

The Texas Natural Resource Conservation Commission (commission) proposes new §80.108, Executive Director Party Status in Permit Hearings and §80.118, Administrative Record. The commission also proposes amendments to §80.17, Burden of Proof; §80.21, Witness Fees; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.127, Evidence; §80.131, Interlocutory Appeals and Certified Questions; §80.153, Issuance of Subpoena or Commission to Take Deposition; §80.251, Judge's Proposal for Decision; §80.252, Judge's Proposal for Decision; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meetings.

#### **BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES**

In accordance with Texas Water Code (TWC) §5.228, the executive director of the commission is required to be a party to all contested case hearings. As a result of public testimony received during its comprehensive review of the commission, the Sunset Advisory Commission recommended that the statute be changed to allow, rather than require, the executive director to participate in contested case permit hearings. The Sunset Advisory Commission also recommended that: 1) the role of the executive director be more clearly defined; 2) that the executive director be expressly prohibited from rehabilitating non-agency witnesses in permit hearings; and (3) that the commission adopt rules specifying the factors the executive director must take into account when considering whether to be a party in a permit hearing.

This recommendation was codified in House Bill (HB) 2912, the Sunset Bill for the commission.

Under HB 2912, TWC, §5.228, was amended to provide that the executive director is required to be a party in a contested case hearing only in a matter where the executive director bears the burden of proof

(e.g., an enforcement proceeding). For permit hearings, the executive director may be a party only for the purpose of providing information to complete the administrative record. The commission is required to specify, by rule, the factors the executive director must consider in determining, on a case-by-case basis, whether to participate in a hearing as a party. Factors the commission must consider in developing these rules include: 1) the technical, legal, and financial capacity of the parties; 2) whether the parties have previously participated in a hearing; 3) the complexity of the issues; and 4) the available resources of commission staff. The executive director is expressly prohibited from rehabilitating the testimony of non-agency witnesses or from assisting an applicant in meeting its burden of proof unless that applicant fits a category of permit applicants that under commission rule are eligible for such assistance. The amendments to TWC, §5.228, take effect September 1, 2001, and apply only to hearings in which the executive director is named as a party on or after that date.

This rulemaking is necessary to implement the provisions of HB 2912 as close as practicable to their effective date.

#### SECTION BY SECTION DISCUSSION

Section 80.17, Burden of Proof, is proposed to be amended to reflect that the executive director must comply with proposed new §80.108, relating to the executive director's party status in permit hearings.

This proposed change implements amended TWC, §5.228(e).

Section 80.21, Witness Fees, is proposed to be amended to clarify that a commission employee who is compelled to testify as a witness or deponent is only entitled to receive those expenses allowed by

commission policy and applicable law.

New §80.108, Executive Director Party Status in Permit Hearings, is proposed to implement TWC, §5.228(b), (c), and (e). This proposed new section directs when, and under what circumstances, the executive director may participate in contested case permit hearings. This proposed new section provides for mandatory abstention of the executive director in some permitting matters, mandatory participation in other permitting matters, and discretionary participation, based on an evaluation of certain criteria, in permitting matters not covered by the mandatory provisions. The commission, in particular, solicits comments regarding the mandatory abstention provisions of proposed new §80.108(a) and whether the types of applications identified should be expanded or restricted.

New §80.108(a) would prohibit the executive director from participating in the following permit hearings: 1) an application concerning municipal solid waste where land use is the sole issue at hearing, including hearings held for determination of land use compatibility under Texas Health and Safety Code (THSC), §361.069; 2) an application for an air quality standard permit to authorize a concrete batch plant under THSC, §382.05195; 3) an application for an air quality permit to authorize emissions from facilities which solely emit the types of emissions that do not require health and welfare effects review as specified on the Toxicology and Risk Assessment (TARA) Emissions Screening List; 4) an application for a permit for a municipal solid waste transfer facility under 30 TAC §330.4; 5) an application for a permit for the processing of grit and grease trap waste under 30 TAC §330.4; 6) an application for a permit for composting facilities under 30 TAC §332.3; and 7) an application to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements

