

The Texas Natural Resource Conservation Commission (commission) adopts new §20.4. The commission adopts this revision to Chapter 20, Rulemaking, to implement Texas Government Code, §2001.004, Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions. This adopted new section would define and clarify procedures for indexing and cross-indexing rules; written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions; final orders; decisions; and opinions. The proposal was published in the November 9, 2001 issue of the *Texas Register* (26 TexReg 9031). The new section is adopted *without changes* and the text will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Texas Government Code, §2001.004(2) and (3), a part of the Administrative Procedure Act (APA), requires all state agencies to index, cross-index to statute, and make available for public inspection all rules, final orders, decisions, opinions, and other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions.

The primary purpose of this rulemaking is to comply with the Decision of the Commission Regarding the Petition for Rulemaking Filed by Mr. Tom Lake in Docket Number 2000-1317-RUL issued December 19, 2000, that directed staff to initiate rulemaking to implement Texas Government Code, §2001.004, in response to a petition for rulemaking by Mr. Lake (the "Lake Petition"). It also relates to Sunset management recommendation New Issue 52, which requires the commission to prospectively comply with APA requirements to create indices and cross-references to its orders, statements of policy, or interpretations and to make final orders available to the public.

Adopted new §20.4, Indexing, Cross-Indexing, and Availability of Certain Documents, defines and clarifies what indexing and cross-indexing mean relative to the documents specified in the statute.

Section 20.4 does not add any new requirements upon agency staff. However, it does define and clarify procedures for indexing, cross-indexing, and making documents available for public inspection.

The Lake Petition proposed that the agency produce a list of all its rules showing the specific statutory basis for each rule and a second list of applicable statutes showing the rules derived from each statute.

This approach is not necessary to comply with the statute.

Senate Bill (SB) 41 established the Administrative Procedure and Texas Register Act (APTRA) in 1975 which set forth standards for state administrative practices and procedures; procedures for adoption of rules by state agencies; the creation of a state register and its contents; and review of state agency procedures (Texas Civil Statutes, Article 6252-13a). Prior to adoption of the APTRA by the 64th Legislature, 1975, “Texas ha{d} no comprehensive unified body of administrative law. Each agency {was} left largely to itself to develop what it deem{ed} proper requirements for hearings, proposed rules and adopted rules. Nor {did} Texas have any sort of central journal in which rules and notices may be published.” (Senate Committee on Judicial Affairs, Bill Analysis, SB 41, 64th Legislature, 1975).

Accordingly, APTRA, §4 required each agency to: 1) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available; 2) index and make available for public inspection all rules and all other written statements of policy or interpretations that are formulated, adopted, or used by the agency in discharging its functions; and 3) index and make available for public inspection all final orders, decisions, and opinions which provided for public

participation in the rulemaking process, as well as proper public notice of proposed agency rules and agency actions through publication of a state register, part of the purpose of the legislation (Article 6252-13a).

The APTRA was subsequently amended in 1991 by House Bill (HB) 2057 to require state agencies to cross-index rules to statute, in addition to indexing and making them available for public inspection.

Similarly, all final orders, decisions, and opinions were also required to be cross-indexed to statute.

“The index to the official Texas Administrative Code published under the authority of the Secretary of State and the Texas Register contain{ed} only an alphabetical listing of ‘standard and familiar classifications of the rules and regulations’ without reference to the statute from which the rule {was} derived.” (House Committee on State Affairs, Bill Analysis, HB 2057, 72nd Legislature, 1991).

“Requiring the state agency proposing the rule to include the particular section or article of the {stat.} code affected {provides for} expedient cross-indexing by the Secretary of State.” (Id.; Article 6252-13a, §5).

The agency complies with the statutory requirement to index the listed documents. Rules are indexed by means of a table of contents. Regulatory guidances are indexed by title and series number in the agency’s publications catalog and on the agency’s public website. Opinions of the staff rule interpretation teams are indexed on the agency’s public website by subject matter. Orders and decisions are indexed by the identifying number or entity name in a database at the Office of the Chief Clerk or at the Central File Room of Records Services at the agency’s Austin headquarters.

