

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§80.17, 80.108, 80.109, 80.117, 80.131, 80.151, 80.257 and 80.261.

### **Background and Summary of the Factual Basis for the Proposed Rules**

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 10 includes changes to the contested case hearings process of the TCEQ.

#### *HB 2694, § 10.01 and §10.05(a): Limitations for State Agencies*

HB 2694, §10.01 amends Texas Water Code (TWC), §5.115(b) by adding language that a state agency receiving notice under this subsection may submit comments to the commission, but may not contest the issuance of a permit or license by the commission. This section further adds that for the purposes of this subsection, "state agency" does not include a river authority. HB 2694, §10.05(a) provides instructive language regarding the effective date for applicability.

The change to TWC, §5.115(b) provides that state agencies receiving notice under this particular subsection may comment on, but not contest, the issuance of a permit or license issued by the commission. TWC, §5.115(b) is part of Subchapter D, which lists the general powers and duties of the commission that apply to the commission's air, water and waste permitting programs. TWC, §5.115(a) specifies that it applies to

contested cases arising under the commission's air, water, or waste programs. Because TWC, §5.115(b) is in Subchapter D and also follows and builds upon TWC, §5.115(a), it is reasonable to conclude that the changes to TWC, §5.115(b) are also intended to apply to contested cases for air quality, water quality, water rights and waste applications.

*HB 2694, §10.02 and §10.04: Executive Director Participation*

HB 2694, §10.02 amends TWC, §5.228(c) and (d), to require the executive director to participate as a party in contested case hearings. That section also states that the executive director's role in the hearing is to provide information to complete the administrative record and support the executive director's position developed in the underlying proceeding, and deletes the limitation that the executive director may testify for the sole purpose of providing information to complete the administrative record.

HB 2694, §10.04 removes TWC, §5.228(e) which prohibited the executive director from assisting a permit applicant in meeting its burden of proof in a hearing at the State Office of Administrative Hearings (SOAH) unless the permit applicant was in a category of permit applicants that the commission had designated as eligible to receive assistance.

*HB 2694, §10.03: Discovery*

HB 2694, §10.03 adds new TWC, §5.315 which provides that in a contested case hearing

held by SOAH that uses prefiled written testimony, all discovery must be completed before the deadline for the submission of that testimony. Further, this section clarifies that water and sewer ratemaking proceedings are exempt from this requirement.

*HB 2694, §10.05(b)*

HB 2694, §10.05(b) states that the changes in law made in HB 2694, Article 10 apply to proceedings before SOAH that are pending or filed on or after September 1, 2011.

Therefore, the changes in HB 2694, §§10.02 - 10.04 will apply to these contested case hearings.

*Proposed Rule Amendments*

Implementation of HB 2694, Article 10 includes changes to commission rules in 30 TAC Chapters 50, 55, and 80, and the changes to all chapters are concurrently proposed by the commission under Rule Project Number 2011-030-080-LS. HB 2694, §10.01 and §10.05(a) would be implemented through amendments concurrently proposed to §50.139, Motion to Overturn Executive Director's Decision; §55.103, Definitions; §55.201, Requests for Reconsideration or Contested Case Hearing; §55.203, Determination of Affected Person; §55.256, Determination of Affected Person; and §80.109, Designation of Parties.

HB 2694, §§10.02, 10.04, and 10.05(b) would be implemented through amendments

concurrently proposed to §80.17, Burden of Proof; §80.108, Executive Director Party Status in Permit Hearings; §80.109, Designation of Parties; §80.117, Order of Presentation; §80.131, Interlocutory Appeals and Certified Questions; §80.257, Pleadings Following Proposal for Decision; and §80.261, Scheduling Commission Meetings.

HB 2694, §10.03 and §10.05(b) would be implemented through amendments concurrently proposed to §80.151, Discovery.