for secondary treatment in 30 TAC Chapter 309. The hearings identified involve matters for which executive director participation is not necessary for one or more of the following reasons: 1) commission technical staff have limited expertise on the issue in controversy (e.g., land use compatibility); 2) the permit conditions for the authorization sought have been developed after extensive technical evaluation and no other unique conditions are involved (e.g., concrete batch plant standard permits); or 3) the issues to be considered are of limited complexity or are ones for which the technical evaluation of staff as reflected in the administrative record, is not likely to require further elaboration.

New §80.108(b) proposes that the executive director be required to participate in the following matters:

1) applications concerning water rights; 2) applications for which the executive director has recommended denial of the permit; 3) involuntary amendments; 4) applications for which the draft permit includes provisions opposed by the applicant; and 5) applications for which the applicant has requested a hearing under 30 TAC §55.27(b) and §55.211(c). Executive director participation in the matters identified in 1) - 5) is proposed for one or more of the following reasons: 1) the executive director is essentially serving in the role of trustee of a natural resource (e.g., water rights); or 2) the executive director's position in the proceeding is contrary to that of the applicant and his participation is necessary to ensure that the commission has the benefit of all relevant information necessary to make a decision (e.g., application for which the executive director has recommended denial).

If the mandatory provisions of this new section for participation or abstention do not apply, then §80.108(c) outlines the factors to be considered by the executive director in determining, in his discretion, whether to participate in a contested case permit hearing as a party. The executive director,

as a preliminary matter, is to consider whether there is any issue that merits his participation, based on the existence of one or more of the following conditions: 1) one or more of the issues to be presented in the hearing are new, unique, or complex, including consideration of whether an issue relates to more than one medium, and whether it is likely that construction of prior agency policy or practice will be involved; 2) it is likely that the decision on any of the issues to be presented in the hearing will have significant implications for other agency actions or policies; 3) it is likely that changes to proposed permit conditions could adversely affect human health or the environment; or 4) any issue to be considered is likely to affect federal program approval or authorization.

Based on an evaluation of these conditions, the executive director may elect to participate as a party or he may proceed with an analysis of additional factors. These factors include whether there is a significant disparity in the legal and technical capacity, and if requested, financial capacity of the parties, whether there are limitations on the availability of commission staff and whether there is a need for the executive director to present an applicant's compliance history.

New §80.108 requires the executive director to notify all parties of his intention to participate in a contested case permit hearing as a party as soon as practicable and no later than one week after the end of the preliminary hearing. The executive director's decision on participation is not subject to review by either the commission or the State Office of Administrative Hearings (SOAH). New §80.108(d) states that when the executive director participates as a party under subsections (b) or (c), he shall do so solely for the purpose of providing information to complete the administrative record. New §80.108(e) clarifies that the executive director may only assist the applicant in meeting its burden of proof if the

applicant is eligible for such help because it meets certain criteria. Those criteria are: 1) the applicant is a qualifying local governmental entity as defined in commission rule; or 2) the applicant is a non-profit entity; and 3) there is a significant public need for the permit to avoid imminent adverse impact to human health or the environment. New §80.108(f) provides that the executive director may assist an applicant in meeting its burden of proof notwithstanding subsections (a) - (d), which set forth the matters in which the executive director shall and shall not participate as well as the factors to be considered. The commission notes that as it develops further experience with implementation of the amendments to TWC, §5.228 under HB 2912, it may further refine in future rulemakings the provision relating to Executive Director Party Status in Permit Hearings.

