

The Texas Commission on Environmental Quality (commission) adopts amendments to §§5.1 - 5.5, 5.7, 5.10, and 5.14. The commission also adopts new §5.20 and §5.21. The commission adopts these amendments and new sections to Chapter 5 to implement House Bill (HB) 2912, Article 1 (Administration and Policy), §1.10, and HB 2914, §§45 - 52, as passed by the 77th Legislature, 2001. Sections 5.2, 5.3, and 5.5 are adopted *with changes* to the proposed text as published in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3451). Sections 5.1, 5.4, 5.7, 5.10, 5.14, 5.20, and 5.21 are adopted *without changes* to the proposed text and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

HB 2912, §1.10, amended Texas Water Code (TWC), §5.107, relating to Advisory Councils, which authorized the commission to create and consult with advisory councils, including councils for the environment, councils for public information, or any other councils that the commission may consider appropriate. The amendment to §5.107 changed the title of the section from “Advisory Councils” to “Advisory Committees, Work Groups, and Task Forces.” The amended section authorizes the commission or the executive director (ED) to create and consult with advisory committees, work groups, or task forces, including committees, work groups, or task forces for the environment, public information, or any other matter that the commission or the ED may consider appropriate; requires the commission to identify affected groups of interested persons for advisory committees, work groups, and task forces and make reasonable attempts to have balanced representation on all advisory committees, work groups, and task forces; and requires the commission to monitor the composition and activities of advisory committees, work groups, and task forces appointed by the commission or formed at the staff level and to maintain that information in a form and location that is easily accessible to the public, including making the information available on the commission’s website. The amended section

provides that the commission is not required to ensure that all representatives attend a scheduled meeting, and further provides that a rule or other action may not be challenged because of the composition of an advisory committee, work group, or task force.

Additionally, HB 2914, §§45 - 52, amended Texas Government Code, Chapter 2110, relating to State Agency Advisory Committees. Among the more significant amendments are changes to the definition of advisory committee, addition of a section relating to applicability of Chapter 2110, addition of a section relating to establishment of advisory committees, and changes to the section relating to the duration of advisory committees. A change to the definition of advisory committee in §2110.001 clarifies that an entity must have multiple members to be considered an advisory committee, and other changes remove the statements that an advisory committee is not a state agency and that it is created by or under state law. New §2110.0011 provides that Chapter 2110 applies unless and to the extent that another state law specifically states that the chapter does not apply; or a federal law or regulation imposes an unconditional requirement that irreconcilably conflicts with the chapter, or imposes a condition on the state's eligibility to receive money from the federal government that irreconcilably conflicts with the chapter. New §2110.0012 provides that a state agency has established an advisory committee if state or federal law has specifically created the committee to advise the agency; or the agency, under state or federal law, created the committee to advise the agency. The changes to §2110.008 provide that unless the state agency, in establishing an advisory committee, by rule, designates a different date on which the committee will be automatically abolished, the committee is automatically abolished on the later of September 1, 2005, or the fourth anniversary of the date of its creation.

The major part of implementing this statutory amendment is adopted as amendments to Chapter 5, Advisory Committees. In addition, a minor amendment to 30 TAC Chapter 20, Rulemaking, is part of the implementation of HB 2912 and is also published in the Adopted Rules section of this issue of the *Texas Register*. The amendment adds a requirement to §20.19, Working Groups, that the processes established under Chapter 5 relating to Advisory Committees and Groups shall be followed.

#### SECTION BY SECTION DISCUSSION

The adopted amendments to this chapter include changing the title from “Advisory Committees” to “Advisory Committees and Groups.” The chapter is now divided into three subchapters: Subchapter A, to establish a common purpose for the other two subchapters; Subchapter B, to address advisory committees; and Subchapter C, to address advisory groups.

The amendments to §5.1, Purpose, make modifications to include the creation and operation of advisory groups in addition to advisory committees.

The amendments to §5.2, Definitions, change the definition of advisory committee and add definitions for balanced representation and minutes. The section is moved to Subchapter A to reflect its applicability to all of the chapter.

The amendments to §5.3, Creation and Duration of Advisory Committees Created by the Commission, expand the title of the section to specify that the section applies to committees created by the commission. The section is further amended to specify that an advisory committee shall be automatically abolished in accordance with Texas Government Code, §2110.008(b), as amended.