### **Section by Section Discussion**

#### *§80.17, Burden of Proof*

The commission proposes to amend §80.17 by deleting subsection (e), which requires the executive director to comply with §80.108, which is proposed for amendment as discussed elsewhere in this preamble. Specifically, this text is no longer necessary because the executive director will always be a party in contested case hearings. This change is necessary to implement HB 2694, §10.04.

#### *§80.108, Executive Director Party Status in Permit Hearings*

The commission proposes to amend §80.108 by deleting current subsections (a) - (c) and (e) - (m). Subsections (a) - (c) list the types of applications for which the executive director is either a mandatory party or is prohibited from being a party and the factors

for the executive director to consider when deciding whether to be a party on applications for which he has discretion. Subsection (e) provides that the executive director may not assist an applicant in meeting its burden of proof, unless the applicant is eligible to receive assistance. Subsections (f) - (m) concern the executive director's decisions regarding party participation and documentation of those decisions.

Existing subsection (d) would remain as the sole text of this section. In addition, the language is proposed to be amended by deleting text that states that the executive director's participation is limited to the sole purpose of providing information. New language is proposed to be added that states that the executive director is a party in all contested case hearings regarding permitting matters, and his role is to support the position developed by the executive director in the underlying proceeding. These changes are necessary to implement HB 2694, §10.02, 10.04 and §10.05(b).

*§80.109, Designation of Parties*

The commission proposes to amend §80.109 by removing language in subsection (a) that provides that the executive director can be named a party after parties are designated at the preliminary hearing. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party. TWC, §5.228(c) is also implemented through a proposed change to subsection (b)(2).

The commission proposes to amend subsection (b)(5) by adding text that provides that notwithstanding any other law, a state agency, except a river authority, may not be a party to a hearing on an application received by the commission on or after September 1, 2011 unless the state agency is the applicant. In addition, the commission proposes to delete current subsections (b)(6) and (7) which provide that the Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status, and that the Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status. These changes are needed to implement HB 2694, §10.01 and §10.05(a) which amended TWC, §5.115(b), which provides that a state agency that receives notice under TWC, §5.115(b) may submit comments to the commission in response to the notice but may not contest the issuance of a permit or license by the commission. Paragraphs (8) – (11) would be renumbered as (6) – (9).

*§80.117, Order of Presentation*

The commission proposes to amend §80.117(b) by deleting a reference to the executive director if named as a party. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party.

*§80.131, Interlocutory Appeals and Certified Questions*

The commission proposes to amend §80.131(c) by deleting text regarding service to and responses from the executive director when the executive director does not participate as a party in a contested case hearing. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party.

*§80.151, Discovery Generally*

The commission proposes to amend §80.151 by designating existing text as subsection (a) and adding proposed subsections (b) and (c) which would establish requirements for discovery in contested case hearings using prefiled testimony. This change is necessary to implement HB 2694, §10.03 and §10.05(b).

Proposed subsection (b) would require that in hearings using prefiled testimony, except for hearings on water and sewer ratemaking, all discovery must be completed before the deadline to submit the prefiled testimony. Hearings in which prefiled testimony was used but in which discovery was completed before September 1, are also excluded from the new requirements of proposed subsection (b). When the deadline for prefiled testimony is the same date for all parties, the discovery deadline would be the same for all parties.

Proposed subsection (b) would not mandate that all prefiled deadlines must be on the same day for a particular party. If the date for submission of prefiled testimony varies by party the deadline for completing discovery must also vary by party, however, all parties are under the continuing duty to supplement their discovery responses as required by the Texas Rules of Civil Procedure, §193.5 and §195.6. The proposed rule does not mandate how the schedule for prefiled testimony must be structured, provided it comports with §80.117. For example, upon agreement of the parties in a permitting matter, the schedule may allow for the applicant's prefiled testimony to be staggered by witness to accommodate the additional burden of concurrently responding to discovery and preparing prefiled testimony. The proposed rule is not intended to allow parties to circumvent full participation in the discovery process by submitting prefiled testimony prior to the date specified by the Administrative Law Judge, thereby limiting the time available for depositions. Additionally, this rule does not mandate prefiled testimony in hearings, nor does it mandate a change to the discovery requirements in hearings that do not use prefiled testimony.

