

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §§5.1 - 5.5, 5.7, 5.10, and 5.14. The commission also proposes new §5.20 and §5.21. The commission proposes these amendments and new sections to Chapter 5 to implement House Bill (HB) 2912, Article 1 (Administration and Policy), §1.10, as passed by the 77th Legislature, 2001.

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

House Bill 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 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 executive director 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, 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 being proposed as amendments to Chapter 5, Advisory Committees. However, as part of this rulemaking, a minor amendment is necessary for 30 TAC Chapter 20, Rulemaking, and is also being proposed in the Proposed Rules section of this issue of the *Texas Register*. That part of the implementation of HB 2912 adds a requirement to §20.19

concerning Working Groups, that appointment of any advisory committees, groups, or persons to advise the commission or the executive director on rulemaking must be in accordance with the process established under Chapter 5.

#### SECTION BY SECTION DISCUSSION

The proposed amendments to this chapter include changing the title from “Advisory Committees” to “Advisory Committees and Groups.” The chapter is also proposed to be 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 proposed amendment to §5.1, Purpose, makes modifications to include the creation and operation of advisory groups in addition to advisory committees.

The proposed amendments to §5.2, Definitions, change the definition of advisory committee and add definitions for balanced representation and minutes.

The proposed amendments to §5.3, Creation and Duration of Advisory Committees, 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).

The proposed 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 currently stated.

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

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

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

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

The proposed new §5.20, Advisory Groups, authorizes the executive director to create and consult with advisory groups.

The proposed new §5.21, Formation of Advisory Groups, directs the executive director to identify affected groups of interested persons for advisory groups, and to make reasonable attempts to balance advisory groups.

**FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT**

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined for the first five-year period the proposed amendments and new sections are in effect, there will be no significant fiscal implications for units of state and local government due to administration and enforcement of the proposed amendments and new sections. The proposed amendments and new sections are intended to affect the operations of the commission. No other units of state or local government are anticipated to be affected by the proposed amendments and new sections.

This rulemaking is intended to implement certain provisions of HB 2912 and HB 2914, and to make minor editorial changes to existing commission advisory committee and advisory group rules. House Bill 2912 authorizes the commission or the executive director to create and consult with advisory committees, work groups, and task forces on issues relating to the environment, public information, or any other matter that the commission or executive director may consider appropriate. The bill requires the commission to identify affected groups of interested persons for inclusion in advisory groups; make reasonable attempts to have a balanced representation in the advisory groups; monitor the composition and activities of advisory groups appointed by the commission or formed at the staff level; and provide advisory group information in a form and location that is easily accessible to the public, including making the information available via the commission's website. Additionally, HB 2914 revises the definition, applicability, establishment, and duration of advisory committees.

The proposed amendments and new sections will incorporate new rule language into existing commission rules that specify the requirements the commission or executive director must follow regarding advisory committees, work groups, and task forces to assure compliance with these provisions of HB 2912 and HB 2914.

The proposed amendments and new sections 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 amendments are procedural in nature and are only intended to implement procedures for the appointing of persons to commission initiated advisory committees and executive director created work groups, monitoring of the composition and activities of the committees and groups, and making information available on the commission's website. The amendments 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.

#### **PUBLIC BENEFITS AND COSTS**

Mr. Davis also has determined for each year of the first five years the proposed amendments and new sections are in effect, the public benefit anticipated from enforcement of and compliance with the proposed amendments and new sections will be an increase in the diversity of participants on advisory committees, work groups, and task forces initiated by the commission or the executive director.

This rulemaking is intended to implement certain provisions of HB 2912 and HB 2914, and to make minor editorial changes to existing advisory group rules. House Bill 2912 authorizes the commission or the executive director to create and consult with advisory committees, work groups, and task forces on

issues relating to the environment, public information, or any other matter that the commission or executive director may consider appropriate. The bill requires the commission to identify affected groups of interested persons for inclusion in advisory groups; make reasonable attempts to have a balanced representation in the advisory groups; monitor the composition and activities of advisory groups appointed by the commission or formed at the staff level; and provide advisory group information in a form and location that is easily accessible to the public, including making the information available via the commission's website. Additionally, HB 2914 revises the definition, applicability, establishment, and duration of advisory committees.

The proposed amendments and new sections will incorporate new rule language into existing commission rules that specify the requirements the commission or the executive director must follow regarding advisory committees, work groups, and task forces to assure compliance with these provisions of HB 2912 and HB 2914.

The proposed amendments and new sections 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 amendments are procedural in nature and are only intended to implement procedures for the appointing of persons to commission initiated advisory committees and executive director created work groups, monitoring of the composition and activities of the committees and groups, and making information available on the commission's website. The amendments 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.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There may be adverse fiscal implications, which are not anticipated to be significant, to small or micro-business due to implementation of the proposed amendments and new sections, which are intended to implement certain provisions of HB 2912 and HB 2914. House Bill 2912 authorizes the commission or the executive director to create and consult with advisory committees, work groups, and task forces on issues relating to the environment, public information, or any other matter that the commission or executive director may consider appropriate. The bill requires the commission to identify affected groups of interested persons for inclusion in advisory groups; make reasonable attempts to have a balanced representation in the advisory groups; monitor the composition and activities of advisory groups appointed by the commission or formed at the staff level; and provide advisory group information in a form and location that is easily accessible to the public, including making the information available via the commission's website. Additionally, HB 2914 revises the definition, applicability, establishment, and duration of advisory committees.

