

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§55.156, 55.201, 55.203, 55.205, 55.210, and 55.211.

Section 55.156(e) is proposed to be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP), or, in the alternative, existing §55.156 is proposed to be withdrawn from the SIP.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking is proposed to implement Senate Bills (SB) 709 and 1267, both adopted by the 84th Texas Legislature (2015) with an effective date of September 1, 2015.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings. SB 709 is implemented by rules proposed in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9 is implemented by rules proposed in Chapters 1, 50, 55, 70, and 80.

SB 709

SB 709 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current contested case hearing

(CCH) process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed below.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a CCH. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications filed on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the

commission from finding a group or association is affected unless their CCH request has timely and specifically identified, by name and physical address, a member who would be affected in the member's own right. The issues submitted by the commission to the State Office of Administrative Hearings (SOAH) for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. SB 709 allows for extensions beyond 180 days based upon agreement of the parties, with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267, also passed by the 84th Texas Legislature (2015), amends the Texas Administrative Procedure Act (APA), codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCH and agency decisions, signature and timeliness of agency decisions, presumption of the date that notice of an agency decision is received, motions for rehearing regarding agency decisions, and the procedures for judicial review of agency decisions.

Rulemaking is needed to implement SB 1267, Sections 4, 6, 7, and 9. The changes to the APA for which TCEQ rulemaking is necessary are as follows.

First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the beginning date is altered for a party that does not receive notice of the commission's decision or order, until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing.

Section by Section Discussion

In addition to the proposed amendments associated with this rulemaking, 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. These changes are non-substantive and generally not specifically discussed in this preamble.

§55.156, Public Comment Processing

Proposed subsections (d)(3) and (e)(3) would implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1 and Section 5(a)(1). These subsections would be amended by adding a date so that these subsections apply to applications filed before September 1, 2015. Proposed subsections (d)(4) and (e)(4) would also implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1. Proposed subsections (d)(4) and (e)(4) would provide that only relevant and material disputed issues of fact raised during the comment period by a hearing requestor who is an affected person and whose request is granted for an application filed with the commission on or after September 1, 2015. Existing subsections (d)(4) and (e)(4) would be re-designated as subsections (d)(5) and (e)(5), respectively. Non-substantive changes are also proposed in subsections (d) and (e) to improve readability and to conform to agency style and usage guidelines. In addition, the applicability text that referenced the effective date of the section in subsection (f) is updated to provide the precise date of June 24, 2010.

Section §55.156(e) is proposed to be submitted to the EPA as a revision to or to be withdrawn from the SIP. The commission solicits comments on whether subsection (e) is necessary to meet requirements for SIPs in the Federal Clean Air Act.

§55.201, Requests for Reconsideration or Contested Case Hearing

The amendment to §55.201 is proposed to implement new Texas Government Code, §2003.047(e-1) and SB 709, Section 1 and Section 5(a)(1). Subsection (c) would be

amended to provide that for applications filed on or after September 1, 2015, a request for a CCH must be based on the affected person's timely comments.

Subsection (d)(4) would be amended by restructuring the paragraph to add applicable date restrictions so that the existing text is re-designated as paragraph (A) and applies to applications filed before September 1, 2015. Proposed paragraph (B) would also provide, for applications filed on or after September 1, 2015, that a hearing requestor must list all relevant and material disputed issues of fact that were raised by that person during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law.

§55.203, Determination of Affected Person

Subsection (c)(6) is proposed to implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1, Texas Water Code, §5.115(a-1)(2)(B) in SB 709, Section 2 and Section 5(a)(1). The rule would provide that, for hearing requests on applications filed on or after September 1, 2015, the commission must consider whether the requestor timely submitted comments on the permit application. Existing subsection (c)(6) is proposed to be re-designated as subsection (c)(7).

Subsection (d) is proposed to implement the amendments to Texas Water Code, §5.115(a-1)(1)(A), (C), (D) and (E) in SB 709, Section 2 and Section 5(a)(1). Subsection (d) would provide that, in determining whether a person is an affected person for the purpose of granting a hearing request on an application filed on or after September 1, 2015, the commission may also consider: 1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance; 2) the analysis and opinions of the executive director; and 3) any other expert reports, affidavits, opinions, or data submitted by the executive director, applicant, or hearing requestor.