Furthermore, the proposed amendment to §80.151 does not prohibit parties from entering into Texas Rules of Civil Procedures, Rule 11 agreements regarding modifications to §80.151 for good cause or prohibit a party from requesting that the Administrative Law Judge require that an expert's factual observations, tests, supporting data, calculations, photographs, or opinions be reduced to a tangible form as

allowed by the Texas Rules of Civil Procedure, §195.5.

Representatives Wayne Smith and Warren Chisum sent a letter to TCEQ Executive Director Mark Vickery dated August 5, 2011, to express clarification and purposes of the legislative intent of HB 2694, §10.03 (new TWC, §5.315). The letter provides that in cases where all parties share the same deadline for prefiled testimony, there should be a single discovery deadline applicable to all parties in the cases. Further, the letter specifically states that the "underlying intent of this legislation is to establish that once a party submits prefiled testimony in a contested case before SOAH, that party is no longer subject to discovery from other parties in the case." The commission considered this information in proposing the changes to §80.151.

Proposed subsection (b)(1) would provide that this subsection is applicable to hearings on applications that are subject to the jurisdiction of SOAH on or after September 1, 2011, with three exceptions. Those exceptions are contested case hearings using prefiled testimony where all discovery was completed before September 1, 2011, water ratemaking proceedings, and sewer ratemaking proceedings.

Proposed subsection (b)(2) would provide that all discovery must be completed before the deadline to submit the prefiled testimony. Proposed subsection (b)(3) would require a single deadline for completion of discovery for all parties in cases where all parties

share the same deadline for prefiled testimony.

Proposed subsection (b)(4) would provide that the deadline to complete discovery shall correspond to the final deadline for that party to submit all of its prefiled testimony in cases where parties have different deadlines for the submission of prefiled testimony. In cases where a party has staggered deadlines for prefiling its written testimony, then the deadline for that party is the last date for filing prefiled testimony. In addition, after the deadline for a party to submit all of its prefiled testimony in a contested case, that party would no longer be subject to discovery from other parties in the case.

Proposed subsection (b)(5) would state that the requirements of this subsection do not relieve a party's duty to supplement its discovery responses as required by Texas Rules of Civil Procedure, §193.5 and §195.6.

Proposed subsection (c) would provide that all other contested case hearings, including those for which discovery has been completed before September 1, 2011, are governed by §80.151 as it existed immediately before the effective date of this section and the rule is continued in effect for that purpose.

*§80.257, Pleadings Following Proposal for Decision*

The commission proposes to amend §80.257 by deleting the second sentence of

subsection (a), which provides that the commission or general counsel may request that the executive director file briefs concerning legal or policy issues in contested cases in which the executive director has not participated as a party. This change is necessary to implement HB 2694, §10.02, which amended TWC, §5.228(c) and (d).

*§80.261, Scheduling Commission Meetings*

The commission proposes to amend §80.261(a) by deleting text regarding notification of commission meetings that applies when the executive director does not participate as a party in a contested case hearing. This change is necessary because the amendment to TWC, §5.228(c) adopted in HB 2694, §10.02 requires the executive director to participate as a party.

**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 rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules.

HB 2694 requires the agency to amend its rules concerning the contested case hearing process. These proposed rules would amend Chapter 80 in conjunction with required amendments to Chapters 50 and 55 to implement the provisions of HB 2694. The fiscal

impact of amendments to Chapters 50 and 55 will be detailed in separate, but related fiscal notes. This fiscal note only pertains to the proposed amendments to Chapter 80 which would revise the role of the executive director in contested case hearings; would state that the executive director will always be a party to a contested case hearing; would repeal the executive director participation rules; and would repeal the rule that stipulates when the executive director could assist certain applicants with burden of proof. The proposed rules would also add a new deadline for discovery in contested case hearings where prefiled testimony is used. The new deadline for discovery would not apply to hearings for which discovery was completed by September 1, 2011 nor would it apply to water and sewer ratemaking proceedings. The proposed rules will also specify that a state agency, except a river authority, may not be a party to a hearing on an application received by the commission on or after September 1, 2011 unless the state agency is the applicant.

