participation is limited to the sole purpose of providing information and replacing it with language stating that the executive director's role is to support the position developed by the executive director in the underlying proceeding; c) repealing the rules which list applications on which the executive director is either a mandatory party or is prohibited from being a party and the factors for the executive director to consider when deciding whether to be a party on applications for which he has discretion; and d) omitting language that provides when the executive director can assist certain applicants with the burden of proof.

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Third, the rulemaking will add a new deadline for discovery in CCHs in which prefiled testimony is used, except for hearings in which discovery was completed before September 1, 2011, and water and sewer ratemaking proceedings.

B.) Scope required by federal regulations or state statutes:

There are no applicable federal regulations that apply to the changes from HB 2694.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

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

Additionally, the amendments are 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 HB 2694, Article 10.

The adopted amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and Article 10 of HB 2694.

Effect on the:

A.) Regulated community:

No effect is anticipated by the adoption and implementation of these rules.

B.) Public:

No effect is anticipated by the adoption and implementation of these rules.

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C.) Agency programs: Currently, the executive director is a party in most permit application CCHs, and therefore restoration of the requirement for the executive director to participate in all hearings would not affect the number of full-time employees needed for CCHs, or affect the work necessary to send and respond to discovery. This change will not significantly affect staff workload and the agency will use currently available resources to implement the rulemaking, and therefore no fiscal impact will be incurred. No effect is anticipated by the adoption and implementation of the amendments to the rules regarding state agency participation and discovery in CCHs.

D.) Other State Agencies: State agencies will no longer be allowed to contest issuance of a permit or license, and may participate in CCHs only if they are an applicant.

Stakeholder meetings:

No stakeholder meetings were held. A public hearing for the rulemaking was held on December 12, 2011.

Public comment:

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), 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. 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.

With regard to implementation of amendments to TWC, §5.115(b), the comments concerned the constitutionality of the statute; the commission's interpretation of the statute with regard to compliance with the Code Construction Act, consideration of the duties of state agencies to protect state property, and the applicability to water right applications, as well as applications under the Texas Health and Safety Code; the lack of definitions for the term "state agency" and the phrase "contest the issuance;" the deprivation of evidence that can be provided to the commission (rather than submittal of comments only); and the commission's incomplete and inadequate fiscal notes.

Significant changes from proposal:

No changes were made to the rule language from proposal.

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Potential controversial concerns and legislative interest:

Because this rulemaking addresses language in the TCEQ sunset legislation, the agency's implementation will be of interest to the legislature, as well as to the Sunset Advisory Commission.

As discussed previously in the public comment summary, the commission's interpretation of amended TWC, §5.515(b) (regarding limitation on state agency participation in permit issuance) and new TWC, §5.315 (regarding discovery) were very controversial.

Does this rulemaking affect any current policies or require development of new policies?

No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

Rulemaking is necessary for certain existing commission rules relating to CCHs to be consistent with the statute, and therefore there are no alternatives to rulemaking to ensure compliance with the statutes.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: November 18, 2011

Anticipated Texas Register publication date: April 27, 2012

Anticipated effective date: May 3, 2012

Six-month Texas Register filing deadline: June 18, 2012

Agency contacts:

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Attachments

HB 2694, Article 10 (82nd Legislature, Regular Session)

cc: Chief Clerk, 2 copies
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