The agency complies with the statutory requirement to cross-index the listed documents. Rules reference the statutory authority in the preamble to the rule proposal and adoption packages published in the *Texas Register*. Other documents specified in the statute cite either the statutory or regulatory authority for their issuance within each document, or they cite the statutory or regulatory authority being exercised or the authority being interpreted within each document.

The agency complies with the statutory requirement to make the listed documents available for public inspection. Agency rules and regulatory guidances are available through the agency's publication office. Rules, opinions of staff rule interpretation teams, and many regulatory guidance documents are also available on the agency's public website. Orders and decisions are available through the Office of the Chief Clerk or through the Central File Room of Records Services at the agency's Austin headquarters. Many of these documents are also available at the agency's regional offices.

The commission adopts new §20.4 to clarify the means by which this provision of the APA is implemented.

SECTION DISCUSSION

New §20.4 is adopted to clarify the practice of indexing and cross-indexing throughout the agency for all five types of documents specified in the statute. New subsection (a) is adopted to specify the five types of documents covered by the section and to clarify that only final versions of those documents in effect are subject to the indexing and cross-indexing provisions of this section, not draft versions, proposed versions, outdated versions, or working copies kept for reference.

New subsection (b) is adopted to define indexing and cross-indexing. New paragraph (1) is adopted to define “index” as a means in assisting the public to access the five types of documents specified by statute. New subparagraphs (A) - (D) are adopted to provide flexibility to the offices responsible for indexing documents by allowing any of four methods of indexing: a table of contents; a list of titles, identifying names, or identifying numbers; an orderly filing system by which those documents may be retrieved; or an electronic database accessed by title, name, or number to be developed in the future as time and money allow. New paragraph (2) is adopted to define the phrase “cross-index to statute” consistent with statutory requirements. New subparagraph (A) is adopted to specify that cross-indexing a rule to statute means to cross-reference or to cite statutory authority for proposing or adopting the rule according to APA provisions, *Texas Register* rules, and other applicable law. New subparagraph (B) is adopted to allow that all other documents to which the APA applies may be cross-indexed either to statutory or regulatory authority, recognizing that all the other documents may implement or interpret rules as well as statutes.

New subsection (c) is adopted to set forth the statutory requirement to index, cross-index to statute, and make available for public inspection all rules; written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions; orders; decisions; and opinions.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the new rule 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. A “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 commission adopts this revision to define and clarify procedures for indexing and cross-indexing rules; written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions; orders; decisions or permits; and opinions. The purpose of new §20.4 is procedural and affects only agency staff. Therefore, the rulemaking does not meet the definition of a “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The commission invited public comment on the draft regulatory impact analysis determination. No comments were received relating to the Draft Regulatory Impact Analysis Determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rulemaking under Texas Government Code, Chapter 2007. The commission’s final analysis indicates that Texas Government Code, Chapter 2007 does not apply to the new rule because the rule is procedural in nature and does not provide the commission with any additional authority or jurisdictional responsibility. The rulemaking will affect only agency staff. No burdens are imposed on any private real property. Therefore, the rulemaking will not constitute a taking under the Fifth and Fourteenth Amendments to the United States Constitution; §17 or §19, Article 1, Texas Constitution; or Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

HEARING AND COMMENTERS

A public hearing was not held. One comment, from the petitioner, was received on the proposal.

RESPONSE TO COMMENTS

The petitioner commented that the commission approved his petition to amend §20.3 of the agency rules, and that the commission could not propose a new §20.4 in place of his petition.