The proposed requirements for executive director participation and for conducting discovery in contested case hearings are not expected to have a significant fiscal impact for the agency since the executive director is a party in most permit application hearings and since discovery rules only change the timeline for completion of discovery and do not expand or limit discovery. The agency and other parties will continue to have the same duty as they currently do under the Texas Rules of Civil Procedure to supplement their discovery responses as needed to accurately reflect the facts and provide pertinent

data.

Since the scope of the proposed rules concerns the role of the executive director in contested case hearings and do not expand or limit rules concerning discovery, units of local government are not expected to experience any significant fiscal impact as a result of the proposed rules.

### **Public Benefits and Costs**

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law, specifically HB 2694.

The proposed amendments to Chapter 80 would not have a significant fiscal impact on individuals or businesses that apply for a license or permit since the scope of the rules concerns the role of the executive director in contested case hearings and since they do not expand or limit rules concerning discovery. Individuals and businesses would continue to have the same duty as they do currently under the Texas Rules of Civil Procedure to supplement their discovery responses in contested case hearings as needed. The proposed rules are not expected to change the practices of an individual or business when participating as a party in a contested case hearing.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. A small business is expected to experience the same fiscal impact as that experienced by individuals or large businesses under the proposed rules.

### **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 rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are 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 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 reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the

definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is 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 amendments to Chapter 80 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendments are procedural in nature and no fiscal impact is expected if these amendments are adopted. Therefore, this rulemaking action does not 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.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; 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 adopt a rule solely under the general powers of the agency instead of under a specific state law. This

rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to Chapter 80 were developed to implement HB 2694. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically authorized under the specific sections listed in the Statutory Authority sections listed elsewhere in 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 amendments and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the proposed rulemaking is to implement HB 2694, which made changes to the commission's contested case hearings process. The proposed amendments are procedural in nature, and therefore promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action.

Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5).

### **Consistency with the Coastal Management Program**

The commission has reviewed this action and found that the action will not adversely affect any applicable coastal natural resource areas identified in the Texas Coastal Management Program. The proposed rules update the commission's contested case hearing process and do not approve or authorize an action listed in 30 TAC §281.45, Actions Subject to Consistency With the Goals and Policies of 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 December 12, 2011, at 10:00 a.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 Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Charlotte Horn, 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.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-030-080-LS. The comment period closes December 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at [http://www.tceq.texas.gov/nav/rules/propose\\_adopt.html](http://www.tceq.texas.gov/nav/rules/propose_adopt.html). For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466, or Kathy Humphreys, Environmental Law Division, (512) 239-3417.

## **SUBCHAPTER A: GENERAL RULES**

### **§80.17**

#### **Statutory Authority**

The amendment is proposed under Texas Water Code, (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

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, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendment would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

**§80.17. Burden of Proof.**

(a) The burden of proof is on the moving party by a preponderance of the evidence, except as provided in subsections (b) - (d) of this section.

(b) Section 291.12 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding involving a proposed change of water and sewer rates not governed by Chapter 291, Subchapter I of this title (relating to Wholesale Water or Sewer Service).

(c) Section 291.136 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding related to a petition to review rates changed pursuant to a written contract for the sale of water for resale filed under Texas Water Code, Chapter 11 or 12, and in an appeal under Texas Water Code, §13.043(f).