Section 80.109(a), Designation of Parties, is amended to reflect that under certain circumstances, the executive director may be added as a party to a permit hearing after the date of the preliminary hearing, without the otherwise required finding of good cause and extenuating circumstances. Section 80.109(b) is amended to provide that the executive director is a required party in commission proceedings concerning matters in which the executive director bears the burden of proof. The executive director would also be named as a party to commission proceedings in matters concerning TWC, §§11.036, 11.041, and 12.013; TWC, Chapters 13, 35, 36, and 49 - 66; Texas Local Government Code, Chapters 375 and 395; matters arising under Texas Government Code, Chapter 2260 and 30 TAC Chapter 11, Subchapter D; and matters under TWC, Chapter 26, Subchapter I, and 30 TAC Chapter 334, Subchapters H and L. The executive director may also be a party in contested case hearings concerning permitting matters if he participates as a party in accordance with the provisions of §80.108. Proposed §80.109(b)(5) (formerly §80.109(b)(3)) is proposed to be amended to correct cross-references to rules

relating to affected persons. The amended section is also proposed to be renumbered to accommodate the changes made in the rule.

Section 80.117, Order of Presentation, is proposed to be amended to remove the requirement that the executive director open with a simple statement of his position in a permit hearing. It is proposed that the applicant open the proceeding instead. The section is also proposed to be amended to that in those cases where the executive director is participating as a party, the executive director follows the applicant, protesting parties, and public interest counsel in presenting evidence.

New §80.118, Administrative Record, lists those documents which at a minimum constitute the administrative record. These include: 1) the final draft permit, including any special provisions or conditions; 2) the summary of the technical review of the permit application; 3) the compliance summary of the applicant; 4) copies of the published and/or mailed public notices relating to the permit application, as well as affidavits of public notices; and 5) any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

New §80.118(b) states that for the purpose of referrals to SOAH under §80.5 and §80.6, the chief clerk's case files must include the administrative record described in subsection (a).

Section 80.127, Evidence, is proposed to be amended to prohibit the executive director from rehabilitating the testimony of a non-agency witness in permitting matters. The executive director may only rehabilitate agency witnesses who are testifying solely for the purpose of completing the administrative record. The proposed change implements TWC, §5.228(d). A new subsection (h) is

also proposed to be added to clarify that commission staff testimony or evidence relating to the administrative record as defined by proposed new §80.118 or any other executive director function required by law shall not constitute assistance to permit applicants in meeting their burden of proof.

Section 80.131, Interlocutory Appeals and Certified Questions, is proposed to be amended to reflect that the judge must send copies of certified questions to the executive director, whether or not he is a party to the hearing. Copies of all briefs and replies must be served on the executive director in accordance with 30 TAC §1.11. The executive director may file briefs and responses to all certified questions. Finally, the chief clerk is required to give the executive director notice of any commission meeting where the certified questions will be considered. These amendments would allow executive director participation on significant policy issues certified to the commission regardless of party status.

Section 80.153(a), Issuance of Subpoena or Commission To Take Deposition, is proposed to be amended to add a cross-reference to §80.21, which specifies the witness fees that must be paid. A new subsection (f) is also proposed to be added to explicitly provide that the executive director's legal staff may participate in defending the deposition of any agency employee upon whom a subpoena or commission is served.

Section 80.251, Judge's Proposal for Decision, applies to any application that is administratively complete before September 1, 1999. Section 80.252, Judge's Proposal for Decision, applies to any application that is administratively complete on or after September 1, 1999. These sections are proposed to be revised to require that the SOAH judge send to the executive director a copy of the

proposal for decision regardless of his party status.

Section 80.257, Pleadings Following Proposal for Decision, is proposed to be amended to clarify that any party may file exceptions or briefs. It is also proposed that for permit hearings in which the executive director has not participated as a party, the commission or the general counsel may request that the executive director file briefs.

Section 80.261, Scheduling Commission Meetings, is proposed to be amended to require that the SOAH judge, in all cases, notify the executive director of the date of the commission meeting at which a proposal for decision will be heard. Additionally, this section is proposed to be revised to require that the chief clerk notify the executive director of any rescheduled commission meetings, whether or not he is a party to the hearing.

The proposed changes to §§80.153, 80.251, 80.257, and 80.261 are intended to ensure that the executive director is kept informed of the status of commission proceedings regardless of party status.