The proposed amendments and new sections will incorporate new rule language into existing commission rules that specify the requirements the commission must follow regarding advisory committees, work groups, and task forces to assure compliance with these provisions of HB 2912 and HB 2914.

The proposed amendments and new sections are intended to affect the commission's operations by making reasonable attempts to achieve balanced representation on all advisory committees, work groups, and task forces initiated by the commission or created by the executive director. The requirement to make reasonable attempts to ensure balanced representation may result in additional

small and micro-businesses being invited to participate in one or more the advisory committees and advisory groups. For these businesses, the commission anticipates there will be additional travel and other costs to participate, which are not anticipated to be significant.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has 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 has reviewed the proposed rulemaking in light of the regulatory impact 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 that statute. “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 proposed 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 proposed 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 proposed rules are procedural in nature and are only intended to implement procedures for the

appointing of persons to commission initiated advisory committees and executive director created work groups, monitoring of the composition and activities of the committees and groups, and making information available on the commission's website. The proposed 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 proposed solely under the general powers of the commission. The commission invites public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposal under Texas Government Code, §2007.043. The following is a summary of that assessment. The proposed rules would implement HB 2912, §1.10 which authorizes the commission or the executive director 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 proposed 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 proposed rules substantially advance those purposes by defining balanced representation, requiring the commission and executive director to make reasonable attempts to provide such balance, monitor the composition and activities through attendance lists, annual reports, and minutes if they are kept and make the information available on the commission's website. The proposed 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 proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 regulations.

Because these proposed 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 proposed rules.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the 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 proposed rules are not subject to the Texas Coastal Management Program.

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on May 20, 2002, at 2:00 p.m., Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Building F, Room 2210.

The hearing is structured for the receipt of oral or written comments by interested persons.

Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before 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 a 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, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808.

Comments must be received by 5:00 p.m., May 28, 2002, and should reference Rule Log Number 2001-068-005-AD. For further information, please contact Debra Barber at (512) 239-0412.

**STATUTORY AUTHORITY**

The amendment is proposed 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 executive director 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 executive director may consider appropriate; and Texas Government Code, Chapter 2110, which establishes requirements for the creation, composition, evaluation, and duration of advisory committees.

The proposed amendment implements TWC, Chapter 5, Texas Natural Resource Conservation Commission, §5.107, Advisory Committees, Work Groups, and Task Forces; and Texas Government Code, Chapter 2110, State Agency Advisory Committees.

**CHAPTER 5: ADVISORY COMMITTEES AND GROUPS**

**SUBCHAPTER A: PURPOSE**

**§5.1**

**§5.1. Purpose.**

This chapter governs procedures for the creation and operation of [applicable to] advisory committees and groups [created to advise the Texas Natural Resource Conservation Commission].

**SUBCHAPTER B: ADVISORY COMMITTEES**

**§§5.2 - 5.5, 5.7, 5.10, 5.14**

**STATUTORY AUTHORITY**

The amendments are proposed 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 executive director 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 executive director may consider appropriate; and Texas Government Code, Chapter 2110, which establishes requirements for the creation, composition, evaluation, and duration of advisory committees.

The proposed amendments implement TWC, Chapter 5, Texas Natural Resource Conservation Commission, §5.107, Advisory Committees, Work Groups, and Task Forces; and Texas Government Code, Chapter 2110, State Agency Advisory Committees.

**§5.2. Definitions.**

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

(1) **Advisory committee** - As used in this subchapter, a [A] committee, council, commission, task force, or other entity, other than a state agency, created by the commission or by state law [or under state law], [other than a state agency,] 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.

### **§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) [on the fourth anniversary of the date of its creation unless the commission has established a different date by commission resolution or votes to continue the advisory committee, or the advisory committee has a specific duration prescribed by statute].

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

The purpose of an advisory committee [committees] 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 [The] advisory committee's [committees'] sole duty is to advise the commission. An advisory committee has [Advisory committees have] 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 [chapter] 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.

(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 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; 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.

**§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, [or] 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 [or commission resolution], each committee shall elect from its members a presiding officer, [chairperson, or co-chairpersons,] who shall report the committee's advice and attendance in writing to the commission. The commission may, at its discretion, appoint other officers [presiding officers, chairpersons, or co-chairpersons,] 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 proposed 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 executive director 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 executive director may consider appropriate; and Texas Government Code, Chapter 2110, which establishes requirements for the creation, composition, evaluation, and duration of advisory committees.

The proposed new sections implement TWC, Chapter 5, Texas Natural Resource Conservation Commission, §5.107, Advisory Committees, Work Groups, and Task Forces; and Texas Government Code, Chapter 2110, State Agency 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.