

The Texas Natural Resource Conservation Commission (commission) adopts the amendments to §50.39, Motion for Reconsideration, and §50.139, Motion to Overturn Executive Director's Decision, *with changes* to the proposed text as published in the September 22, 2000 issue of the *Texas Register* (25 TexReg 9414).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On January 12, 2000, the commission adopted amendments to its procedural rules to implement Senate Bill (SB) 211, including amendments (see the January 28, 2000 issue of the *Texas Register* (25 TexReg 593)) to §50.39, Motion for Reconsideration and §50.139, Motion to Overturn Executive Director's Decision. These amendments were intended to mirror the provisions of SB 211, which amended Texas Government Code, §2001.142, to provide that a party is presumed to have been notified of a decision or order in a contested case on the third day after notice is mailed by first class mail. Prior to SB 211, the Texas Government Code provided that the date of notification was presumed to be the date on which the notice of the decision was mailed. Likewise, prior to the amendments to §50.39 and §50.139, the time for filing a motion for reconsideration or motion to overturn of an uncontested permit ran from the time of mailing to the applicant. Since adoption of these amendments to §50.39 and §50.139, the time for filing a motion for reconsideration or motion to overturn runs from the time of written notification to the applicant, with a presumption that a person is notified on the third day after the date of mailing of the executive director's decision. Thus, while SB 211 did not specifically require changes in procedures for uncontested matters, in the interest of consistency, the commission changed its procedures to give movants additional time to file motions for reconsideration and motions to overturn.

Since adoption, however, staff have recognized that the rules as written may on occasion result in

uncertainty concerning when the time period for filing begins to run. For the convenience of the applicant, staff in some cases hand-delivered or faxed early notice of the executive director's decision. The intent of the rule is for the time for filing a motion for reconsideration or motion to overturn to begin from the date notice of the executive director's action is mailed. Since an early copy furnished to the applicant might be construed to constitute "notice in writing," thereby resulting in confusion regarding a movant's time for filing, the commission adopts certain changes to make the beginning date more certain in all cases.

The adopted rules as proposed provided that motions for reconsideration and motions to overturn must be filed no later than 23 days after the agency mails notice of the signed permit, approval, or other action of the executive director and set forth the circumstances under which the public interest counsel and timely commenters would receive notice of the action. For purposes of simplicity and clarity, the rules as adopted now provide that notice of the action is to be mailed to the applicant and persons on any required mailing list for the action. Related rules on extension of time limits and disposition of motions would also be changed with this adoption. Additionally, a change is adopted to clarify that in some situations, agency staff, rather than the chief clerk, mail notice of a signed permit or other executive director action. These changes should benefit both applicants and potential protestants. Applicants should benefit because, where time is of the essence, the practice of faxing and hand-delivering copies of signed permits and other approvals can resume. Persons opposing the issuance of permits or approvals will benefit because the deadline for filing a motion for reconsideration or motion to overturn will allow a full 20 days for filing these motions, taking into account three days from mailing to receipt of notification.

SECTION BY SECTION DISCUSSION

Section 50.39, relating to Motion for Reconsideration, which applies to certain applications declared administratively complete before September 1, 1999, is adopted to be amended to specify that the deadline for filing a motion for reconsideration runs from the date the agency mails notice of a signed permit, approval, or other executive director's action. In addition, to cover the time from mailing to the time of notification, it is adopted that the deadline for filing be changed so that it is 23 days after notice of the signed permit or other action of the executive director is mailed to the applicant and persons on any required mailing list. This change is reflected in adopted amendments to §50.39(b). Two other changes are adopted for §50.39(b). A change is adopted to reflect that in some situations agency staff, rather than chief clerk, may mail notice of a signed permit or other executive director action. Another change is adopted to mirror a revised provision in §50.139(b) that provides that, if timely comments are received in response to any required prior notice of an application, notice of an executive director action will be mailed to public interest counsel and timely commenters, as well as the applicant. Corresponding changes are adopted to §50.39(d) and §50.39(e) to reflect the adopted changes to the deadline for filing of motions for reconsideration.

Section 50.139, relating to Motion to Overturn Executive Director's Decision, which applies to certain applications declared administratively complete on or after September 1, 1999, is adopted to be amended to mirror the adopted changes to §50.39. That is, changes are adopted to specify that the deadline for filing a motion to overturn runs from the date the agency mails notice of a signed permit, approval, or other executive director's action to the applicant and persons on any required mailing list. The adopted rule will also allow for 23 days from the date of mailing of notice of the signed permit or other executive director

action. This change is reflected in §50.139(b). Two other changes are adopted for §50.139(b). A change is adopted to reflect that in some situations, agency staff, rather than the chief clerk, may mail notice of a signed permit or other executive director action. Another change is adopted to reflect that the obligation to mail notice of the executive director's action to the public interest counsel and commenters is triggered by the receipt of timely comments, in response to any required prior notice of an application. Corresponding changes are adopted to §50.139(e) and §50.139(f) to reflect the adopted changes to the deadline for filing motions to overturn.

FINAL 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. This rulemaking does not meet the definition of "major environmental rule" because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Instead, this rulemaking is procedural in nature and sets time frames for the filing of a motion for reconsideration or motion to overturn of a signed permit, approval or other action of the executive director.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The specific purpose of the rulemaking is to provide that motions for reconsideration and motions to overturn must be filed no later than 23 days after the date the agency mails notice of a signed permit, approval, or other action of the executive director to the applicant and persons on any required mailing list. They are procedural rule changes only and do not affect private real property. Therefore, these rules 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 amendments are 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 do they affect any action or authorization identified in the Coastal Coordination Act Implementation Rules, §505.11. This rulemaking concerns only the procedural rules of the commission and is therefore not subject to the CMP.

HEARING AND COMMENTERS

A public hearing was held on October 17, 2000. No one attended the hearing. The comment period closed on October 23, 2000. No comments were received.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which establish the commission's general authority to adopt rules and to set policy by rule; and Texas Government Code,

§2001.004, which requires state agencies to adopt rules of practice.

SUBCHAPTER C: ACTION BY EXECUTIVE DIRECTOR

§50.39

§50.39. Motion for Reconsideration.

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion for reconsideration of the executive director's action on an application.

(b) A motion for reconsideration 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) An action by the executive director under this subchapter is not affected by a motion for reconsideration filed under this section unless expressly ordered by the commission.

(d) With the agreement of the parties or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions for reconsideration 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 written notice of the executive director's action.

(e) Disposition of motion.

(1) Unless an extension of time is granted, if a motion for reconsideration 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 for reconsideration 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.

(f) Section 80.271 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 for reconsideration is denied by commission action or under subsection (e) of this section and no motions for rehearing shall be filed. 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.

SUBCHAPTER G: ACTION BY THE EXECUTIVE DIRECTOR

§50.139

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which establish the commission's general authority to adopt rules and to set policy by rule; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§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 of the executive director's action on an application or water quality management plan (WQMP) update certification. 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.