(d) In an enforcement case, the executive director has the burden of proving by a preponderance of the evidence the occurrence of any violation and the appropriateness of any proposed technical ordering provisions. The respondent has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. Any party submitting facts relevant to the factors prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty has the burden of proving those facts by a preponderance of the evidence.

[(e) In permitting matters, the executive director shall comply with the requirements of §80.108 of this title (relating to Executive Director Party Status in Permit Hearings).]

**SUBCHAPTER C: HEARING PROCEDURES**  
**§§80.108, 80.109, ~~80.115~~, 80.117, 80.131**

**Statutory Authority**

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements for requests for

reconsideration and contested case hearings.

Additionally, the amendments are 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, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011. The amendment is also proposed under Texas Government Code, Chapter 311.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

**§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) an application concerning municipal solid waste where land use is the sole issue at hearing, including hearings held for determination of land use compatibility under Texas Health and Safety Code (THSC), §361.069;]

[(2) an application for an air quality standard permit to authorize a concrete batch plant under THSC, §382.05195;]

[(3) an application for an air quality permit to authorize 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 (TARA) Section Emissions Screening List;]

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

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

[(6) an application for a permit for composting facilities under §332.3 of this title (relating to Applicability); and]

[(7) an application to authorize solely the irrigation of domestic or municipal wastewater effluent meeting the requirements for secondary treatment in

Chapter 309 of this title (relating to Domestic Wastewater Effluent Limitation and Plant Siting).]

[(b) The executive director shall participate as a party in the following contested case hearings relating to permitting matters:]

[(1) an application concerning water rights;]

[(2) an application for which the executive director has recommended denial of the permit;]

[(3) an involuntary amendment; and]

[(4) an application for which the draft permit includes provisions opposed by the applicant.]

[(c) For permitting matters not included in subsections (a) or (b) of this section, the executive director shall, on a case-by-case basis, consider the following criteria in the manner specified in determining whether to participate as a party.]

[(1) The executive director shall, as a preliminary matter, determine whether there is any issue to be presented in the hearing that merits participation of the executive director, based on the existence of one or more of the following:]

[(A) one or more of the issues to be presented in the hearing are new, unique, or complex, including consideration of whether an issue relates to more than one medium, and whether it is likely that construction of prior agency policy or practice will be involved;]

[(B) it is likely that the decision on any of the issues to be presented in the hearing will have significant implications for other agency actions or policies;]

[(C) it is likely that changes to proposed permit conditions could adversely affect human health or the environment; or]

[(D) any issue to be considered is likely to affect federal program approval or authorization.]

[(2) If the executive director finds that there are issues weighing in favor of participation under paragraph (1) of this subsection, the executive director may elect to

participate as a party or he may also consider the following factors in the manner described:]

[ (A) whether there is a significant disparity in the experience and resources of the parties. A significant disparity weighs in favor of executive director participation. In evaluating whether there is a significant disparity, the executive director shall consider:]

[ (i) the legal capacity of the parties, based on whether any party is not represented by counsel and the prior contested case hearing experience of the parties at the agency;]

[ (ii) the financial capacity of the parties, including documentation or evidence of financial disparity if offered by any party, and including whether any party is:]

[ (I) a qualifying local governmental entity;]

[ (II) a non-profit entity; or]

[ (III) a small business; and]

[(iii) the technical capacity of the parties, including an evaluation of:]

[(I) the number and complexity of the administrative and technical notices of deficiency issued during the administrative and technical review of the application;]

[(II) the number and complexity of the technical issues raised by parties to the hearing during the comment period or at the preliminary hearing; and]

[(III) whether any of the parties does not have access to a technical expert; and]

[(B) whether there are limitations on the availability of agency staff, including specialized staff expertise on the issues to be presented at hearing, which shall weigh against executive director participation; and]

[(C) whether the draft permit contains any provision that has been included by the executive director to address an applicant's compliance history, which shall weigh in support of executive director participation.]