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

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined for the first five-year period the proposed rules are in effect, there may be fiscal implications, which are not anticipated to be significant, to units of state or local government as a result of implementation of the proposed rules. The executive director is currently required to be a party to all contested case hearings for permits. The proposed rules are intended to require the executive director to be a party to a

contested case permit hearing only when the executive director bears the burden of proof or when certain conditions are met.

The proposed rules are intended to implement certain provisions of HB 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001. Specifically, HB 2912 authorizes the executive director to participate as a party in contested case permit hearings before the commission or SOAH for the purpose of providing information to complete the administrative record. The proposed rules include an identification of matters in which the executive director shall and shall not participate as a party as well as specify the factors the executive director must consider in determining whether to participate as a party in a contested case hearing not covered by the mandatory provisions. Additionally, the proposed rules are intended to specify the categories of permit applicants eligible to receive assistance in meeting their burden of proof.

The proposed rules require that when choosing whether to participate as a party in a contested case hearing, the executive director has to consider as a preliminary matter whether any issue to be presented merits participation. If the executive director finds that any issue merits participation, he may elect to participate as a party or he may also consider the following factors: whether there is a significant disparity in the legal and technical, and if requested, financial capacity of the parties; whether there are limitations on the availability of agency staff; and whether there is a need for the executive director to present an applicant's compliance history.

In order for the executive director to assist an applicant in meeting its burden of proof in a contested case hearing concerning a permitting matter before the commission or the SOAH, the proposed rules set forth the following criteria: the applicant is a qualifying local governmental entity; or the applicant is a non-profit entity; and there is a significant public need for the permit to avoid imminent adverse impact to human health or the environment.

The commission does not anticipate that units of state and local government will incur significant costs due to implementation of the proposed rules. However, implementation of the proposed rules may result in the executive director participating in fewer contested case permit hearings as a party, which may provide a cost savings to the commission, in an amount that is not anticipated to be significant.

#### PUBLIC BENEFIT AND COSTS

Mr. Davis also determined for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules would be to ensure the executive director does not unnecessarily participate as a party in contested case permit hearings.

The proposed rules are intended to implement certain provisions of HB 2912. Specifically, HB 2912 authorizes the executive director to participate as a party in contested case permit hearings before the commission or the SOAH for the sole purpose of providing information to complete the administrative record. The proposed rules include an identification of matters in which the executive director shall and shall not participate as a party as well as specify the factors the executive director must consider in

determining whether to participate as a party in a contested case hearing not covered by the mandatory provisions. Additionally, the proposed rules set forth the categories of permit applicants eligible to receive assistance in meeting their burden of proof.

The commission does not anticipate that individuals and businesses will incur significant costs due to implementation of the proposed rules.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no significant adverse fiscal implications for small or micro-businesses as a result of implementation of the proposed rules. The proposed rules are intended to implement certain provisions of HB 2912. Specifically, HB 2912 authorizes the executive director to participate as a party in contested case permit hearings before the commission or the SOAH for the sole purpose of providing information to complete the administrative record.

The proposed rules are intended to specify the conditions under which the executive director shall or shall not participate as a party in a contested case hearing. Additionally, the proposed rules are intended to specify the categories of permit applicants eligible to receive assistance in meeting their burden of proof.

The commission anticipates that small or micro-businesses will not incur significant costs due to implementation of the proposed rules.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of 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 that statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the proposed rulemaking is procedural in nature and establishes procedures for the executive director’s participation as a party in contested case hearings on permitting matters, the rulemaking does not meet the definition of a major environmental rule.

