

The Texas Commission on Environmental Quality (commission) adopts an amendment to §20.19 as part of the implementation of House Bill (HB) 2912, Article 1 (Administration and Policy), §1.10, and HB 2914, §§45 - 52, as passed by the 77th Legislature, 2001. Section 20.19 is adopted *with change* to the proposed text as published in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3456).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

HB 2912 amended Texas Water Code (TWC), §5.107, relating to Advisory Committees, which authorizes 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 an amendment to 30 TAC Chapter 5, Advisory Committees, and is published in the Adopted Rules section of this issue of the *Texas Register*. This part of the implementation of HB 2912 changes the title and adds a requirement to

§20.19 that appointment of any workgroups or persons to advise the commission or the ED on rulemaking must be in accordance with the process established under Chapter 5.

SECTION DISCUSSION

The adopted amendments to §20.19 add a requirement that the processes established under Chapter 5, relating to Advisory Committees and Groups, shall be followed. Comments received during the comment period pointed out a potential for confusion in the proposed language. To clarify that rulemaking advisory committees as well as rulemaking advisory groups are subject, as applicable, to the requirements of Chapter 5, the reference to Subchapter C has been deleted. The adopted amendments to this section also change the title of the section from “Working Groups” to “Working Committees and Groups.”

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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. 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 rule is not specifically intended to protect the environment or reduce risks from environmental exposure and is 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 rule is intended to affect the commission's operations and is not anticipated to result in fiscal implications for any other unit of state or local government. The rule is procedural in nature and is 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 website. The rule also modifies the effect of other state or federal law on the membership of advisory committees and alters 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 is the rule 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. This adopted rule will assist in the implementation of 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 rule also implements 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.

The adopted rule substantially advances those purposes by requiring compliance with other rules 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 rule also substantially advances 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 the adopted rule will be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rule does 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 will exist in the absence of the rule.

Because the rule affects 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 the adopted rule.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the adopted rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is 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. The comment period closed on May 28, 2002. Written comments were received from the Alliance for a Clean Texas (ACT).

RESPONSE TO COMMENTS

ACT commented that §20.19 must be modified to apply all requirements of Chapter 5 to rulemaking advisory committees, whether they are created by the ED or by the commission.

The commission disagrees in part with this comment. Chapter 5, as proposed, creates no exception for rulemaking advisory bodies from its requirements. Therefore, bodies created under §20.19 would be subject to the requirements of Chapter 5. As a result of this comment, the commission has deleted reference to Subchapter C to clarify that rulemaking advisory committees must comply with applicable provisions of Chapter 5. The commission has also revised the language of §20.19 to clarify that the executive director may create such informal bodies, subject to Chapter 5.

CHAPTER 20: RULEMAKING

§20.19

STATUTORY AUTHORITY

The amendment is 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.

§20.19. Working Committees and Groups.

Before initiating any formal rulemaking action, the executive director may convene informal working groups to obtain viewpoints and advice of interested persons. The commission or the executive director may also appoint working committees or groups of experts, interested persons, or representatives of the general public to advise it regarding any contemplated rulemaking. The powers of such working groups shall be advisory only. The processes established under Chapter 5 of this title (relating to Advisory Committees and Groups) shall be followed.