[(d)] The executive director is a party in all contested case hearings concerning permitting matters. The executive director's participation [as a party under subsection (b) or (c) of this section] shall be [for the sole purpose of providing information] to complete the administrative record and support the executive director's position developed in the underlying proceeding.

[(e) When the executive director participates as a party in a contested case hearing concerning a permitting matter before the commission or SOAH, the executive director may not assist an applicant in meeting its burden of proof unless the applicant is eligible to receive assistance because:]

[(1) the applicant is a qualifying local governmental entity; or]

[(2) the applicant is a non-profit entity; and]

[(3) there is a significant public need for the permitting action to avoid adverse impact to human health or the environment.]

[(f) The executive director may elect to participate as a party for the purpose of assisting an applicant in meeting its burden of proof in accordance with subsection (e) of this section notwithstanding the provisions of subsections (a) - (d) of this section.]

[(g) The executive director must notify all parties and the SOAH judge of his intention to participate as a party to a contested case hearing concerning a permitting matter in writing or on the record as soon as practicable, but not later than one week after the end of the preliminary hearing.]

[(h) The executive director's decision on participation as a party in contested case hearing concerning a permitting matter and the executive director's decision on whether an applicant is eligible to receive assistance in accordance with subsection (e) of this section are not subject to review by the commission or SOAH].

[(i) This section does not apply to matters in which the executive director is a party in accordance with §80.109(b)(1) of this title (relating to Designation of Parties).]

[(j) For purposes of this section:]

[(1) "qualifying local governmental entity" means a district, authority, county, or municipality that demonstrates that it lacks the technical, legal, and financial resources to support its application in the contested case hearing process; and]

[(2) "small business" means a small business as defined by §70.9(b)(1) and (2) of this title (relating to Installment Payment of Administrative Penalty).]

[(3) "non-profit entity" shall mean those entities which are defined in 26 United States Code, §501(c)(3) and (4).]

[(k) The executive director shall record his decision on party participation and the grounds for his decision under this section on a case-by-case basis.]

[(l) The executive director shall on an annual basis compile the records required by subsection (k) of this section and present this information to the commission in a written report.]

[(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.]

**§80.109. Designation of Parties.**

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no person [other than the executive director, as provided in §80.108 of this title (relating to Executive Director Party Status in Permit Hearings),] will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed.

(b) Parties.

(1) The executive director is a mandatory party to all commission proceedings concerning matters in which the executive director bears the burden of proof, and in the following commission proceedings:

(A) matters concerning Texas Water Code (TWC), §§11.036, 11.041, and 12.013; TWC, Chapters 13, 35, 36, and 49 - 66; and Texas Local Government Code, Chapters 375 and 395;

(B) matters arising under Texas Government Code, Chapter 2260 and Chapter 11, Subchapter D of this title (relating to Resolution of Contract Claims); and

(C) matters under TWC, Chapter 26, Subchapter I, and Chapter 334, Subchapters H and L of this title (relating to Reimbursement Program and Overpayment Prevention).

(2) In addition to subsection (b)(1) of this section, the executive director is always [may also be] a party in contested case hearings concerning permitting matters, pursuant to, and in accordance with, the provisions of §80.108 of this title (relating to Executive Director Party Status in Permit Hearings).

(3) The public interest counsel of the commission is a party to all commission proceedings.

(4) The applicant is a party in a hearing on its application.

(5) Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 and §55.203 of this title (relating to

Determination of Affected Person). Notwithstanding any other law, a state agency, except a river authority, may not be a party to a hearing on an application received by the commission on or after September 1, 2011 unless the state agency is the applicant.

[(6) The Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status.]

[(7) The Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status.]

(6) ~~(8)~~ The parties to a contested enforcement case include:

(A) the respondent(s);

(B) any other parties authorized by statute; and

(C) in proceedings alleging a violation of or failure to obtain an underground injection control or Texas Pollutant Discharge Elimination System permit, or a state permit for the same discharge covered by a National Pollutant Discharge Elimination System (NPDES) permit that has been assumed by the state under NPDES

authorization, any other party granted permissive intervention by the judge. In exercising discretion whether to permit intervention, the judge shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(7) [(9)] The parties to a hearing upon a challenge to commission rules include the person(s) challenging the rule and any other parties authorized by statute.