In addition, even if the proposed rules are a major environmental rule, a draft regulatory impact assessment is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. This proposal does not exceed a standard set by federal law. This proposal does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and TWC, Chapter 5, Subchapter F, as well as the other statutory authorities

cited in the STATUTORY AUTHORITY section of this preamble. This proposal does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because the rule is consistent with, and does not exceed, federal requirements, and is in accordance with TWC, §5.228, which expressly requires the commission to adopt rules necessary to specify the factors the executive director must consider in determining whether to participate as a party in a contested case permit hearing. Further, TWC, §5.228, requires the commission to adopt rules that establish categories of permit applicants eligible to receive assistance from the executive director in meeting their burden of proof. This proposal does not adopt a rule solely under the general powers of the agency, but rather under a specific state law (i.e., TWC, Chapter 5, Subchapter F and Texas Government Code, §2001.004). Finally, this rulemaking is not being proposed or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules 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 rules. Nevertheless, the commission further evaluated the proposed rules and performed a preliminary analysis of whether the proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific primary purpose of the proposed rules is to revise the commission rules to establish procedures for executive director participation in contested case permit hearings as required by HB 2912, §1.20. The proposal relates to the factors the executive director must consider when deciding whether to participate as a

party in a contested case permit hearing as well as to categories of permit applicants eligible to receive assistance in meeting their burden of proof from the executive director. The proposed rules will substantially advance these stated purposes by providing specific provisions on the aforementioned matters. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules because the proposed language relates to procedural matters relating to executive director party status rather than any substantive requirements.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the rules are 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 rules are not subject to the Texas Coastal Management Program.

#### ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held September 18, 2001 at 10:00 a.m. in Room 2210 of TNRCC Building F, located at 12100 Park 35 Circle, Austin. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-027-080-AD. Comments must be received by 5:00 p.m., September 24, 2001. For further information, please contact Kathy Ramirez, Regulation Development Section, at (512) 239-6757.

#### STATUTORY AUTHORITY

The amendments are proposed under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

The proposed amendments implement TWC, §5.228.

**SUBCHAPTER A: GENERAL RULES**

**§80.17, §80.21**

**§80.17. Burden of Proof.**

(a) - (d) (No change.)

(e) In permitting matters, the executive director shall comply with the requirements of §80.108 of this title (relating to Executive Director Party Status in Permit Hearings).

**§80.21. Witness Fees.**

(a) A person who is not a party and is compelled to attend any hearing or proceeding or to produce books, records, papers, or other objects is entitled to receive mileage reimbursement if the location of the hearing or proceeding is more than 25 miles from the person's place of residence. Reimbursement shall be at the current rate for state employees. The person is also entitled to receive a minimum fee of \$70 or the amount equal to state employees' current maximum travel reimbursement for overnight lodging plus meals, whichever is greater, for each day or part of a day the person is necessarily present as a witness or deponent. This fee shall be paid to the witness or deponent even if overnight lodging is not used, and the fee shall not be prorated for parts of days. A witness or deponent who is an agency employee may only receive travel expenses, to the extent allowed by applicable law and commission policy.

(b) (No change.)

**SUBCHAPTER C: HEARING PROCEDURES**

**§§80.108, 80.109, 80.117, 80.118, 80.127, 80.131**

**STATUTORY AUTHORITY**

The amendments and new sections are proposed under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

Additionally, the amendments and new sections are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

The proposed amendments and new sections implement TWC, §5.228.

**§80.108. Executive Director Party Status in Permit Hearings.**

(a) Except to the extent superseded by subsection (b) of this section, the executive director shall not participate as a party in the following contested case hearings concerning permitting matters:

(1) an application concerning municipal solid waste where land use is the sole issue at hearing, including hearings held for determination of land use compatibility under Texas Health and Safety Code (THSC), §361.069;

(2) an application for an air quality standard permit to authorize a concrete batch plant under THSC, §382.05195;

(3) an application for an air quality permit to authorize emissions from facilities which solely emit the types of emissions that do not require health and welfare effects review as specified on the Toxicology and Risk Assessment (TARA) Section Emissions Screening List;

(4) an application for a permit for a municipal solid waste transfer facility under 30 TAC §330.4;

(5) an application for a permit for the processing of grit and grease trap waste under §330.4 of this title (relating to Permit Required);

(6) an application for a permit for composting facilities under §332.3 of this title (relating to Applicability); and

(7) an application to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements for secondary treatment in Chapter 309 of this title (relating to Domestic Wastewater Effluent Limitation and Plant Siting).