The commission disagrees with this comment. Under Texas Government Code, §2001.021, the commission may only deny the petition or initiate a rulemaking under Texas Government Code, Chapter 2001, Subchapter B. The commission chose to initiate rulemaking. In making that decision, the commission did not approve the petitioner's petition but rather granted the petitioner's request for rulemaking. Once the rulemaking process was initiated, the commission determined that it was not necessary to amend §20.3 to add the indexing and cross-indexing requirements to comply with the provisions of the APA. The APA consists of Texas Government Code, Chapter 2001, which is divided into ten subchapters covering various aspects of contested case hearings as well as rulemaking. Section 20.3 requires the commission to follow APA rulemaking requirements. Those requirements are found in Chapter 2001, Subchapter B,

consisting of §§2001.021 - 2001.039. Section 2001.004, the statute requiring an agency to index and cross-index specific documents, is in Subchapter A, relating to general provisions, and those general provisions apply to contested case hearings as well as to rulemaking. Although some orders result from rulemaking or other deliberative processes and other orders and decisions result from uncontested situations, §2001.004(3) applies to documents that generally are the result or outcome of contested cases. Section 2001.004(2) applies to documents that generally result from rulemaking. Since that section applies to documents related to both contested cases and rulemaking, it is inappropriate to include the indexing and cross-indexing requirements in a section of the rules that applies only to the rulemaking process. The commission determined that the creation of new §20.4 was appropriate to address the indexing and cross-indexing requirements. The commission has made no changes in response to this comment.

The petitioner commented that the proposed rulemaking did not substantially represent but rather mitigated the scope and intent of the original petition to amend the rules. Specifically, the petitioner's position was that his petition would fully implement APA, §2001.004, by indexing and cross-indexing rules and underlying statutes, while the proposed rulemaking only addressed indexing and cross-indexing in a manner divergent from the petition. The petitioner also stated that the agency was not in compliance with APA, §2001.021, the provision under which the petition was submitted, because by mitigating both the scope and intent of the original petition, the agency was circumventing the statute's expressed legislative intent to provide opportunity for public participation in the rulemaking process.

The commission disagrees with this comment. The intent of the statute was public availability of agency rules and other written statements of policy or interpretations, orders, decisions, and

opinions. The petitioner’s proposal was for a list of agency rules by number showing the statutes from which each rule was derived and a second list of statutes by number showing the rules derived from each statute.

The original language of §2001.004 required a state agency “{to} index and make available for public inspection all rules and other written statements of policy or interpretations . . . and . . . all final orders, decisions, and opinions.” The statute was amended in 1991 when the phrase “cross-index to statute” was added, thus requiring a state agency “{to} index, cross-index to statute, and make available for public inspection all rules and other written statements of policy or interpretations . . . and . . . all final orders, decisions, and opinions.” It thus imposes 15 separate requirements on a state agency: 1) to index all rules; 2) to cross-index all rules to statute; 3) to make all rules available for public inspection; 4) to index all other written statements of policy or interpretations; 5) to cross-index all other written statements of policy or interpretations to statute; 6) to make all other written statements of policy or interpretations available for public inspection; 7) to index all final orders; 8) to cross-index all final orders to statute; 9) to make all final orders available for public inspection; 10) to index all final decisions; 11) to cross-index all final decisions to statute; 12) to make all final decisions available for public inspection; 13) to index all final opinions; 14) to cross-index all final opinions to statute; and 15) to make all final opinions available for public inspection.

The petitioner’s proposal interprets the statute to require an agency: 1) to produce an index of rules to statutes; and 2) to produce a cross-index of statutes to rules. The petitioner’s cross-index would be a second index of rules by statute. The commission disagrees with this interpretation of

the statute. The petitioner’s proposal does not fulfill the legislative intent of public availability of rules, nor does it address written statements of policy or interpretations, orders, decisions, or opinions. Thus, the petition was incomplete as to the scope of the 15 statutory requirements and misinterpreted the legislative intent behind the statute. The commission has made no changes in response to this comment.

The petitioner asserted that the proposed new rule did not recognize the relationship between a rule and the particular statutory provision that the rule implemented, noting that the proposed rulemaking substituted “statutory authority” for “statutory basis.” The petitioner asserted that “statutory basis” was a requirement of the APA. Elsewhere, the petitioner referred to “statute specific factual basis” and commented that the legislative intent was to have a direct relationship of rule-to-particular statute being implemented, rather than a less direct relationship of rule-to-general rulemaking authority, and that this was a requirement of §2001.033(a)(1)(B) and (2).