(8) [(10)] The parties to a permit revocation action initiated by a person other than the executive director shall include the respondent and the petitioner.

(9) [(11)] The parties to a post-closure order contested case are limited to:

(A) the executive director;

(B) the applicant(s); and

(C) the Public Interest Counsel.

(c) Alignment of participants. Participants (both party and non-party) may be aligned according to the nature of the proceeding and their relationship to it. The judge

may require participants of an aligned class to select one or more persons to represent them in the proceeding. Unless otherwise ordered by the judge, each group of aligned participants shall be considered to be one party for the purposes of §80.115 of this title (relating to Rights of Parties) for all purposes except settlement.

(d) Effect of postponement. If a hearing is postponed for any reason, any person already designated as a party retains party status.

**§80.117. Order of Presentation.**

(a) In all proceedings, the moving party has the right to open and close. Where several matters have been consolidated, the judge will designate who will open and close. The judge will determine at what stage other parties will be permitted to offer evidence and argument. After all parties have completed the presentation of their evidence, the judge may call upon any party for further material or relevant evidence upon any issue.

(b) The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and[, if named as a party,] the executive director. In all cases, the applicant shall be allowed a

rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.

(c) In all contested enforcement case hearings, the executive director has the right to open and close. In all such cases, the executive director shall be allowed to close with his rebuttal.

**§80.131. Interlocutory Appeals and Certified Questions.**

(a) No interlocutory appeals may be made to the commission by a party to a proceeding before a judge except that in an enforcement action a party may seek an interlocutory appeal to the commission on jurisdictional issues only.

(b) On a motion by a party or on the judge's own motion, the judge may certify a question to the commission. Certified questions may be made at any time during a proceeding, regarding commission policy, jurisdiction, or the imposition of any sanction by the judge which would substantially impair a party's ability to present its case. Policy questions for certification purposes include, but are not limited to:

(1) the commission's interpretation of its rules and applicable statutes;

(2) which rules or statutes are applicable to the proceeding; or

(3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(c) If a question is certified, the judge shall file a request to answer the certified question with the chief clerk and serve copies on the parties. [In a contested case hearing concerning a permitting matter, the judge shall serve the executive director with a copy of the request.] Within five days after the request is filed, [the executive director and] all parties to the proceeding may file briefs or replies. [Copies of all briefs and replies shall be served on the executive director as provided in §1.11 of this title (relating to Service on Judge, Parties, and Interested Persons). The executive director shall be allowed to file briefs and replies within the prescribed time frames.] The chief clerk shall provide copies of the request and any briefs or replies to the general counsel and commission. Upon the request of the general counsel or a commissioner to the general counsel, the request will be scheduled for consideration during a commission meeting. The chief clerk shall give the judge[, the executive director,] and all parties notice of the meeting. The judge may abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed. If the chief clerk does not receive a request from the general counsel to set the question for consideration within 15 days after filing, the request is denied by operation of law.

## **SUBCHAPTER D: DISCOVERY**

### **§80.151**

#### **Statutory Authority**

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

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, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

**§80.151. Discovery Generally.**

(a) Discovery shall be conducted according to the Texas Rules of Civil Procedure, unless commission rules provide or the judge orders otherwise. The Rules of Civil Procedure shall be interpreted consistently with this chapter, the Texas Water Code, the Texas Health and Safety Code, and the APA. Drafts of prefiled testimony are not discoverable.

(b) Discovery in contested case hearings using prefiled testimony.

