

The Texas Commission on Environmental Quality (commission or agency) proposes an amendment to §80.254.

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

#### SECTION DISCUSSION

##### *§80.254, Settlement of Enforcement Cases*

The commission proposes to amend §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 proposed amendment provides that an agreed order is entered into in accordance with §70.10. In addition, the proposal amends §80.254 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 would be deleted to clarify the procedure for settlement of enforcement cases at hearing that is consistent with rules already in place.

The commission also proposes to 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.

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

Jeff Horvath, Analyst, Strategic Planning and Assessment Unit, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or any other unit of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule implements certain provisions of SB 1693, relating to the enforcement authority of the commission. SB 1693 amends TWC, §7.002, by allowing the commission to delegate to the executive director the authority to issue an administrative order.

The proposed rule clarifies 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 proposed amendment provides that an agreed order is entered into in accordance with §70.10. Delegating the authority to the executive director to issue an administrative order on behalf of the commission will streamline the existing enforcement process and could result in a decrease in time necessary to issue the administrative order. No significant fiscal implications are anticipated for the agency.

#### PUBLIC BENEFITS AND COSTS

Mr. Horvath has 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 compliance with state law and more efficient enforcement procedures.

No fiscal implications are anticipated for businesses or individuals as a result of the administration or enforcement of the proposed rule. The proposed rule clarifies 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 proposed amendment provides that an agreed order is entered into in accordance with §70.10.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule clarifies a procedure for settlement and issuance of enforcement cases at hearing when the executive director and the respondent reach an agreement in an enforcement action and no party dissents from the proposed settlement.

#### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law, and the proposed rule does not adversely affect a small or micro-business for the first five-year period the proposed rule is in effect.

#### 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 reviewed the proposed 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 proposed rulemaking does not fall under the definition of a major environmental rule because the proposed amendment is primarily designed to clarify the existing regulatory requirements and implement the statutory provisions. The proposed 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 proposed 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 proposed 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 proposed solely under the general powers of the agency, but rather under specific authorizing statutes as referenced in the STATUTORY AUTHORITY section of this preamble.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an assessment of whether this proposed 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 proposed rule would constitute neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 proposed 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 proposed 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 proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on March 9, 2010, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, 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/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-045-070-CE. The comment period closes March 15, 2010. Copies of the proposed rulemaking 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 Melinda Johnston, Office of Compliance and Enforcement at (512) 239-5832.

## **SUBCHAPTER F: POST HEARING PROCEDURES**

### **§80.254**

#### **STATUTORY AUTHORITY**

The amendment is proposed 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 commissions enforcement authority and provide specific requirements governing that authority.

Additionally, the amendment is proposed 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 proposed 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). [Where the executive director and the respondent have reached an agreed settlement of an enforcement case, they shall submit the settlement agreement to the judge in writing. The judge shall forward the proposed settlement agreement to the commission for consideration.] 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 may either approve the proposed settlement, or disapprove it and remand the case to the State Office of Administrative Hearings [SOAH] for hearing.