

The Texas Commission on Environmental Quality (commission or agency) adopts the amendment to §80.254 *with change* to the proposed text as published in the February 12, 2010, issue of the *Texas Register* (35 TexReg 1026) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

In 2009, the 81st Legislature passed Senate Bill (SB) 1693, relating to the enforcement authority of the commission. SB 1693 amends Texas Water Code (TWC), §7.002, by allowing the commission to delegate to the executive director the authority to issue an administrative order.

Corresponding rulemaking is published in this issue of the *Texas Register* concerning 30 TAC Chapter 70, Enforcement.

SECTION DISCUSSION

§80.254, Settlement of Enforcement Cases

The commission adopts amended §80.254 to clarify a procedure for settlement and issuance of enforcement cases at hearing when the executive director and the respondent reach an agreement, or settlement, in an enforcement action and no party dissents from the proposed settlement. When both conditions are met, the amendment provides that an agreed order is entered into in accordance with §70.10. In addition, §80.254 is amended by deleting language instructing the executive director and the respondent to submit the agreed settlement in writing to the judge who shall forward the proposed settlement agreement to the commission for consideration. This language will be deleted to clarify the procedure for settlement of enforcement cases at hearing that is consistent with rules already in place.

The commission will also replace the acronym "SOAH" with "State Office of Administrative Hearings" to reflect the agency's current practices and to conform to Texas Register and agency guidelines.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the 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 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 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 commission has determined that the rulemaking does not fall under the definition of a major environmental rule because the amendment is primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The amendment concerns procedural requirements of the agency, such as clarifying a procedure for settlement of enforcement cases at hearing that is consistent with rules already in place. This amendment allows for greater flexibility in the enforcement process while maintaining appropriate protection of human health and the environment. The amendment does not rise to the level of material, but rather is limited to incorporating modifications to the current regulatory framework based upon the implementation of the rules to date.

Furthermore, the rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is

specifically required by federal law; 3) 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; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed the requirements of state law; 3) 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 any state and federal program; and 4) is not adopted solely under the general powers of the agency, but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY section of this preamble.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rule and performed an assessment of whether this rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rule is to clarify a procedure for settlement of enforcement cases at hearing that is consistent with rules already in place.

Promulgation and enforcement of the rule would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the regulations do not affect a landowner's rights in real property because the clarification in the 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 proposed clarification of the regulations. In other words, there are no burdens imposed on

private real property under this rulemaking because they only establish a procedural mechanism for administrative enforcement orders that is already in place elsewhere in the rules. Therefore, the rule does not have any impact on the use or enjoyment of private real property, and there would be no reduction in value of property as a result of this rulemaking.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rule and found that it is neither identified in the 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 §505.11(a)(6). Therefore, the rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period and no comments were received.

PUBLIC COMMENT

The commission held a public hearing on March 9, 2010 at 2:00 p.m. The public hearing was not formally opened due to the fact that no one signed in to provide public comment. The comment period closed on March 15, 2010. The commission received written comments from Lloyd Gosselink, Attorneys At Law.

RESPONSE TO COMMENTS

Lloyd Gosselink supported the overall revisions and implementation of the legislative intent of SB 1693 of the 81st Legislature. Lloyd Gosselink noted that the state's proposal does not address implementation in conjunction with TWC, §7.034 regarding deferral for municipally owned utilities claiming financial

inability to pay. Lloyd Gosselink commented that the commission has not applied the provisions of TWC, §7.034 in a manner that truly benefits the utilities that were the intended beneficiary of this provision.

Lloyd Gosselink expressed concern that if the rule were adopted without consideration of implementation in conjunction with TWC, §7.034, the ability for utilities to engage in the relief envisioned in the provision would be further diluted.

Lloyd Gosselink's suggested changes are outside the scope of the rulemaking which is to specifically address payment of the penalty by installment and delegation to the executive director the authority to issue an administrative order. With regard to Lloyd Gosselink's concerns, the commission appropriately applies the provisions of TWC, §7.034, consistently adhering to the language in the statute. No changes were made to the rule in response to this comment.

SUBCHAPTER F: POST HEARING PROCEDURES

§80.254

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.228, which establishes that the executive director shall be named a party in hearings before the commission in a matter in which the executive director bears the burden of proof.

Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the general jurisdiction of the commission; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; §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 an agency; and §§7.001 *et seq.*, which establish the commission's enforcement authority and provide specific requirements governing that authority.

Additionally, the amendment is adopted under Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice and procedure, and Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation.

The adopted amendment implements TWC, §7.002, which directs the commission to adopt rules to provide for executive director authority to issue administrative orders upon delegation of that authority by the commission.

§80.254. Settlement of Enforcement Cases.

The executive director and the respondent may reach an agreement, or settlement, in an enforcement action such that an agreed order is entered into in accordance with §70.10 of this title (relating to Agreed Orders). If there is a party to the case that dissents from the proposed settlement, the judge shall give such party a reasonable time to file comments, and shall forward all timely filed comments to the commission together with the proposed settlement. After any required public notice and opportunity for comment on proposed settlements and consideration of the record, the commission or the executive director may either approve the proposed settlement, or disapprove it and remand the case to the State Office of Administrative Hearings for hearing.