

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §39.420, Transmittal of the Executive Director's Response to Comments and Decision.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The primary purpose of the proposed 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 proposing 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

Modifications are proposed to §39.420, Transmittal of the Executive Director's Response to Comments and Decision. First, new subsection (c)(3) is proposed to provide 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, then the air application can be processed as an uncontested matter. Current subsection (c)(3) (proposed to be renumbered as subsection (c)(4)) implicitly leads to this result by providing that when a hearing request is filed and then withdrawn, the transmittal does not include instructions for requesting a hearing or reconsideration. If there is no opportunity to request a hearing when a hearing request is filed but timely withdrawn, then there is no opportunity to request a hearing if a timely hearing request was not filed at all. The rule is now proposed to explicitly provide 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. Subsection (c)(3) (now proposed to be renumbered as (c)(4)) is also modified to expressly reflect that only those hearing requests that are timely are covered by this subsection. Subsection (c)(4) is proposed to be renumbered as subsection (c)(5) due to the addition of a new subsection (c)(3).

Section 39.420(d) is proposed to describe the effect of withdrawal of all timely comments before the filing of the executive director's response to comments. This proposed 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 proposed rule clarifies that instructions for filing a request for hearing or reconsideration would not be provided where all timely comments have been withdrawn in writing prior to the filing of the executive director's response to comment. 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.

#### 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 amendment is in effect, there will be no fiscal implications for units of state and local government as a result of administration and enforcement of the proposed amendment. This rulemaking is intended to clarify existing commission rules pertaining to the processing of HB 801 permits.

Specifically, this rulemaking is intended to clarify existing procedural 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 permitting proceedings subject to HB 801.

The proposed amendment is procedural in nature and does not add additional regulatory requirements for units of state and local government to comply with. The proposed amendment is intended to clarify

the effect that withdrawal of comments prior to the filing of the executive director's response to comments has on subsequent procedural steps in the permitting process.

#### PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated from enforcement of and compliance with this rulemaking will be to eliminate any potential confusion regarding the circumstances under which there is an opportunity to file requests for hearing or reconsideration.

This rulemaking is intended to clarify existing procedural 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 permitting proceedings subject to HB 801.

The proposed amendment is procedural in nature and does not add additional regulatory requirements for individuals and businesses to comply with. The proposed amendment is intended to clarify existing procedural rules regarding the circumstances under which the opportunity for filing requests for hearing or reconsideration exists for permitting matters under HB 801.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal impacts to any small or micro-business as a result of the proposed amendment, which is intended to change existing commission rules relating to certain HB 801 permitting procedures.

Specifically, this rulemaking is intended to clarify existing procedural rules regarding the 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 air permitting proceedings.

The proposed amendment is procedural in nature and does not add additional regulatory requirements for small and micro-businesses to comply with. The proposed amendment is intended to clarify existing procedural rules relating to the circumstances under which the opportunity to file requests for hearing or reconsideration exist.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this 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 is 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 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 proposed 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 proposed rule is a major environmental rule, a draft 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 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 M, 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. 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 M and THSC, §382.056). 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 performed a preliminary analysis for this proposed rule in accordance with Texas Government Code, §2007.043. The following is a summary of that analysis. The specific primary purpose of the proposed rulemaking is to clarify certain existing procedural requirements that apply to permitting actions subject to HB 801. The proposed 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 proposed 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 proposed rulemaking and determined that the proposed section is not subject to the Texas Coastal Management Program (CMP). The proposed 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.).

#### ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on October 25, 2001 at 10:00 a.m. at the Texas Natural Resource Conservation Commission complex in Building F, Room 2210, located at 12100 Park 35 Circle. 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 prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, 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 2001-028B-055-AD. Comments must be received by 5:00 p.m., October 29, 2001. For further information, please contact Ray Henry Austin at (512) 239-6814.

#### STATUTORY AUTHORITY

The amendment is proposed 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.

The proposed amendment implements TWC, Chapter 5, Subchapter M; THSC, §382.056; and Texas Government Code, §2001.004.

**SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS**

**§39.420**

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

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

(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) - (2) (No change.)

(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) [(3)] applications for which [where] 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) [(4)] 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.