The commission disagrees with this comment. This rule does recognize the relationship between the rule and the particular provision which it implements. This rule is adopted to clarify and expressly address how the agency complies with the APA requirement to adopt rules of practice, and index rules, orders, and decisions set forth in §2001.004.

With respect to the assertion that statutory basis is a requirement of the APA, the commission notes that §2001.033(a)(1)(B) provides that “a state agency order finally adopting a rule must include a summary of the factual basis for the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted.” Section 2001.033(a)(2)

sets forth that “a state agency order finally adopting a rule must include a concise restatement of the particular statutory provisions under which the rule is adopted or how the agency interprets the provisions as authorizing or requiring the rule.” The APA makes no reference to the term “statutory basis.” Furthermore, this rulemaking is consistent with the APA. “Statutory authority” is referenced in the APA in §2001.024(3) (relating to Content of Notice, “a statement of the statutory or other authority under which the rule is proposed to be adopted”), the rules of the Office of the Secretary of State relating to publication in the *Texas Register*, in 1 TAC §91.67(b) (relating to Rule Submission Preambles, “each rule submission has its own statutory authority note”), and the Texas Water Code (TWC), §5.103 (relating to Rules). The commission currently cites the statutory authority for a proposed rulemaking in accordance with APA, §2001.024(a)(3)(A) and §2001.033(a)(2), and TWC, §5.103. It is important to recognize that this agency, like other agencies, is charged with carrying out broad and complex regulatory programs. While the legislature, in some cases, establishes specific charges to be carried out the by agency, the legislature delegates to the agency general powers to administer these programs as well as general rulemaking authority so that the agency can prescribe any specific requirements necessary to achieve the statutory objectives.

The petitioner commented that the rule proposal package did not comply with the APA Content of Notice requirements at §2001.024(a)(3)(A) and (B) and quotes from the Background and Summary of the Factual Basis for the Proposed Rule section of the proposal, which lacks any statement of statutory authority.

The commission disagrees with this comment. The commission complies with the content of notice requirements of APA, §2001.024, as well as rule adoption order requirements of §2001.033. The “particular statutory or other provisions under which the rule is proposed; {and} the section or article of the code affected” are included in the preamble’s Statutory Authority section. The commission has made no changes in response to this comment.

STATUTORY AUTHORITY

The new section is adopted under Texas Government Code, §2001.004, which provides the commission authority to adopt rules of practice. The new section is authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under TWC, §5.013, which establishes the general jurisdiction of the commission; and §5.105, which provides the commission with authority to establish and approve all general policy of the commission.

CHAPTER 20: RULEMAKING

§20.4

§20.4. Indexing, Cross-Indexing, and Availability of Certain Documents.

(a) This section applies only to final versions of the following documents that are in effect:

(1) rules;

(2) other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions;

(3) orders;

(4) decisions; and

(5) opinions.

(b) For the purposes of this section, the following words or phrases shall have the following meanings.

(1) **Index** - To produce or furnish, as an aid in making documents accessible to the public, one or more of the following:

(A) a table of contents;

(B) a current list of the titles, identifying names, or identifying numbers of the documents;

(C) an orderly filing system by which those documents may be retrieved; or

(D) an electronic database of documents by which at least the titles, identifying names, or identifying numbers of those documents can be searched.

(2) Cross-index to statute -

(A) For rules: to cross-reference or cite statutory authority, for proposing or adopting the rule, according to the requirements of the APA, *Texas Register* rules, and other applicable law.

(B) For written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions, orders, decisions, and opinions: to cross-reference or cite statutory or regulatory authority within the document.

(c) The agency shall index, cross-index to statute, and make available for public inspection the following:

(1) rules;

(2) other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions;

(3) orders;

(4) decisions; and

(5) opinions.