(b) The executive director shall participate as a party in the following contested case hearings relating to permitting matters:

(1) an application concerning water rights;

(2) an application for which the executive director has recommended denial of the permit;

(3) an involuntary amendment;

(4) an application for which the draft permit includes provisions opposed by the applicant; and

(5) an application for which the applicant has requested a hearing under §55.27(b) and §55.211(c) of this title (relating to Commission Action on Hearing Request and Commission Action on

Requests for Reconsideration and Contested Case Hearing).

(c) For permitting matters not included in subsections (a) or (b) of this section, the executive director shall, in his discretion and on a case-by-case basis, consider the following criteria in the manner specified in determining whether to participate as a party.

(1) The executive director shall, as a preliminary matter, determine whether there is any issue to be presented in the hearing that merits participation of the executive director, based on the existence of one or more of the following:

(A) one or more of the issues to be presented in the hearing are new, unique, or complex, including consideration of whether an issue relates to more than one medium, and whether it is likely that construction of prior agency policy or practice will be involved;

(B) it is likely that the decision on any of the issues to be presented in the hearing will have significant implications for other agency actions or policies;

(C) it is likely that changes to proposed permit conditions could adversely affect human health or the environment; or

(D) any issue to be considered is likely to affect federal program approval or authorization.

(2) If the executive director finds that there are issues weighing in favor of participation under paragraph (1) of this subsection, the executive director may elect to participate as a party or he may also consider the following factors in the manner described:

(A) whether there is a significant disparity in the experience and resources of the parties. A significant disparity weighs in favor of executive director participation. In evaluating whether there is a significant disparity, the executive director shall consider:

(i) the legal capacity of the parties, based on whether any party is not represented by counsel and the prior contested case hearing experience of the parties at the agency;

(ii) if requested, the financial capacity of the parties, including whether any party is:

(I) a qualifying local governmental entity;

(II) a non-profit entity; or

(III) a small business; and

(iii) the technical capacity of the parties, including an evaluation of:

(I) the number and complexity of the administrative and technical notices of deficiency issued during the administrative and technical review of the application;

(II) the number and complexity of the technical issues raised by parties to the hearing during the comment period or at the preliminary hearing;

(III) whether any of the parties does not have access to a technical expert;

(B) whether there are limitations on the availability of agency staff, including specialized staff expertise on the issues to be presented at hearing, which shall weigh against executive director participation; and

(C) whether there is a need for the executive director to present an applicant's compliance history which shall weigh in support of executive director participation.

(d) The executive director's participation as a party under subsection (b) or (c) of this section shall be for the sole purpose of providing information to complete the administrative record.

(e) The executive director may not assist an applicant in meeting its burden of proof in a contested case hearing concerning a permitting matter before the commission or SOAH unless the applicant is eligible to receive assistance because:

(1) the applicant is a qualifying local governmental entity; or

(2) the applicant is a non-profit entity; and

(3) there is a significant public need for the permitting action to avoid imminent adverse impact to human health or the environment.

(f) The executive director may elect to participate as a party for the purpose of assisting an applicant in meeting its burden of proof notwithstanding the provisions of subsections (a)-(d) of this section.

(g) The executive director must notify all parties of his intention to participate as a party to a contested case hearing concerning a permitting matter in writing as soon as practicable, but not later than one week after the end of the preliminary hearing.

(h) The executive director's decision on participation as a party in contested case hearing concerning a permitting matter and the executive director's decision on whether an applicant is eligible to receive assistance in accordance with subsection (e) of this section are not subject to review by the commission or SOAH.

(i) This section does not apply to matters in which the executive director is a party in accordance with §80.109(b)(1) of this title (relating to Designation of Parties).

(j) For purposes of this section:

(1) “qualifying local governmental entity” means a district, authority, county, or municipality that demonstrates that it lacks the technical, legal, and financial resources to support its application in the contested case hearing process; and

(2) “small business” means a small business as defined by §70.9(b)(1) and (2) of this title (relating to Installment Payment of Administrative Penalty).