(1) This subsection is applicable to contested case hearings for applications which are subject to the jurisdiction of the State Office of Administrative Hearings (SOAH) under 1 TAC §155.51 (relating to Jurisdiction), except for

(A) contested case hearings using prefiled testimony where all discovery was completed before September 1, 2011;

(B) water ratemaking proceedings; and

(C) sewer ratemaking proceedings.

(2) All discovery on a party must be completed before the deadline for that party to submit its prefiled testimony.

(3) In cases where all parties share the same deadline for submission of prefiled testimony, a single deadline for completion of discovery shall apply to all parties.

(4) If parties have different deadlines for the submission of prefiled testimony, the deadline to complete discovery on a party shall be no later than the final deadline for that party to submit prefiled testimony. After a party's final deadline to

submit its prefiled testimony in a contested case, that party is no longer subject to discovery from other parties in the case.

(5) The requirements of this subsection do not relieve a party's duty to supplement its discovery responses as required by Texas Rules of Civil Procedure, §193.5 and §195.6.

(c) All other contested case hearings are governed by this section as it existed immediately before the effective date of this section and the rule is continued in effect for that purpose.

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

### **§80.257, §80.261**

#### **Statutory Authority**

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which establishes the commission's general authority necessary to carry out its jurisdiction, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules necessary to carry out its powers and duties; TWC, §5.105, concerning General Policy, which provides the commission with the authority to establish and approve all general policy of the commission by rule; TWC, §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines affected person and establishes notice requirements; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.315, concerning Discovery in Cases Using Prefiled Testimony, which defines discovery deadlines in cases using prefiled testimony; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; and TWC, §5.556, concerning Request for Reconsideration or Contested Case Hearing, which establishes requirements requests for reconsideration and contested case hearings.

Additionally, the amendments are 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, and House Bill (HB) 2694, Article 10, 82nd Legislature, 2011.

The proposed amendments would implement TWC, §§5.115, 5.228, 5.315, 5.311, and 5.556, and HB 2694, Article 10.

**§80.257. Pleadings Following Proposal for Decision.**

(a) Pleadings. Unless right of review has been waived, any party may within 20 days after the date of issuance of the proposal for decision, file exceptions or briefs. [For permit hearings in which the executive director has not participated as a party, the commission or general counsel may request in writing that the executive director file briefs concerning legal or policy issues.] The request shall be served on the parties and the judge, shall specify the issues to be briefed and shall set reasonable deadlines for the executive director's response and the parties replies to that response, avoiding delay of the matter to the extent practicable. Proposed findings of fact may be filed when permitted or requested by the commission. Any replies to exceptions, briefs, or proposed

findings of fact shall be filed within 30 days after the date of issuance on the proposal of decision.

(b) Change of filing deadlines. On his own motion or at the request of a party, the general counsel may change the deadlines to file pleadings following the proposal for decision. A party requesting a change must file a written request with the chief clerk, and must serve a copy on the general counsel, the judge, and the other parties. The request must explain that the party requesting the change has contacted the other parties, and whether the request is opposed by any party. The request must include proposed dates (preferably a range of dates) and must indicate whether the judge and the parties agree on the proposed dates.

**§80.261. Scheduling Commission Meetings.**

(a) The chief clerk, in coordination with the judge, shall schedule motions by parties requiring commission action and the presentation of the proposal for decision. The judge, when transmitting the proposal for decision, shall notify the [executive director and the] parties of the date of the commission meeting and the deadlines for the filing of exceptions and replies. The general counsel, either by agreement of the parties and the judge, or on the general counsel's own motion, may reschedule the presentation of the proposal for decision. The chief clerk shall send notice of the rescheduled meeting

date to the parties[, and, if not also a party, to the executive director] no later than ten days before the rescheduled meeting.

(b) Consistent with notices required by law, the commission may consolidate related matters if the consolidation will not injure any party and may save time and expense or otherwise benefit the public interest and welfare.

(c) The commission may sever issues in a proceeding or hold special hearings on separate issues if doing so will not injure any party and may save time and expense or benefit the public interest and welfare.