

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §50.39, Motion for Reconsideration, and §50.139, Motion to Overturn Executive Director's Decision.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 23 days to file motions for reconsideration and motions to overturn from delivery of notice.

Since adoption, however, staff have recognized that the rule as written may have unintended consequences and present certain difficulties with respect to the point at which the time period begins to run. In some

cases where time is of the essence, staff in some cases in the past hand-delivered or faxed notice of the executive director's decision to the applicant. Because, as the rule is written, the time for filing a motion for reconsideration or motion to overturn runs from the time that the applicant is notified in writing (that is, the time of hand-delivery or receipt of the fax), and the actual mailing of the notice of the executive director's action may occur at a later time, a portion of the movant's time for filing a motion for reconsideration or motion to overturn may be lost. Thus, to avoid unduly shortening a movant's time for filing and to enable the agency to continue the practice of faxing or hand-delivering permits and other authorizations to applicants when needed, the commission proposes certain changes to its rules.

The proposed rules would provide 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. Related rules on extension of time limits and disposition of motions would also be changed with this proposal. Additionally, a change is proposed 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 proposed 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 proposed 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. This change is reflected in proposed amendments to §50.39(b). Two other changes are proposed for §50.39(b). A change is proposed 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 proposed 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 proposed to §50.39(d) and §50.39(e) to reflect the proposed 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 proposed to be amended to mirror the proposed changes to §50.39. That is, changes are proposed 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. The proposed rule will also allow for 23 days from 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 proposed for §50.139(b). A change is proposed 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 proposed 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 proposed to §50.139(e) and §50.139(f) to reflect the proposed changes to the deadline for filing motions to overturn.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed amendments are 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 amendments.

Motions for reconsideration and motions to overturn are procedural mechanisms used by persons to request that the commission review decisions made by the executive director on a variety of issues, including: certificates of adjudication, industrial and hazardous waste permits, radioactive waste or radioactive material permits or licenses, and municipal solid waste permits. Motions for reconsideration are filed for applications that were administratively complete prior to September 1, 1999. Motions to overturn are filed for applications that were administratively complete on or after September 1, 1999.

The proposed amendments are intended to clarify when the notification period begins and ends concerning motions for reconsideration and motions to overturn. The current rules state that a person has 20 days after the applicant is notified in writing to file for a motion for reconsideration or to overturn, and that a person is presumed to have been notified three days after the notice is mailed. The proposed amendments will change the rule language to specify a movant has 23 days from the agency's mailing of the signed permit,

approval or other action to file a motion for reconsideration or motion to overturn.

By specifying that the response period begins with the mailing of the notice, the amendments are intended to avoid unduly shortening the time for a person to file a motion for reconsideration or motion to overturn.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments will be to ensure that persons who desire to avail themselves of the motion for reconsideration/motion to overturn process are not subjected to unduly shortened deadlines and that the deadline for filing runs from the date the agency mails the notice of the signed permit, approval or other executive director action.

There will be no fiscal implications to individuals and businesses as a result of administration and enforcement of the proposed amendments because these amendments are procedural in nature and have no fiscal impact to any individual or business.

The proposed amendments are intended to clarify when the notification period begins and ends concerning motions for reconsideration and motions to overturn. The proposed amendments will change the rule language to specify that the time for filing ends 23 days after the notice is mailed. By specifying that the time for filing begins with the mailing of the notice, the amendments are intended to eliminate any potential confusion concerning when a person is considered notified. These changes are not anticipated to have any

adverse impact to any individual or business intending to file a motion for reconsideration or a motion to overturn.

SMALL AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-business as a result of the proposed amendments. These amendments to the agency's rules are procedural in nature and will have no fiscal impact on small or micro-businesses.

The proposed amendments are intended to clarify when the notification period begins and ends concerning motions for reconsideration and motions to overturn. The proposed amendments will change the rule language to specify that the time for filing runs from the date the agency mails the notice and ends 23 days after the notice is mailed. By specifying that the response period begins with the mailing of the notice, the amendments are intended to eliminate any potential confusion concerning when a person is considered notified. These changes in notification and response procedures for motions of reconsideration or motions to overturn are not anticipated to have any adverse economic impact on any small or micro-business intending to file such a motion.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and has 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 proposal 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. 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 has prepared a takings impact assessment for these proposed 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. 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 has reviewed the rulemaking and found that the proposed rule 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 proposed 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 October 17, 2000 at 10:00 a.m. in Building E, Room 3202A, Texas Natural Resource Conservation Commission Complex, 12100 Park 35 Circle, Austin. 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 Durón, 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 2000-017-050-AD. Comments must be received by 5:00 p.m., October 23, 2000. 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 Texas Water Code, §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.

The proposed amendment implements Texas Water Code, §5.103 and §5.105, and Texas Government Code, §2001.004.

SUBCHAPTER C: ACTION BY [THE] EXECUTIVE DIRECTOR

§50.39

§50.39. Motion for Reconsideration.

(a) (No change.)

(b) A motion for reconsideration must be filed no later than 23 [20] days after the date the agency mails notice [applicant is notified in writing] of the signed permit, approval, or other action of the executive director. If timely comments are filed in response to any required prior notice of this application, the agency shall mail notice of the executive director's action to the public interest counsel and timely commenters in addition to the applicant. [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.]

(c) (No change.)

(d) [Extension of time limits.] 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 [applicant is notified] 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 [applicant is notified] 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 [applicant is notified] 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 [the] 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 proposed under Texas Water Code, §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.

The proposed amendment implements Texas Water Code, §5.103 and §5.105, and Texas Government Code, §2001.004.

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

(a) (No Change.)

(b) A motion to overturn must be filed no later than 23 [20] days after the date the agency mails notice [applicant is notified in writing] of the signed permit, approval, or other action of the executive director. If timely comments are filed in response to any required prior notice of the application the agency [The chief clerk] shall mail notice of the action to the [applicant,] public interest counsel and [to other persons who] timely commenters, in addition to the applicant. [filed public comment in response to public notice. 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.]

(c) [WQMP updates.] 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) (No change.)

(e) [Extension of time limits.] 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 [applicant is notified in writing] 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 [applicant is notified in writing] 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 [applicant is notified in writing] 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 [the] Texas Health and Safety Code, §§361.321, 382.032, or 401.341.