**§80.109. Designation of Parties.**

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no person other than the executive director, as provided in §80.108 of this title (relating to Executive Director Party Status in Permit Hearings), will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed.

(b) Parties.

(1) The executive director is a mandatory party to all commission proceedings concerning matters in which the executive director bears the burden of proof, and in the following commission proceedings:

(A) matters concerning Texas Water Code (TWC), §§11.036, 11.041, and 12.013; TWC, Chapters 13, 35, 36, and 49 - 66; and Texas Local Government Code, Chapters 375 and 395;

(B) matters arising under Texas Government Code, Chapter 2260 and Chapter 11, Subchapter D of this title (relating to Resolution of Contract Claims); and

(C) matters under TWC, Chapter 26, Subchapter 1, and Chapter 334, Subchapters H and L of this title (relating to Reimbursement Program and Overpayment Prevention).

(2) In addition to subsection (b)(1) of this section, the executive director may also be a party in contested case hearings concerning permitting matters, pursuant to, and in accordance with, the provisions of §80.108 of this title.

(3) [(1)] The [executive director and] public interest counsel of the commission is a party [are parties] to all commission proceedings.

(4) [(2)] The applicant is a party in a hearing on its application.

(5) [(3)] Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 and §55.203 of this title (relating to Determination of Affected Person).

(6) [(4)] The Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status.

(7) [(5)] The Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status.

(8) [(6)] The parties to a contested enforcement case include:

(A) the respondent(s);

(B) any other parties authorized by statute; and

(C) in proceedings alleging a violation of or failure to obtain an underground injection control or Texas Pollutant Discharge Elimination System [a UIC or TPDES] permit, or a state permit for the same discharge covered by a National Pollutant Discharge Elimination System (NPDES) permit that has been assumed by the state under NPDES authorization, any other party granted permissive intervention by the judge. In exercising discretion whether to permit intervention, the judge

shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(9) [(7)] The parties to a hearing upon a challenge to commission rules include the person(s) challenging the rule and any other parties authorized by statute.

(10) [(8)] The parties to a permit revocation action initiated by a person other than the executive director shall include the respondent and the petitioner.

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

**§80.117. Order of Presentation.**

(a) (No change.)

(b) [In a permit hearing the executive director shall open with a simple statement of his preliminary position on the application and in a permit hearing, will present the draft permit including special provisions if any.] The applicant shall [then] present evidence to meet its burden of proof on the application, followed by the protesting [other] parties, the public interest counsel, and, if named as a party, the executive director. In all cases, the applicant shall be allowed a rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.

(c) (No change.)

**§80.118. Administrative Record.**

(a) In all permit hearings, the record in a contested case includes the following certified copies of documents:

(1) the final draft permit, including any special provisions or conditions;

(2) the summary of the technical review of the permit application;

(3) the compliance summary of the applicant;

(4) copies of the public notices relating to the permit application, as well as affidavits of public notices; and

(5) any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

(b) For purposes of referral to SOAH under §80.5 and §80.6 of this title (Referral to SOAH), the chief clerk's case file shall contain the administrative record as described in subsection (a) of this section.

**§80.127. Evidence.**

(a) General admissibility of evidence.

(1) - (3) (No change.)

(4) In a contested case hearing concerning a permitting matter, the executive director shall not rehabilitate the testimony of a witness unless the witness is an agency employee testifying for the sole purpose of providing information to complete the administrative record.

(b) - (g) (No change.)

(h) Staff testimony and evidence. Testimony or evidence offered by agency staff relating to the documents listed in §80.118 of this title (relating to Administrative Record) or any analysis, study, or review that the executive director is required by statute or rule to perform shall not constitute assistance to the permit applicant in meeting its burden of proof.

**§80.131. Interlocutory Appeals and Certified Questions.**

(a) - (b) (No change.)

