

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§55.1, 55.27, 55.101, and 55.250, *without changes* to the proposed text as published in the July 13, 2018, issue of the *Texas Register* (43 TexReg 4645) and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The Public Utility Commission of Texas (PUC) Sunset Legislation, House Bill (HB) 1600 and Senate Bill (SB) 567 passed by the 83rd Texas Legislature, 2013, transferred from the TCEQ to the PUC the functions relating to the economic regulation of water and wastewater utilities effective September 1, 2014.

Concurrent with this adoption, and published in this issue of the *Texas Register*, the commission is adopting revisions to 30 TAC Chapter 35, Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions; Chapter 37, Financial Assurance; Chapter 50, Action on Applications and Other Authorizations; Chapter 80, Contested Case Hearings; Chapter 281, Applications Processing; Chapter 290, Public Drinking Water; Chapter 291, Utility Regulations; and Chapter 293, Water Districts.

Section by Section Discussion

In addition to the adopted revisions associated with this rulemaking, the adopted rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology.

Where subsections were removed, subsequent subsections were re-lettered accordingly.

These changes are non-substantive and generally not specifically discussed in this preamble.

§55.1, Applicability

The commission adopts amended §55.1(a) to remove the reference to Texas Water Code (TWC), §12.013 and Chapter 13. With the transfer of these functions from the commission to the PUC in HB 1600 and SB 567, this language is no longer applicable. Additionally, the commission adopts to remove the reference to TWC, §11.036 and §11.041, because Chapter 55, Subchapters D and G do not apply to TWC, §11.036 and §11.041.

§55.27, Commission Action on Hearing Request

The commission adopts amended §55.27 to remove subsection (d), because the subsection pertains to functions that were transferred from the commission to the PUC in HB 1600 and SB 567. The commission also adopts to remove §55.27(e), because the language in the subsection is obsolete due to the repeal of Chapter 80, Subchapter E in September 1999.

§55.101, Applicability

The commission adopts amended §55.101(g)(5) to remove the reference to TWC, §12.013 and Chapter 13 and revise the sentence accordingly to account for the removal. With the transfer of these functions from the commission to the PUC in HB 1600 and SB 567, this language is no longer applicable. Additionally, the commission adopts to remove the requirements for the executive director to review hearing requests, determine the sufficiency of hearing requests, and refer the application to the chief clerk for hearing

processing, because those requirements are not applicable to TWC, §11.036 and §11.041, petitions.

§55.250, Applicability

The commission adopts amended §55.250 to remove the reference to TWC, §12.013 and Chapter 13 and revise the sentence accordingly to account for the removal. With the transfer of these functions from the commission to the PUC in HB 1600 and SB 567, this language is no longer applicable.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225. Texas Government Code, §2001.0225 applies to a "Major environmental rule" which is defined in Texas Government Code, §2001.0225(g)(3) as a rule with a specific intent "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."

First, the adopted rulemaking does not meet the statutory definition of a "Major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The PUC Sunset Legislation, HB 1600 and SB 567, transferred from the TCEQ to the PUC the functions relating to the economic

regulation of water and wastewater utilities. The specific intent of the adopted rulemaking is to amend TCEQ rules in Chapter 55 relating to the economic regulation of water and wastewater utilities. Therefore, the intent is not to protect the environment or reduce risks to human health from environmental exposure, but instead to amend the rules relating to economic regulation of water and wastewater utilities as those functions were transferred to the PUC.

Second, the adopted rulemaking does not meet the statutory definition of a "Major environmental rule" because the adopted rules will not 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. It is not anticipated that the cost of complying with the adopted rules will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the adopted amendments will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Finally, the adopted rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 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 adopted rulemaking does not meet any of the four preceding applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for the economic regulation of water or wastewater utilities; 2) does not exceed any express requirements of TWC, Chapter 11, 12, or 13, which relate to the economic regulation of water and wastewater utilities; 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 a state and federal program; and 4) is not adopted solely under the general powers of the agency.

Since this adopted rulemaking does not meet the statutory definition of a "Major environmental rule" nor does it meet any of the four applicability requirements for a "Major environmental rule" this rulemaking is not subject to Texas Government Code, §2001.0225.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed a preliminary assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007.

