

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §55.156, Public Comment Processing, and §55.209, Processing Requests for Reconsideration and Contested Case Hearing, and new §55.210, Direct Referrals.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The primary purpose of the proposed amendments and new section is to implement portions of Senate Bill (SB) 688 (an act relating to requirements for public notice and hearing on applications for certain permits that may have environmental impact), 77th Legislature, 2001. More specifically, this rulemaking would implement the SB 688 provisions related to direct referrals of certain permit applications to the State Office of Administrative Hearings (SOAH) for contested case hearing.

In 1999, the 76th Legislature enacted House Bill (HB) 801. House Bill 801 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. While the provisions of HB 801 allowed an applicant or the executive director to request referral of a permitting matter to SOAH for contested case hearing, the procedural steps to be followed limited the opportunities for this option to be exercised.

Essentially, since agreement regarding the list of disputed issues and maximum expected duration of the hearing had to be reached with all timely hearing requesters and all timely hearing requesters could not be identified until 30 days after transmittal of the executive director's decision and response to comments, generally a direct referral to SOAH was only practicable late in the permitting process. The

relevant portions of SB 688 now explicitly provide the applicant or the executive director the option of proceeding directly to a contested case hearing immediately after the executive director issues a preliminary decision.

SECTION BY SECTION DISCUSSION

Section 55.156, Public Comment Processing, is proposed to be amended to add a new subsection (e) which provides that the public comment procedures of this section do not apply to a matter referred to SOAH for hearing under the procedures allowed by SB 688. This proposed rule change is consistent with new TWC, §5.557(b), as added by SB 688.

Section 55.209, Processing Requests for Reconsideration and Contested Case Hearing, is proposed to be amended to delete subsection (h) relating to procedures for requesting that a matter be referred directly to SOAH for contested case hearing. This subsection is proposed to be deleted because a new section is being proposed in this rulemaking to apply to direct referrals authorized by the provisions of SB 688.

New §55.210, Direct Referrals, is proposed to provide that either the executive director or the applicant can file a request with the chief clerk that the application be sent directly to SOAH for a hearing on whether the application complies with all relevant statutory and regulatory requirements. As provided by SB 688, it would also provide that the application may be referred after the executive director has issued his preliminary decision on the application and thus, completed his technical review. The commission also proposes to provide that the chief clerk may then refer the matter to SOAH. This

section further proposes that the provisions of HB 801 relating to public meetings do not apply to cases referred under this section. Instead, the public meeting provisions governing pre-HB 801 applications would apply.

For further background and discussion, please refer to the preamble discussion in the proposed 30 TAC Chapter 80 rulemaking published concurrently in this issue.

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 amendments are 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 amendments. This rulemaking is intended to implement provisions of SB 688.

The bill requires that immediately after the executive director issues a preliminary decision on a permit application, the commission, at the request of the applicant or the executive director, shall refer the application directly to SOAH for a contested case hearing. This provision would cover air new source review (NSR), underground injection control (UIC), industrial and hazardous waste (IHW), municipal solid waste (MSW), and water quality (WQ) permit actions subject to HB 801 permitting procedures. Prior to enactment of the bill, a permitting matter subject to HB 801 permitting procedures could not be referred to SOAH until all timely hearing requesters were identified.

The proposed amendments are procedural in nature and do not add additional regulatory requirements for units of state and local government to comply with. The proposed amendments are intended to implement the provisions of SB 688 which allow the referral of a permitting matter to SOAH for a contested case hearing at the request of the applicant or executive director earlier in the permitting process than would have been expressly allowed under prior law.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated from enforcement of and compliance with this rulemaking will potentially result in quicker processing of permit applications requiring contested case hearings.

This rulemaking is intended to implement the provisions of SB 688. The bill requires that immediately after the executive director issues a preliminary decision on a permit application, the commission, at the request of the applicant or the executive director, shall refer the application directly to SOAH for a contested case hearing. This provision would cover air NSR, UIC, IHW, MSW, and WQ permit actions subject to HB 801 permitting procedures. Prior to enactment of this bill, a permitting matter subject to HB 801 procedures could not be referred to SOAH until all timely hearing requesters were identified.