The amendments to §5.4, Purpose and Duties of Advisory Committees, clarify that advisory committees have no executive or administrative powers or duties with respect to the operation of the agency, rather than the operation of the commission as previously stated.

The amendments to §5.5, Composition of Advisory Committees, add a subsection that will emphasize that the commission shall make reasonable attempts to provide balanced representation on all advisory committees. The adopted subsection includes the exceptions provided by Texas Government Code, §2110.0011, as amended.

The amendments to §5.7, Membership, add “becomes ineligible” as another basis for a member to vacate his or her position on the committee.

The amendments to §5.10, Presiding Officer, modify the manner of appointing the presiding officer or other officers of advisory committees.

The amendments to §5.14, Monitoring of Advisory Committees and Records, reflects the title change of the section to highlight the commission’s statutory responsibility to monitor an advisory committee’s composition and activities. New subsection (a) is adopted to specifically establish that requirement. New subsection (c) is also adopted to require that minutes of committee meetings and reports shall be maintained in a form and location that is easily accessible to the public.

New §5.20, Advisory Groups, authorizes the ED to create and consult with advisory groups.

New §5.21, Formation of Advisory Groups, directs the ED to identify affected groups of interested persons for advisory groups, and to make reasonable attempts to balance advisory groups.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rules are not subject to §2001.0225 because they do not meet the definition of a “major environmental rule” as defined in that statute. 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, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rules are not specifically intended to protect the environment, or reduce risks from environmental exposure and are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the adopted rules are intended to affect the commission's operations and are not anticipated to result in fiscal implications for any other unit of state or local government. The adopted rules are procedural in nature and are only intended to implement procedures for the appointing of persons to commission-initiated advisory committees and ED-created work groups, monitoring of the composition and activities of the committees and groups, and making information available on the commission’s website. The adopted rules also modify the effect of other state or federal law on the membership of advisory committees and alter the procedures allowed to set the duration of advisory committees. As for the four applicability requirements, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of any delegation

agreement or contract between the state, the commission, and an agency or representative of the federal government, nor are the rules adopted solely under the general powers of the commission. The commission solicited public comment on the draft regulatory impact analysis determination, but no comments were received.

#### TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for this rulemaking under Texas Government Code, §2007.043. The adopted rules will implement HB 2912, §1.10 which authorizes the commission or the ED to create and consult with advisory committees, work groups, and task forces and requires the commission to make reasonable attempts to have balanced representation on those entities, monitor the composition and activities of the entities, and maintain that information in a form and location easily accessible to the public, including placing the information on the commission's website.

The adopted rules also implement HB 2914 which modified the effect of other state or federal law on the membership of advisory committees and altered the procedures allowed to set the duration of advisory committees.

These adopted rules substantially advance those purposes by defining balanced representation; requiring the commission and ED to make reasonable attempts to provide such balance; monitoring the composition and activities through attendance lists, annual reports, and minutes, if they are kept; and making the information available on the commission's website. The adopted rules also substantially advance those purposes by utilizing the statutory language concerning the effect of state and federal law on membership and duration of advisory committees.

Promulgation and enforcement of these adopted rules will be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would exist in the absence of the rules.

Because these adopted rules affect only advisory entities, this action will not create a burden on private real property, and will not burden, restrict, or limit an owner's right to property and reduce its value by 25% or more.

No exceptions set out in Texas Government Code, §2007.003(b) apply to these adopted rules.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adopted rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11.

Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

#### PUBLIC COMMENT

The commission held a public hearing on the proposal in Austin on May 20, 2002. No individuals provided oral comments at the hearing. The comment period closed on May 28, 2002. Written comments were submitted during the comment period by the Alliance for a Clean Texas (ACT). ACT opposed the proposal as discussed in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

ACT commented that the proposed rules attempt to exempt any advisory group created by the ED from the requirements to make publicly accessible information on the group's activities and to exempt ED-created groups from the definition of balanced representation, and that the rules attempt to authorize the agency to continue to conduct business "as usual."

