

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §39.420, Transmittal of the Executive Director's Response to Comments and Decision. Section 39.420 is adopted *with change* to the proposed text as published in the September 28, 2001 issue of the *Texas Register* (26 TexReg 7459).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The primary purpose of the adopted amendment is to clarify certain procedural requirements associated with the processing of House Bill (HB) 801 permit applications. In 1999, the 76th Legislature enacted HB 801, which revised the public participation procedures applicable to environmental permits issued under Chapters 26 and 27 of the Texas Water Code (TWC) and Chapters 361 and 382 of the Texas Health and Safety Code (THSC). House Bill 801 provides for early notice of applications, expanded public participation opportunities, and a streamlined contested case hearing process.

The commission is adopting certain changes to Chapter 39 to clarify commission rules regarding the circumstances under which there is an opportunity to file requests for hearing and reconsideration in response to the chief clerk's transmittal of the executive director's response to comments in HB 801 proceedings.

SECTION DISCUSSION

In adopted §39.420(a), the commission has changed the word "chapter" to "title" to conform with *Texas Register* style requirements.

Adopted new §39.420(c)(3) provides that where no timely hearing requests have been filed in response to a Notice of Receipt of Application and Intent to Obtain Permit for air applications, then the chief clerk's transmittal will not include instructions for requesting a hearing or reconsideration of the executive director's decision. Under HB 801, where no timely hearing request is filed in response to issuance of the first notice, an air application may be processed as an uncontested matter. The new rule is a clarification of existing subsection (c)(3) (adopted to be renumbered as subsection (c)(4)) which provides that when a hearing request is filed and then withdrawn, the transmittal does not include instructions for requesting a hearing or reconsideration. If there is no opportunity to request a hearing when a hearing request is filed but timely withdrawn, then it follows that there is no opportunity to request a hearing if a timely hearing request was not filed at all. The adopted rule now explicitly provides for the scenario where no timely hearing request is filed in response to Notice of Receipt of Application and Intent to Obtain Permit for air applications. If there are no timely hearing requests, but there are timely comments, the executive director's response to comments is required. However, there is no further opportunity to file a request for hearing or reconsideration. Adopted subsection (c)(4) is also modified to expressly reflect that only those hearing requests that are timely are covered by this subsection. Previous subsection (c)(4) is renumbered as subsection (c)(5) due to the addition of new subsection (c)(3).

Adopted §39.420(d) describes the effect of withdrawal of all timely comments before the filing of the executive director's response to comments. This adopted subsection makes clear that if all comments received are withdrawn in writing prior to the filing of the executive director's response to comment, then the transmittal of the executive director's response to comment will not provide an opportunity to

request a hearing or reconsideration of the executive director's decision. The statutes do not address the effect that the withdrawal of comments has on subsequent procedural steps in the permitting process. (See TWC, Chapter 5, Subchapter M and THSC, §382.056.) But, under commission rules, the executive director must prepare a response to timely, relevant and material, or significant comment, whether or not withdrawn. Thus, under commission rules, the fact that a comment is withdrawn does not affect the requirement that the executive director prepare and file a response to comment.

However, commission rules also provide under 30 TAC §55.201(c) that a request for contested case hearing may not be based on an issue that was raised solely in public comment withdrawn before the filing of the executive director's response to comment. Therefore, if all timely comments have been withdrawn before the response to comment is filed, then commission rules provide that no hearing request may be granted by the commission. (See 30 TAC §55.211(b)(3)(A) and (c)(2)(A).) If no hearing request may be granted by the commission, then providing for an opportunity for hearing requests to be filed with the transmittal of the executive director's response to comment fails to be a meaningful exercise. As stated in the preamble to the adoption of the 30 TAC Chapter 55 rules implementing HB 801, "{t}he commission believes that only current, live disputed issues of fact should be the basis for a referral to SOAH." (See the October 15, 1999 issue of the *Texas Register* (24 TexReg 9026).) Further, under HB 801, while the time period for filing requests for hearing and requests for reconsideration generally follows the transmittal of the executive director's response to comment (see TWC, §5.555 and THSC, §382.056), there are circumstances where the opportunity to file requests for hearing or reconsideration after the transmittal of the executive director's response to comment does not exist. For example, if no timely hearing requests are received in response to Notice of Receipt of Application and Intent to Obtain Permit for an air application, then further notice is not required and the

