

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §80.6, Referral to SOAH, and §80.105, Preliminary Hearings, and new §80.126, Public Comment Evidence in 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 in matters subject to HB 801.

In addition, the commission is also proposing certain changes to modify commission rules to expressly provide for the judge to take public comment in matters directly referred to SOAH as allowed by SB 688 as well as certain water utilities matters.

SECTION BY SECTION DISCUSSION

Section 80.6, Referral to SOAH, is proposed to be amended to reflect that when an application is referred under proposed new §55.210, the hearing is to address all relevant statutory and regulatory requirements. Thus, consistent with SB 688, contested case hearings on matters that are referred directly to SOAH will address all issues relevant to the application.

Section 80.105, Preliminary Hearings, is proposed to be amended to reflect that preliminary hearings shall be held in all matters referred under proposed new 30 TAC §55.210. Section 80.105 is also proposed to be amended to provide that the judge shall accept public comment not only in enforcement hearings, but also in certain water utilities matters, and applications referred directly to SOAH.

As part of the rulemaking implementing HB 801 provisions in September of 1999, §80.105 was amended to provide that the judge shall, for enforcement hearings only, take public comment.

Generally, this was intended to maintain the distinction between informal public comment and the

evidentiary hearing in permitting matters. In particular, this also effectuated the framework established by HB 801 whereby the public comment period occurs early in the process, public comments are addressed in the executive director's response to comment, and only limited issues are referred for contested case hearing.

While maintaining these distinctions is of continued importance for matters undergoing the entire HB 801 permitting process, matters directly referred to SOAH under proposed new §55.210 (relating to Direct Referrals) and certain water utilities matters (which are not subject to the provisions of HB 801) may be better suited to different procedures. For these matters, the preliminary hearing may be the first opportunity for affected citizens to express their views regarding an application and provide public comment. While existing rules do not prohibit the taking of public comment by the judge in any matter, they do not currently explicitly address the public comment procedures for such water utilities matters and matters directly referred to SOAH under the provisions of SB 688. Thus, this rule change is proposed to explicitly provide for the taking of public comment at preliminary hearings held in connection with certain water utilities matters and direct referrals under proposed new §55.210.

New §80.126, Public Comment Evidence in Direct Referrals, is proposed to reflect the procedures for commission consideration of public comment and the executive director's responses to public comment in direct referrals.

For further background and discussion, please refer to the preamble discussion in the proposed 30 TAC Chapter 55 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 primarily intended to implement provisions of SB 688 and to modify existing commission rules relating to public comment at preliminary hearings for certain water utilities matters and matters directly referred to SOAH as allowed by 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 this bill, a permitting matter could not be referred to SOAH until all hearing requesters were identified. This rulemaking is also intended to modify existing procedural rules regarding the taking of public comment at preliminary hearings for certain water utilities matters and matters directly referred to SOAH as allowed by SB 688.

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 provisions of SB 688 and to modify existing commission rules regarding the taking of public comment at certain preliminary hearings. 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 could not be referred to SOAH until all hearing requesters were identified. This rulemaking is also intended to modify existing procedural rules regarding the taking of public comment at preliminary hearings for certain matters.

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 in the permitting process than would 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 and to modify existing commission rules regarding the taking of public comment for certain matters.

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 this bill, a permitting matter could not be referred to SOAH until all hearing requesters were identified. This rulemaking is also intended to modify existing procedural rules regarding the taking of public comment at preliminary hearings for certain matters.

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 speed up the process of referring a permitting matter to SOAH for a contested case hearing at the request of the applicant or executive director.

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 to SOAH for hearing and taking public comment at certain preliminary hearings, 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 required by SB 688. In addition, the rules will also modify certain existing procedural requirements relating to taking public comment at certain preliminary hearings. The proposed rules will substantially advance these stated purposes 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, 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 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; §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; §§11.036, 11.041, and 12.013, which establish the commission's authority to determine water rates; and §13.041, which establishes the commission's general authority over water and sewer utilities; 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 A: GENERAL RULES

§80.6

§80.6. Referral to SOAH.

(a) (No change.)

(b) When a case is referred to SOAH, the chief clerk shall:

(1) - (4) (No change.)

(5) send the commission's list of disputed issues and maximum expected duration of the hearing to SOAH unless the case is referred under §55.210 of this title (relating to Direct Referrals).

(c) (No change.)

(d) When a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title (relating to Judges) may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues. This subsection does not apply to a case referred under §55.210 of this title (relating to Direct Referrals).

SUBCHAPTER C: HEARING PROCEDURES

§80.105, §80.126

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; §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; §§11.036, 11.041, and 12.013, which establish the commission's authority to determine water rates; and §13.401, which establishes the commission's general authority over water and sewer utilities; 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.

80.105. Preliminary Hearings.

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required

in an enforcement matter, except in those under federally authorized underground injection control (UIC) or Texas Pollutant Discharge Elimination System (TPDES) programs. A preliminary hearing is required for applications referred to SOAH under §55.210 of this title (relating to Direct Referrals).

(b) If jurisdiction is established, the judge shall:

(1) name the parties [and, for enforcement hearings only, accept public comment];

(2) accept public comment in the following matters:

(A) enforcement hearings;

(B) applications under Texas Water Code (TWC), Chapter 13 and TWC, §§11.036, 11.041, or 12.013; and

(C) applications referred to SOAH under §55.210 of this title.

(3) [(2)] establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes; and

(4) [(3)] allow the parties an opportunity for settlement negotiations.

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

§80.126. Public Comment Evidence in Direct Referrals

In permit cases referred under §55.210 of this title (relating to Direct Referrals), all timely public comment on the application and the executive director's responses to timely, relevant and material, or significant public comment shall be admitted into the evidentiary record. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes. The parties shall be allowed to respond and to present evidence on each issue raised in public comment or the executive director's responses.