The commission adopts this rulemaking for the purpose of amending TCEQ rules in Chapter 55 relating to the economic regulation of water and wastewater utilities as those functions have transferred from the TCEQ to the PUC.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules based upon an exception to applicability in Texas Government Code, §2007.003(b)(5). The adopted rulemaking is a discontinuance of the economic regulation of water and wastewater utilities within the TCEQ, which provides a unilateral expectation that does not rise to the level of a recognized interest in private real property. Because the adopted rulemaking falls within an exception under Texas Government Code, §2007.003(b)(5), Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

Further, the commission determined that promulgation of these adopted rules will be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the adopted rules neither relate to, nor have any impact on, the use or enjoyment of private real property, and there will be no reduction in property value as a result of these rules. This rulemaking is required due to the transfer of functions relating to the economic regulation of water and wastewater utilities from the TCEQ to the PUC pursuant to HB 1600 and SB 567. The specific intent of the adopted rulemaking is to amend TCEQ rules relating to the economic regulation of water and wastewater utilities. Therefore, the adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding consistency with the CMP.

Public Comment

The commission offered a public hearing on August 7, 2018. The comment period closed on August 13, 2018. The commission did not receive any comments regarding Chapter 55.

SUBCHAPTER A: APPLICABILITY AND DEFINITIONS

§55.1

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The adopted amendment implements House Bill 1600 and Senate Bill 567 passed by the 83rd Texas Legislature, 2013.

§55.1. Applicability.

(a) This chapter is divided into subchapters, each of which governs only certain specific types of applications. This subchapter and Subchapter B of this chapter (relating to Hearing Requests, Public Comment) describe the hearing request and comment procedures which will continue to apply to applications declared administratively complete before September 1, 1999. Subchapter D of this chapter (relating to Applicability and Definitions) describes the applications that will be subject to Subchapters E, F, and G of this chapter (relating to Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain

Applications). Subchapters E and F of this chapter establish public comment, public meeting, request for reconsideration and contested case hearing procedures that apply to applications filed under Texas Water Code (TWC), Chapters 26 and 27 and Texas Health and Safety Code, Chapters 361 and 382 that are declared administratively complete on or after September 1, 1999. Subchapter G of this chapter addresses requests for contested case hearing and public comment procedures on applications filed under other statutory provisions that are declared administratively complete on or after September 1, 1999.

(b) Hearing requests and comments regarding any permit application that is declared administratively complete before September 1, 1999 are subject to this subchapter and Subchapter B of this chapter.

(c) This subchapter and Subchapter B of this chapter do not apply to hearing requests on:

(1) applications for emergency or temporary orders;

(2) applications for temporary or term permits for water rights;

(3) air quality exemptions from permitting under Chapter 106 of this title (relating to Permits by Rule) except for construction of concrete batch plants which are not temporarily located contiguous or adjacent to a public works project; and

(4) applications for weather modification licenses or permits under TWC,
Chapter 18.

(d) This subchapter and Subchapter B of this chapter do not apply to:

(1) applications for sludge registrations and notifications under Chapter 312 of
this title (relating to Sludge Use, Disposal, and Transportation);

(2) applications for authorization under Chapter 321 of this title (relating to
Control of Certain Activities by Rule) except for applications for individual permits under
Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding
Operations);

(3) applications for registrations under Chapter 330 of this title (relating to
Municipal Solid Waste);

(4) applications for registrations and notifications under Chapter 332 of this
title (relating to Composting);

(5) applications under Chapter 122 of this title (relating to Federal Operating
Permits Program);

(6) air quality standard permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); and

(7) applications where the opportunity for a contested case hearing does not exist under the law.

SUBCHAPTER B: HEARING REQUESTS, PUBLIC COMMENT

§55.27

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The adopted amendment implements House Bill 1600 and Senate Bill 567 passed by the 83rd Texas Legislature, 2013.

§55.27. Commission Action on Hearing Request.

(a) The determination of the validity of a hearing request is not, in itself, a contested case subject to the Texas Administrative Procedure Act (APA). The commission will evaluate the hearing request at the scheduled commission meeting, and may:

(1) determine that a hearing request does not meet the requirements of this subchapter, and act on the application;

(2) determine that a hearing request does not meet the requirements of this subchapter, and refer the application to a public meeting to develop public comment before acting on the application;

(3) determine that a hearing request meets the requirements of this subchapter, and direct the chief clerk to refer the application to the State Office of Administrative Hearings (SOAH) for a hearing; or

(4) direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the request meets the requirements of this subchapter. The referral may also direct SOAH to proceed with a hearing on the application if the judge finds that a hearing request meets the requirements of this chapter. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the APA.

(b) A request for a contested case hearing shall be granted if the request is:

(1) made by the applicant or the executive director;

(2) made by an affected person if the request:

(A) is reasonable;

(B) is supported by competent evidence;

(C) complies with the requirements of §55.21 of this title (relating to Requests for Contested Case Hearings, Public Comment);

(D) is timely filed with the chief clerk; and

(E) is pursuant to a right to hearing authorized by law;

(3) for an air quality permit, made by a legislator in the general area of the facility if the request:

(A) is reasonable;

(B) complies with the requirements of §55.21 of this title, except for §55.21(d)(2) - (4) of this title;

(C) is timely filed with the chief clerk; and

(D) is pursuant to a right to hearing authorized by law.

