

The Texas Commission on Environmental Quality (commission) proposes an amendment to §0.108.

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

The proposed amendment will provide the commission with the express authority to direct the executive director to participate as a party in contested case hearings regarding certain permit applications. The amendment would revise only the mandatory abstention subsection of the existing rule, which currently provides that the executive director shall not participate as a party in contested case hearings regarding permit applications for seven types of applications. This change will afford the commission the opportunity to benefit from the executive director's specialized knowledge by participating in some of these contested case hearings. Although these types of applications were initially included because they were identified as less complex or not having unique conditions, experience has shown that technical and policy issues in these types of cases may warrant participation by the executive director as a party. It will also ensure that the administrative record is complete.

Prior to September 1, 2001, Texas Water Code, §5.228 required the executive director of the commission to participate as a party in all contested case hearings. As a result of public testimony received during its comprehensive review of the commission, the Sunset Advisory Commission recommended that the statute be changed to allow, rather than require, the executive director to participate in contested case permit hearings. The Sunset Advisory Commission also recommended that: 1) the role of the executive director be more clearly defined; 2) that the executive director be expressly prohibited from rehabilitating non-agency witnesses in permit hearings; and (3) that the

commission adopt rules specifying the factors the executive director must take into account when considering whether to be a party in a permit hearing.

This recommendation was adopted in House Bill (HB) 2912, (77th Legislature, 2001) the Sunset Bill for the commission. Under HB 2912, Texas Water Code, §5.228 was amended to provide that the executive director is required to be a party in a contested case hearing only in a matter where the executive director bears the burden of proof (e.g., an enforcement proceeding). For permit hearings, the executive director may be a party only for the purpose of providing information to complete the administrative record. The commission is required to specify, by rule, the factors the executive director must consider in determining, on a case-by-case basis, whether to participate in a hearing as a party. Factors the commission must consider in developing these rules include: 1) the technical, legal, and financial capacities of the parties; 2) whether the parties have previously participated in a hearing; 3) the complexity of the issues; and 4) the available resources of commission staff. The executive director is expressly prohibited from rehabilitating the testimony of non-agency witnesses or from assisting an applicant in meeting its burden of proof unless that applicant fits a category of permit applicants that under commission rule are eligible for such assistance. The amendments to Texas Water Code, §5.228 took effect September 1, 2001, and apply only to hearings in which the executive director is named as a party on or after that date. Section 80.108 was one of the new rules adopted by the commission, effective November 15, 2001, implementing the revisions to Texas Water Code, §5.228.

## SECTION DISCUSSION

Section 80.108 is proposed to be amended by adding subsection (m) which provides an option for the commission to direct the executive director to participate as a party in the types of hearings listed in subsections (a) and (c).

In addition, cross-references in subsection (a)(4) and (5) are proposed to be updated.

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

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, there are no significant fiscal implications for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rule. Implementation of the proposed rule may result in the executive director participating as a party in more contested case hearings for certain types of permits. As a result, the executive director may be required to allocate staff resources to attend more hearings. However, any allocation of resources to participate in these hearings is not anticipated to result in any significant fiscal implications for the agency, local governments, or other parties in contested case hearings.

The proposed rule would revise the mandatory abstention in §80.108(a)(1) - (7) to provide the commission with the express authority to direct the executive director to participate as a party in contested case hearings regarding the types of permit applications cited. The proposed revision would give the commission the option to direct the executive director, as a party, to participate in contested case hearings before the State Office of Administrative Hearings (SOAH) for certain types of air, water quality, and waste permits and would afford the commission the benefit of the executive director's

specialized knowledge. Experience has shown that this knowledge may be helpful and warranted where technical and policy issues are part of a contested case hearing regarding municipal solid waste permits where land use is the sole issue; air quality standard permits authorizing concrete batch plants under the Texas Health and Safety Code, §382.05195; air permits authorizing emissions from facilities which solely emit the types of emissions that do not require health and welfare effects review as specified on the Toxicology and Risk Assessment Section Emissions Screening List; the municipal solid waste transfer facilities; permits to process grit and grease trap waste; permits for composting facilities; and permit applications solely authorizing the irrigation of domestic or municipal wastewater effluent. Any costs for the agency, for applicants, or for protestants in these hearings because of executive director participation are anticipated to be insignificant.

#### PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be the benefit of having more complete information being presented to SOAH and the commission for decisions regarding contested cases on the types of air, water quality, and municipal solid waste permits listed in §0.108(a)(1) - (7).

Any increase or decrease in costs to applicants or protestants in these hearings due to the participation of the executive director as a party in these hearings is not anticipated to be significant.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Any increase or decrease in costs due to the participation of the executive director as a party in contested cases for the affected permits is not anticipated to be significant in nature.

#### 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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

#### DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(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 establishes procedures for the executive director’s participation as a party in contested case

hearings on permitting matters, the rulemaking does not meet the definition of a major environmental rule.

In addition, even if the proposed rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does 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 Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; and Texas Water Code, §5.228, as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. 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 rule is consistent with, and does not exceed, federal requirements, and is in accordance with Texas Water Code, §5.228, which expressly requires the commission to adopt rules necessary to specify the factors the executive director must consider in determining whether to participate as a party in a contested case permit hearing. This proposal does not adopt a rule solely under the general powers of the agency, but rather under specific state law. 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 evaluated the proposed rule and performed an analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's analysis indicates that Texas Government Code,

Chapter 2007 does not apply to the proposed rule. Nevertheless, the commission further evaluated the proposed rule as to whether the rule constitutes a takings under Texas Government Code, Chapter 2007. The specific primary purpose of the proposed rule is to revise a commission rule to establish procedures for executive director party participation in certain contested case hearings as required by Texas Water Code, §5.228. The proposal relates to when the executive director will participate as a party as directed to do so by the commission. The proposed rule will substantially advance this purpose by providing the commission the express authority to direct the executive director to participate as a party. Promulgation and enforcement of this rule will not affect private real property which is the subject of the rules because the proposed language relates to procedural matters relating to executive director party status rather than any substantive requirements.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §05.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Duón, MC 205, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087; or faxed to (512) 239-4808. Electronic comments may be submitted at <http://www5.tceq.state.tx.us/rules/ecomments/>. All comments should reference Rule Project Number 2007-003-080-LS. The comment period closes March 26, 2007. Copies of the

proposed rule can be obtained from the commission's Web site at

*[http://www.tceq.state.tx.us/nav/rules/propose\\_adopt.html](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html)*. For further information, please contact

Janis Hudson, Environmental Law Division, (512) 239-0466.

## **SUBCHAPTER C: HEARING PROCEDURES**

### **§80.108**

#### **STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code, §5.013, concerning General Jurisdiction of the commission, which establishes the commission's general authority to carry out its jurisdiction; §5.102, concerning the commission's General Powers, including calling and holding hearings and issuing orders; §5.103, concerning Rules, which requires the commission to adopt rules when amending any agency statement of general applicability that describes the procedures or practice requirements of an agency; and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and §5.228, which establishes the executive director's authority to participate in contested case hearings. Additionally, the amendment is proposed under Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders and Decisions, which requires state agencies to adopt rules of practice and procedure.

The proposed amendment implements Texas Water Code, §5.228.

**SUBCHAPTER C: HEARING PROCEDURES**

**§80.108**

**§80.108. Executive Director Party Status in Permit Hearings.**

(a) Except to the extent superseded by subsection (b) of this section, the executive director shall not participate as a party in the following contested case hearings concerning permitting matters:

(1) - (3) (No change.)

(4) an application for a permit for a municipal solid waste transfer facility under §330.7 §330.4] of this title (relating to Permit Required);

(5) an application for a permit for the processing of grit and grease trap waste under §330.7 §330.4] of this title;

(6) - (7) (No change.)

(b) - (l) (No change.)

(m) Notwithstanding the requirements of subsections (a) and (c) of this section regarding executive director party participation, the executive director shall participate as a party if directed to do so by the commission.