matter can be processed as an uncontested permit. (See THSC, §382.056(g).) Therefore, in such cases, the failure to file a hearing request in response to first notice not only removes the opportunity for filing hearing requests, but also results in no further solicitation of requests for reconsideration. That is, under HB 801, the opportunity to file requests for reconsideration only exists where there is an opportunity to file hearing requests. Thus, this adopted rule clarifies that instructions for filing a request for hearing or reconsideration will not be provided where all timely comments have been withdrawn in writing prior to the filing of the executive director's response to comment. To further clarify the rule as proposed, a phrase has been added to adopted subsection (d) to reflect that upon the withdrawal of timely comments and requests, the application may be processed as an uncontested permit. Under such circumstances, any person seeking commission review of the action would still have the opportunity to file a Motion to Overturn under 30 TAC §50.139.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

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 rulemaking is procedural in nature and clarifies the circumstances under which there is an opportunity for filing requests for hearing or reconsideration, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the adopted rule is a major environmental rule, a regulatory impact assessment is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This rule does not exceed a standard set by federal law. This rule 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 M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. This rule 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. This rule 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 M and THSC, §382.056). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary analysis for this adopted rule in accordance with Texas Government Code, §2007.043. The following is a summary of that analysis. The specific primary

purpose of the rulemaking is to clarify certain existing procedural requirements that apply to permitting actions subject to HB 801. The adopted rule will substantially advance this stated purpose by providing specific provisions on the aforementioned matter. Promulgation and enforcement of this rule will not affect private real property which is the subject of the rule because the rule language consists of amendments relating to the commission's procedural rules rather than substantive requirements.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and determined that the adopted section is not subject to the Texas Coastal Management Program (CMP). The rulemaking action concerns only the procedural rules of the commission, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40, et seq.).

HEARING AND COMMENTERS

The commission provided notice of a public hearing on the proposed rulemaking to be held on October 25, 2001. No one appeared to provide formal comment, therefore the public hearing was not convened. The comment period closed at 5:00 p.m. on October 29, 2001. No comments were submitted on the proposed rule changes to Chapter 39.

STATUTORY AUTHORITY

The amendment is adopted under TWC, Chapter 5, Subchapter M, §§5.551, 5.552, 5.553, 5.554, 5.555, and 5.556; and THSC, §382.056, which establish the commission's authority concerning

environmental permitting procedures. 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; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§39.420

§39.420. Transmittal of the Executive Director's Response to Comments and Decision.

(a) When required by and subject to §55.156 of this title (relating to Public Comment Processing), after the close of the comment period, the chief clerk shall transmit to the people listed in subsection (b) of this section the following information:

- (1) the executive director's decision;
- (2) the executive director's response to public comments;
- (3) instructions for requesting that the commission reconsider the executive director's decision; and
- (4) instructions for requesting a contested case hearing.

(b) The following persons shall be sent the information listed in subsection (a) of this section:

- (1) the applicant;

- (2) any person who requested to be on the mailing list for the permit action;
- (3) any person who submitted comments during the public comment period;
- (4) any person who timely filed a request for a contested case hearing;
- (5) Office of the Public Interest Counsel; and
- (6) Office of Public Assistance.

(c) For air applications which meet the following conditions, items listed in subsection (a)(3) and (4) of this section are not required to be included in the transmittals:

- (1) applications for initial issuance of voluntary emission reduction permits under Texas Health and Safety Code, §382.0519;
- (2) applications for initial issuance of electric generating facility permits under Texas Utilities Code, §39.264;
- (3) applications for which no timely hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain a Permit;

(4) applications for which a timely hearing request is submitted in response to the Notice of Receipt of Application and Intent to Obtain Permit and the request is withdrawn before the date the preliminary decision is issued; or

(5) the application is for any amendment, modification, or renewal application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted unless the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(d) For applications for which all timely comments and requests have been withdrawn before the filing of the executive director's response to comments, the chief clerk shall transmit only the items listed in subsection (a)(1) and (2) of this section and the executive director may act on the application under §50.133 of this title (relating to Executive Director Action on Application or WQMP Update).