(c) The commission may refer an application to SOAH if there is no hearing request complying with this subchapter, if the commission determines that a hearing would be in the public interest.

(d) A decision on a hearing request is an interlocutory decision on the validity of the request and is not binding on the issue of designation of parties under §80.109 of this title (relating to Designation of Parties). A person whose hearing request is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's hearing request.

(e) If a hearing request is denied, the procedures contained in §80.272 of this title (relating to Motion for Rehearing) apply. A motion for rehearing in such a case must be filed no earlier than, and no more than 20 days after, the date the person or his attorney of record is notified of the commission's final decision or order on the application. If the motion is denied under §80.272 of this title and §80.273 of this title (relating to Decision Final and Appealable), the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

SUBCHAPTER D: APPLICABILITY AND DEFINITIONS

§55.101

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The adopted amendment implements House Bill 1600 and Senate Bill 567 passed by the 83rd Texas Legislature, 2013.

§55.101. Applicability.

(a) This subchapter and Subchapters E – G of this chapter (relating to Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications) apply to permit applications that are declared administratively complete on or after September 1, 1999, as specified in subsections (b) - (g) of this section.

(b) This subchapter and Subchapters E – G of this chapter apply to public comments, public meetings, hearing requests, and requests for reconsideration.

(c) This subchapter and Subchapters E and F of this chapter apply only to applications filed under Texas Water Code (TWC), Chapters 26, 27, and 32 and Texas Health and Safety Code (THSC), Chapters 361 and 382.

(d) Subchapter G of this chapter applies to all applications other than those listed in subsection (e) of this section and other than those filed under TWC, Chapters 26, 27, and 32 and THSC, Chapters 361 and 382.

(e) This subchapter and Subchapters E and F of this chapter apply to applications for amendment, modification, or renewal of air quality permits that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may not seek further public comment or hold a public hearing under the procedures provided by §39.419 of this title (relating to Notice of Application and Preliminary Decision), §55.156 of this title (relating to Public Comment Processing), and Subchapter F of this chapter for such applications. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(f) This subchapter and Subchapters E – G of this chapter do not apply to hearing requests related to:

(1) applications for emergency or temporary orders;

(2) applications for temporary or term permits for water rights;

(3) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Permits by Rule) except for construction of concrete batch plants which are not temporarily located contiguous or adjacent to a public works project;

(4) applications for Class I injection well permits used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under TWC, §27.021, concerning Permit for Disposal of Brine From Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(5) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under TWC, §27.025, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals; and

(6) applications where the opportunity for a contested case hearing does not exist under other laws.

(g) This subchapter and Subchapters E - G of this chapter do not apply to:

(1) applications for sludge registrations and notifications under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation);

(2) applications for authorization under Chapter 321 of this title (relating to Control of Certain Activities by Rule) except for applications for individual permits under Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(3) applications for registrations under Chapter 330 of this title (relating to Municipal Solid Waste);

(4) applications for registrations and notifications under Chapter 332 of this title (relating to Composting);

(5) applications under TWC, §11.036 or §11.041. The maximum expected duration of a hearing on an application referred to the State Office of Administrative Hearings (SOAH) under this provision shall be no longer than one year from the first day of the preliminary hearing, unless otherwise directed by the commission. The issues to be

considered in a SOAH hearing on an application subject to this provision are all those issues that are material and relevant under the law;

(6) applications under Chapter 122 of this title (relating to Federal Operating Permits Program);

(7) applications for initial issuance of voluntary emissions reduction permits under THSC, §382.0519;

(8) applications for initial issuance of permits for electric generating facility permits under Texas Utilities Code, §39.264;

(9) air quality standard permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(10) applications for multiple plant permits under THSC, §382.05194;

(11) applications for pre-injection unit registrations under §331.17 of this title (relating to Pre-Injection Units Registration); and

(12) applications where the opportunity for a contested case hearing does not exist under other laws.

**SUBCHAPTER G: REQUESTS FOR CONTESTED CASE HEARING AND PUBLIC COMMENT
ON CERTAIN APPLICATIONS
§55.250**

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The adopted amendment implements House Bill 1600 and Senate Bill 567 passed by the 83rd Texas Legislature, 2013.

§55.250. Applicability.

This subchapter applies to applications filed with the commission except applications filed under Texas Water Code (TWC), Chapter 26 or 27, Texas Health and Safety Code, Chapter 361 or 382, or TWC, §11.036 or §11.041. Any permit application that is declared administratively complete on or after September 1, 1999 is subject to this subchapter.