(c) If a question is certified, the judge shall file a request to answer the certified question with the chief clerk and serve copies on the parties. In a contested case hearing concerning a permitting matter, the judge shall serve the executive director with a copy of the request. Within five days after the request is filed, the executive director and all parties to the proceeding may file briefs or replies. Copies of all briefs and replies shall be served on the executive director as provided in §1.11 of this title (relating to Service on Judge, Parties, and Interested Persons). The executive director shall be allowed to file briefs. The chief clerk shall provide copies of the request and any briefs or replies to the general counsel and commission. Upon the request of the general counsel or a commissioner to the general counsel, the request will be scheduled for consideration during a commission meeting. The chief clerk shall give the judge, the executive director, and all parties notice of the meeting. The judge may abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed. If the chief clerk does not receive a request from the general counsel to set the question for consideration within 15 days after filing, the request is denied by operation of law.

## **SUBCHAPTER D: DISCOVERY**

### **§80.153**

#### **STATUTORY AUTHORITY**

The amendment is proposed under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

Additionally, the amendment is proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

The proposed amendment implements TWC, §5.228.

**§80.153. Issuance of Subpoena or Commission To Take Deposition.**

(a) - (b) (No change.)

(c) If the requestor and witness sign an Agreement to Waive Fee form, subpoenas and commissions may be issued without a witness fee deposit. Only a non-party witness or deponent is entitled to receive this fee to the extent provided in §80.21 of this title (relating to Witness Fees).

(d) - (e) (No change.)

(f) If a subpoena or commission to take deposition is served on an agency employee, the executive director's legal staff may participate in defending the deposition.

## **SUBCHAPTER F: POST HEARING PROCEDURES**

### **§§80.251, 80.252, 80.257, 80.261**

#### **STATUTORY AUTHORITY**

The amendments are proposed under TWC, §5.228, which establishes the executive director's authority to participate in contested case permit hearings.

Other relevant sections of the TWC under which the commission takes this action include: §5.013, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; and §5.103, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency.

Additionally, the amendments are proposed under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

The proposed amendments implement TWC, §5.228.

**§80.251. Judge's Proposal for Decision.**

(a) (No change.)

(b) Judge's proposal for decision. After closing the hearing record, the judge will file a written proposal for decision with the chief clerk within 30 working days and will send a copy by certified mail to the executive director and to each party. If the judge is unable to file the proposal within the 30 days, the judge shall request an extension from the commission by filing a request with the chief clerk. Neither the judge's failure to request an extension, the commission's failure to grant the requested extension, nor the judge's failure to file the proposal within the 30 day or extended period shall in any way affect the validity of the judge's proposal for decision or the commission's jurisdiction, consideration, or action relative to the proposal for decision.

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

**§80.252. Judge's Proposal for Decision.**

(a) (No change.)

(b) Judge's proposal for decision. After closing the hearing record, the judge shall file a written proposal for decision with the chief clerk no later than the end of the maximum expected duration set by the commission and shall send a copy by certified mail to the executive director and to

each party.

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

**§80.257. Pleadings following Proposal for Decision.**

(a) Pleadings. Unless right of review has been waived, any [adversely affected] party may within 20 days after the date of issuance of the proposal for decision, file exceptions or briefs. For permit hearings in which the executive director has not participated as a party, the commission or general counsel may request that the executive director file briefs. Proposed findings of fact may be filed when permitted or requested by the commission. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the proposal of decision.

(b) (No change.)

**§80.261. Scheduling Commission Meeting.**

(a) The chief clerk, in coordination with the judge, shall schedule motions by parties requiring commission action and the presentation of the proposal for decision. The judge, when transmitting the proposal for decision, shall notify the executive director and the parties of the date of the commission meeting and the deadlines for the filing of exceptions and replies. The general counsel, either by agreement of the parties and the judge, or on the general counsel's own motion, may reschedule the

presentation of the proposal for decision. The chief clerk shall send notice of the rescheduled meeting date to the parties, and, if not also a party, to the executive director no later than ten days before the rescheduled meeting.

(b) - (c) (No change.)