

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** October 14, 2011

**Thru:** Bridget 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 Proposed 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 proposed rulemaking would implement House Bill (HB) 2694, Article 10, Contested Case Hearings, 82nd Legislature, 2011, Regular Session, 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 hearings (CCHs) 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. 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. It should be noted that these state agencies, under the proposed rule, may be able to be a party to a CCH on an application at the State Office of Administrative Hearings (SOAH) but will be prohibited from contesting the issuance of the permit or license.

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

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discretion; and d) omitting language that provides when the executive director can assist certain applicants with the burden of proof.

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 is no applicable federal regulation that applies 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 proposed 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 SOAH and §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and CCHs.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation, and HB 2694, Article 10.

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

**Effect on the:**

**Regulated community:** No new group of affected persons, and there will be no fiscal impact.

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**Public:** No new group of affected persons, and there will be no fiscal impact.

**Other State Agencies:** Some state agencies will no longer be allowed to contest issuance of a permit or license. No fiscal impact was identified for this change in the law.

**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.

**Stakeholder meetings:**

No stakeholder meetings were held.

**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.

A potentially controversial issue will be the proposed interpretation of new TWC, §5.315, which states that for hearings that use prefiled written testimony, all discovery must be "completed before the deadline for the submission of that testimony." Although the letter submitted to TCEQ by Representatives Chisum and Smith was considered when developing the proposed changes to §80.151, there may be other interpretations, such as:

- 1) all discovery must be completed before the first party prefiles its testimony; or
- 2) all discovery has to be filed by the date the last party files its prefiled.

**Will 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 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 proposal rulemaking schedule:**

**Anticipated proposal date:** November 2, 2011

**Anticipated *Texas Register* publication date:** November 18, 2011

**Public hearing date (if any):** December 12, 2011

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**Public comment period:** Ends December 19, 2011  
**Anticipated adoption date:** April 11, 2012

**Agency contacts:**

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Environmental Law Division  
Charlotte Horn, Texas Register Coordinator, 239-0779

**Attachments**

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

cc: Chief Clerk, 2 copies  
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