**The commission disagrees with this comment because a rule cannot overrule a statute and because the commission's policy at all times, and specifically with respect to advisory bodies, is to comply fully with all applicable statutes and rules. The commission notes that TWC, §5.107, requires only that reasonable attempts be made to obtain balanced representation. The rules also expressly require that reasonable attempts be made to have balanced representation on all advisory committees (§5.5) and advisory groups (§5.21).**

**Public information is defined in Texas Government Code, §552.002, as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body. There is no requirement to create public information. Public information remains public under these rules. The commission is not required under TWC, §5.1733, to create specific types of documents, such as minutes, attendance lists, or agendas. However, the commission may choose to use such documents to monitor the composition and activities of advisory groups. If kept, such documents would be public information and would be posted on the agency's website. In the case of advisory committees, a rule, §5.14, creates a duty to record minutes for advisory committees. Effective September 2001,**

**the ED promulgated guidance directing staff to develop minutes for groups created by the ED and those minutes are posted on the agency's website.**

**The commission disagrees with the comment that the rules represent an effort to continue to conduct business "as usual." Upon the statute taking effect, the ED promulgated guidance that directs staff to change the manner in which advisory bodies are used by the ED and staff. This guidance includes direction to seek management review of the creation of advisory bodies, the creation of agendas and minutes, and the creation of websites for the posting of this information. The ED has also required staff to review all groups that were active on the effective date of the statute, and to attempt to obtain balanced representation on such groups or to terminate any where an attempt was not made.**

**The commission has made no changes in response to this comment.**

ACT commented that by failing to adhere to the statutory definitions, the rules attempt to substantially narrow the type of advisory body covered by the balanced representation and information accessibility requirements.

**The commission disagrees with this comment. Section 5.21 of the rules specifically applies the requirement to make reasonable attempts to have balanced representation on advisory groups created by the ED, even though the statute could be construed as excluding ED-created groups from this requirement. As previously discussed, Texas Government Code, §552.002 continues to apply to these groups. The commission has made no changes in response to this comment.**

ACT commented that the definition section (proposed §5.2) must apply to the entire Chapter 5 and all aspects of the rules (balanced representation, keeping and posting of membership and minutes, and monitoring by the commission) must be made applicable to all advisory bodies, both those created by the commission itself and any created by the ED.

**In response to this comment, the commission has moved the definition section (§5.2) to Subchapter A, which applies to the entire chapter. While the commission does not agree that this change is necessary to comply with HB 2912, the commission believes that this change will make the chapter more clear.**

**The commission disagrees with the comment that all aspects of the rules should apply to all advisory bodies. Subchapter B, which applies to advisory committees created by the commission, includes requirements that are not in TWC, §5.107. The commission finds that it would not be appropriate to apply many of the requirements of Subchapter B to many of the evanescent bodies created by the ED and staff. For example, Subchapter B now requires that an advisory committee elect its presiding officer. This process might not be appropriate for bodies that only will meet once, or are composed of members of the public and regulated community who elect to attend. The commission has made no changes in response to this comment.**

ACT commented that the rules should expressly provide that only the commission or ED can create an advisory committee, work group, advisory group, or task force and that the law does not allow these groups to be created by individual staff members or departments.

**The commission disagrees with this comment. First, TWC, §5.107(c), specifically contemplates the formation of groups at staff level. Second, the commission notes that these rules follow the statute in requiring a reasonable attempt to obtain balanced representation, whether an advisory body is created by the commission, the ED, or the ED's staff. Finally, the commission in 30 TAC §3.2 has defined "executive director" to include staff. Under the rules of statutory construction, the legislature is assumed to have had the knowledge of preexisting rules. The commission has made no changes in response to this comment.**

## **CHAPTER 5: ADVISORY COMMITTEES AND GROUPS**

### **SUBCHAPTER A: PURPOSE**

#### **§5.1, §5.2**

#### **STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §5.107, which authorizes the commission or the ED to create and consult with advisory committees, work groups, or task forces, including committees, work groups, or task forces for the environment, for public information, or for any other matter that the commission or the ED may consider appropriate; and Texas Government Code, Chapter 2110, which establishes requirements for the creation, composition, evaluation, and duration of advisory committees.

#### **§5.1. Purpose.**

This chapter governs procedures for the creation and operation of advisory committees and groups.

**§5.2. Definitions.**

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Advisory committee** - As used in this chapter, a committee, council, commission, task force, or other entity, other than a state agency, created by the commission or by state law, that has as its primary function the provision of advice to the commission. An advisory group created by the executive director is not an advisory committee.