The proposed amendments are procedural in nature and do not add additional regulatory requirements for individuals and businesses to comply with. The proposed amendments are intended to implement the provisions of SB 688 which allow the referral of a permitting matter to SOAH for a contested case

hearing at the request of the applicant or executive director earlier than would otherwise have been expressly allowed under prior law.

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 amendments, which are intended to implement provisions of SB 688.

The bill requires that immediately after the executive director issues a preliminary decision on a permit application, the commission, at the request of the applicant or the executive director, shall refer the application directly to SOAH for a contested case hearing. Prior to enactment of the bill, a permitting matter subject to HB 801 procedures could not be referred to SOAH until after all timely hearing requesters were identified.

The proposed amendments are procedural in nature and do not add additional regulatory requirements for small and micro-businesses to comply with. The proposed amendments are intended to implement the provisions of SB 688 which allow the referral of a permitting matter to SOAH for a contested case hearing at the request of the applicant or executive director earlier in the permitting process than would otherwise have been expressly allowed under prior law.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are 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 revises procedures for direct referrals of applications subject to HB 801 to SOAH for hearing, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the proposed rules are major environmental rules, 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 M, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the proposal is in direct response to SB 688, 77th Legislature, and does not exceed the requirements of this bill. 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 rules are consistent with, and do 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., SB 688). 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 these proposed rules 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 revise commission rules relating to procedures for direct referrals in certain permitting proceedings as provided by SB 688. The proposed rules will substantially advance this stated purpose by providing specific provisions on the aforementioned matter. Promulgation and enforcement of these rules will not affect private real property which is the subject of the rules 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 sections are not subject to the Texas Coastal Management Program (CMP). The proposed rulemaking action concerns only the procedural rules of the commission which are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves 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 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 SB 688, §5, 77th Legislature, 2001 (the Act), which requires the agency to adopt rules to implement TWC, §5.557 and THSC, §382.056, as added and amended by the Act; TWC, §5.557; and THSC, §382.056. 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 to carry out its jurisdiction; 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 the agency; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

The proposed amendment implements TWC, §5.557; THSC, §382.056; and Texas Government Code, §2001.004.

SUBCHAPTER E: PUBLIC COMMENT AND PUBLIC MEETINGS

§55.156

§55.156. Public Comment Processing.

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

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(e) Subsections (b) - (d) of this section do not apply to a case referred to SOAH under §55.210 of this title (relating to Direct Referrals).

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR
CONTESTED CASE HEARING**

§55.209, §55.210

STATUTORY AUTHORITY

The amendment and new section are proposed under SB 688, §5, 77th Legislature, 2001 (the Act), which requires the agency to adopt rules to implement TWC, §5.557 and THSC, §382.056, as added and amended by the Act; TWC, §5.557; and THSC, §382.056. 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 to carry out its jurisdiction; 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 the agency; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

The proposed amendment and new section implement TWC, §5.557; THSC, §382.056; and Texas Government Code, §2001.004.

§55.209. Processing Requests for Reconsideration and Contested Case Hearing.

(a) - (g) (No change.)

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[(h) The executive director or the applicant may file a request with the chief clerk that the

application be sent directly to SOAH for a hearing on the application. If a request is filed under this subsection, the commission's scheduled consideration of the hearing request will be canceled. An application may only be sent to SOAH under this subsection if the executive director, the applicant, the public interest counsel and all timely hearing requestors agree on a list of issues and a maximum expected duration of the hearing.]

§55.210. Direct Referrals

(a) The executive director or the applicant may file a request with the chief clerk that the application be sent directly to SOAH for a hearing on the application.

(b) After receipt of a request filed under this section and after the executive director has issued his preliminary decision on the application, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

(c) A case for which a request for direct referral is filed under this section shall not be subject to the public meeting requirements of §55.154 of this title (relating to Public Meetings) but shall instead be subject to the public meeting requirements of §55.25(b)(2) of this title (relating to Public Comment Processing).