

The Texas Natural Resource Conservation Commission (commission) proposes new §20.4, Indexing, Cross-Indexing, and Availability of Certain Documents. The commission proposes 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 proposed 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.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

Texas Government Code, §2001.004(2) and (3), and the Administrative Procedure Act (APA), require 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 No. 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.

Proposed new §20.4 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. Staff researched the legislative intent of the statute and subsequently determined that this approach was 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 (Vernon's Ann Civ. Stat. Art. 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 adequate proper public notice of proposed agency rules and agency actions through publication of a state register, part of the purposes 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 web site. Opinions of the staff rule interpretation teams are indexed on the agency’s public web site by subject matter. Orders and decisions are indexed by identifying number or entity name in a database.

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, many regulatory guidances, and opinions of staff rule interpretation teams are also available on the agency's public web site. Orders and decisions are available through the Office of the Chief Clerk and through Central Records at the agency's Austin headquarters. Many of these documents are also available at the agency's regional offices.

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

SECTION DISCUSSION

New §20.4 is proposed 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 proposed 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 proposed to define indexing and cross-indexing. New paragraph (1) is proposed 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 proposed 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; or 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 proposed to define the phrase “cross-index to statute” consistent with statutory requirements. New subparagraph (A) is proposed 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 proposed 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 proposed 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.

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 rule is in effect, there will be no significant fiscal impacts to units of state or local government as a result of administration of the proposed rule.

This rulemaking is proposed to define and clarify agency procedures for indexing and cross-indexing rules, orders, decisions, permits, and opinions. Additionally, the proposal will also set forth procedures to index and cross-index written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions.

The proposed rulemaking only affects the agency. No other units of state and local government are affected by this proposal. The commission does not anticipate the proposed rulemaking will result in significant costs to the agency.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from administration of the proposed rule would be a better understanding of how the agency implements and complies with the APA.

This rulemaking is intended to define and clarify agency procedures for indexing and cross-referencing rules, orders, decisions, permits, and opinions. Additionally, the proposal will set forth procedures to index and cross-index written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions.

The proposed rulemaking only affects the agency; therefore, there will be no costs to individuals and businesses to implement provisions of this proposal.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impacts to small or micro-businesses as a result of the proposed new rule, which is intended to define and clarify agency procedures for indexing and cross-referencing rules, orders, decisions, permits, and opinions. Additionally, the proposal will also set forth procedures to index and cross-index written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions.

The proposed rulemaking only affects the agency; therefore, there will be no costs to small or micro-businesses to implement provisions of this proposal.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed the proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule would be in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed 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 act. “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 proposes 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 “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 invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed a preliminary analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission’s preliminary analysis indicates that Texas Government Code, Chapter 2007 does not apply to the proposed 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 proposed 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 proposed rule is not subject to the Coastal Management Program.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-058-020-AD. Comments must be received by 5:00 p.m., December 10, 2001. For further information, please contact Debra Barber, Policy and Regulations Division, at (512) 239-0412.

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §2001.004, which provides the commission authority to adopt rules of practice. The new section is authorized by Texas Water Code (TWC), §5.103, which provides the commission with the authority to adopt rules necessary to carry out its power 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.

The proposed new section implements Texas Government Code, §2001.004, relating to Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions.

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.