(2) **Balanced representation** - Membership that represents a diversity of viewpoints on issues to be discussed including: factors such as geography, socioeconomic status, ethnicity, and size and type of businesses and governments; and membership in classes such as environmental groups, trade groups, consumer or public interest groups, industries or occupations, and consumers of services provided by the commission or by industries or occupations.

(3) **Minutes** - Notes or summary covering points to be remembered from a meeting, not a detailed description or verbatim transcript of the discussion.

**SUBCHAPTER B: ADVISORY COMMITTEES**

**§§5.3 - 5.5, 5.7, 5.10, 5.14**

**STATUTORY AUTHORITY**

The amendments are adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §5.107, which authorizes the commission or the ED to create and consult with advisory committees, work groups, or task forces, including committees, work groups, or task forces for the environment, for public information, or for any other matter that the commission or the ED may consider appropriate; and Texas Government Code, Chapter 2110, which establishes requirements for the creation, composition, evaluation, and duration of advisory committees.

**§5.3. Creation and Duration of Advisory Committees Created by the Commission.**

Except as otherwise provided by law, advisory committees created by the commission shall be created by commission resolution. An advisory committee shall be automatically abolished in accordance with Texas Government Code, §2110.008(b), as amended.

**§5.4. Purpose and Duties of Advisory Committees.**

The purpose of an advisory committee shall be to give the commission the benefit of the members' collective business, environmental, and technical expertise and experience with respect to matters within the commission's jurisdiction. An advisory committee's sole duty is to advise the commission. An advisory committee has no executive or administrative powers or duties with respect to the operation of the commission, and all such powers and duties rest solely with the commission. The specific purposes and tasks of an advisory committee subject to this subchapter shall be identified by commission resolution.

**§5.5. Composition of Advisory Committees.**

(a) The composition of advisory committees created by the commission shall comply with the requirements of Texas Government Code, Chapter 2110, as amended.

(b) The commission shall make reasonable attempts to provide balanced representation on all advisory committees. A rule or other action may not be challenged because of the composition of an advisory committee. This section does not apply to an advisory committee to the extent that:

(1) another state law specifically states that Texas Government Code, Chapter 2110, as amended, does not apply; or

(2) a federal law or regulation:

(A) imposes an unconditional requirement that irreconcilably conflicts with the requirements of Texas Government Code, Chapter 2110, as amended; or

(B) imposes a condition on the state's eligibility to receive money from the federal government that irreconcilably conflicts with Texas Government Code, Chapter 2110, as amended.

**§5.7. Membership.**

Except as otherwise provided by law, all members of advisory committees are appointed by and serve at the pleasure of the commission. If a member resigns, dies, becomes incapacitated, is removed by the commission, otherwise vacates his or her position, or becomes ineligible prior to the end of his or her term, the commission shall appoint a replacement who shall serve the remainder of the unexpired term.

**§5.10. Presiding Officer.**

Except as otherwise provided by law, each committee shall elect from its members a presiding officer, who shall report the committee's advice and attendance in writing to the commission. The commission may, at its discretion, appoint other officers of advisory committees. Committees may elect other officers at their pleasure.

**§5.14. Monitoring of Advisory Committees and Records.**

- (a) The commission shall monitor the composition and activities of advisory committees.
  
- (b) Agency staff shall record and maintain the minutes of each advisory committee and subcommittee meeting. The staff shall maintain a record of actions taken and shall distribute copies of approved minutes and other committee documents to the commission and to advisory committee members.
  
- (c) Minutes kept for advisory committee meetings and reports required under §5.11 of this title (relating to Manner of Reporting) shall be maintained in a form and location that is easily accessible to the public, including making the information available on the commission's website.

## **SUBCHAPTER C: ADVISORY GROUPS**

### **§5.20, §5.21**

#### **STATUTORY AUTHORITY**

The new sections are adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; §5.107, which authorizes the commission or the ED to create and consult with advisory committees, work groups, or task forces, including committees, work groups, or task forces for the environment, for public information, or for any other matter that the commission or the ED may consider appropriate; and Texas Government Code, Chapter 2110, which establishes requirements for the creation, composition, evaluation, and duration of advisory committees.

#### **§5.20. Advisory Groups.**

The executive director may create and consult with advisory groups.

#### **§5.21. Formation of Advisory Groups.**

The executive director shall identify affected groups of interested persons for advisory groups and shall make reasonable attempts to have balanced representation on all advisory groups.