

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §80.105, Preliminary Hearings.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission is proposing a number of changes to its procedural rules in this issue of the *Texas Register*. The changes include proposed revisions to Chapters 1, 35, 39, 50, 55, 80, 106, and 116. These chapters contain proposed changes to update and clarify agency rules, to facilitate permit processing and to more clearly set out the responsibilities of those involved in the permitting process. In addition, in part, the changes proposed in this issue of the *Texas Register* are intended to be responsive to comments received during the rulemaking proceedings implementing House Bill (HB) 801 during the summer and early fall of 1999 requesting that the adopted rules be subject to subsequent review to address any deficiencies which became apparent following adoption. (See September 24, 1999 issue of the *Texas Register* (24 TexReg 8190).)

The primary purpose of the proposed change to Chapter 80 is to expressly provide for State Office of Administrative Hearings (SOAH) judges to accept public comment at preliminary hearings related to water utilities cases under Texas Water Code (TWC), Chapter 13. In September of 1999, the commission amended Chapter 80 to implement the provisions of HB 801 enacted by the 76th Legislature and which revised the commission's procedures for public participation in environmental permitting. (See September 24, 1999 issue of the *Texas Register* (24 TexReg 8276).)

As part of that rulemaking, the commission added §80.4(d) to provide that the judge is not required to

accept public comment into the evidentiary record and amended §80.105 to provide that the judge shall, for enforcement hearings only, take public comment. Generally, this was intended to maintain the distinction between informal public comment and the evidentiary hearing in permitting matters. In particular, this also effectuated the framework established by HB 801 whereby the public comment period occurs early in the process, public comments are addressed in the executive director's response to comment, and only limited issues are referred for contested case hearing.

While maintaining these distinctions is of continued importance, it is recognized that water utilities matters are not subject to the provisions of HB 801 and may be better suited to different procedures. First, unlike other programs, there are no existing express provisions in statute or rules requiring that public meetings allowing for public comment be held. Thus, the preliminary hearing may be the first opportunity for affected citizens to express their views regarding an application. Second, the opportunity to provide public comment and engage in dialogue with the applicant and commission staff regarding the merits of a water utilities application has, in the past, been helpful in facilitating settlement or narrowing of issues to be litigated as well as the management of the proceeding. Third, while existing rules do not prohibit the taking of public comment by the judge in any matter, they do not currently explicitly address the public comment procedures for water utilities matters. Therefore, in recognition of the unique nature of water utilities applications, to facilitate a process that enhances public participation opportunities and encourages informal resolution of disputes, and to ensure that the commission's desired practice for the taking of public comment during water utilities hearings is clear, this rule change is proposed to explicitly provide for the taking of public comment at preliminary hearings held in connection with water utilities matters.

#### SECTION BY SECTION DISCUSSION

Changes to §80.105(b) are proposed to explicitly provide that a judge is to take public comment at preliminary hearings related to water utilities matters under TWC, Chapter 13.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendment is in effect there will be no significant fiscal impacts for units of state and local government as a result of administration or enforcement of the proposed amendment.

The proposed amendment is intended to require SOAH judges to accept public comment at preliminary hearings related to water utility cases. Currently, these judges are only required to accept public comment for enforcement hearings. This rule change is procedural in nature and is not anticipated to result in significant fiscal impacts for units of state and local government.

#### PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendment will be to enhance public participation in contested hearings involving water utility matters.

The proposed amendment is intended to require SOAH judges to accept public comment at preliminary hearings related to water utility cases. Currently, these judges are only required to accept public comment

for enforcement hearings. This rule change is procedural in nature and is not anticipated to result in significant fiscal impacts for individuals and businesses.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of the proposed amendment. The proposed amendment is intended to require SOAH judges to accept public comment at preliminary hearings related to water utility cases. Currently, these judges are only required to accept public comment for enforcement hearings. This rule change is procedural in nature and is not anticipated to result in significant fiscal impacts for small or micro-businesses.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the statute. “Major environmental rule” means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, 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 rulemaking is procedural in nature and is intended to provide that a judge shall accept public comment for hearings under TWC, Chapter 13. Therefore, the rulemaking does not meet the definition of “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rulemaking pursuant to Texas Government Code, §2007.043. The specific purpose of the rulemaking is to provide that a judge shall accept public comment for hearings under TWC, Chapter 13. The rulemaking contains procedural rule changes only and does not affect private real property. Therefore, the rulemaking will not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rulemaking is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP) nor does it affect any action or authorization identified in §505.11. The rulemaking concerns only the procedural rules of the commission. Therefore, the rulemaking is not subject to the CMP.

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal on March 6, 2001 at 10 a.m., Building F, Room 2210, Texas Natural Resource Conservation Commission Complex, 12100 Park 35 Circle, Austin, Texas. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, agency staff members will be available to discuss the proposal 30 minutes before each hearing and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs who are planning

to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Duron, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-016-035-AD. Comments must be received in writing by 5:00 p.m., March 12, 2001. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

#### STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103(b), which requires the commission to adopt reasonable procedural rules to be followed in a commission hearing; TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §13.041, which establishes the commission's general authority over water and sewer utilities and authorizes the commission to adopt rules governing practice and procedure before the commission; and Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules.

The proposed amendment affects no other statutes, articles, or codes.

**SUBCHAPTER C: HEARING PROCEDURES**

**§80.105**

**§80.105. Preliminary Hearings.**

(a) (No change.)

(b) If jurisdiction is established, the judge shall:

(1) name the parties and[,] for hearings under Texas Water Code, Chapter 13 and for enforcement hearings [only], accept public comment;

(2) - (3) (No change.)

(c) - (d) (No change.)