§55.205, Request by Group or Association

The amendment to §55.205 is proposed to implement the amendments to Texas Water Code, §5.115(a-1) and (2) in SB 709, Section 2 and Section 5(a)(1). Proposed subsection (b)(3) and (4) carries forward two existing requirements in subsection (a)(2) and (3). Subsection (b) would also specifically implement Texas Water Code, §5.115(a-1)(2)(A) in proposed subsection (b)(1) and (2). Proposed subsection (b)(1) and (2) would provide that a request for a CCH from a group or association on an application filed on or after September 1, 2015, may not be granted unless the group or association timely submits comments on the application and identifies one or more members of the group or

association by name and physical address. Existing subsection (b) is proposed to be re-designated as subsection (c).

§55.210, Direct Referrals

The amendment to §55.210 is proposed to implement new Texas Government Code, §2003.047(e-5) in SB 709, Section 1 and Section 5(a)(1). Subsection (e) would be amended to clarify the applicability of the procedures for when Notice of Application and Preliminary Decision is provided at or after direct referral under this section. Specifically, those procedures would only apply to applications received by the commission before September 1, 2015.

Proposed subsection (f) would prohibit an administrative law judge from holding a preliminary hearing on applications filed on or after September 1, 2015, until after the issuance of the executive director's response to comment.

§55.211, Commission Action on Requests for Reconsideration and Contested Case Hearing

The amendment to §55.211(c)(2)(A) is proposed to implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1 and Section 5(a)(1). Subsection (c)(2)(A) is restructured into clauses (i) and (ii). Clause (i) is amended by adding an applicability

clause to the existing rule that provides that this paragraph is applicable to applications filed before September 1, 2015.

Proposed subsection (c)(2)(A)(ii) would provide that, for an application that was filed on or after September 1, 2015, the requestor must have raised disputed issues of fact during the comment period, which were not withdrawn and that are relevant and material to the commission's decision.

The amendment to subsection (f) is proposed to implement SB 1267, Section 9, which amends the APA (Texas Government Code, §2001.146), and would change the date for filing a motion for rehearing from within 20 days after notification to not later than the 25 days after the commission's decision or order is signed. However, the deadline may be extended under prescribed sections of the APA. The amendment removes the text regarding the presumption that notification of the commission's decision or order is received on the third day after it is mailed. Concurrent with this rulemaking, §80.272 is proposed to be amended to include similar changes.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, 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 for other units of state or local

government. The proposed rules are procedural in nature and do not directly impact the cost of CCHs. The proposed rules would implement SBs 709 and 1267, both adopted by the 84th Texas Legislature (2015).

SB 709

SB 709 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current CCH process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a hearing. A group or association seeking to be considered as an affected person must specifically identify in its comments a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior

to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications received on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their comments have timely and specifically identified a member who would be affected in the member's own right. The issues submitted by the commission to the SOAH for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to

support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the ALJ's proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by the date specified by the commission. SB 709 allows for continuances based upon agreement of the parties with the approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267, also passed by the 84th Texas Legislature, amends the APA, codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCH and agency decisions, signature and timeliness of agency decisions, presumption of the date notice

that an agency decision is received, motions for rehearing of agency decisions, and the procedures for judicial review of agency decisions. Rulemaking is needed to implement SB 1267, Sections 4, 6, 7, and 9.

The changes to the APA for which TCEQ rulemaking is necessary are as follows. First, the presumption that notice is received on the third day after mailing is removed. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision was not received can seek to alter the timelines for filing a motion for rehearing. Third, the date from which the time period for filing a motion for rehearing will now begin on the date the order is signed, unless altered for a party that does not receive notice of the commission's order until at least 15 days after the commission's decision or order is signed but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission order that modifies, corrects, or reforms a commission order in response to a previously issued motion for rehearing.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal

requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Local governments that are permit applicants and are subject to a CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

The number of units of local governments is a small percentage of the number of applicants for and who comment on air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications. While it is possible that a unit of state government can be a permit applicant, it is rare. If one is, it would be affected in the same way as other governmental entities who are applicants. State agencies are generally prohibited from contesting TCEQ permit applications, so they would not be affected the same as other governmental entities who protest applications and participate in CCHs.

There are fiscal implications for the agency due to the need to revise the Commissioners' Integrated Database to adequately implement SB 709. However, costs to upgrade the database are not expected to be significant and would be absorbed using current resources.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and greater clarity for the public and also for applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications.

No significant fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to a CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected

to be significant.

The rules will apply to applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications. The number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. The proposed amendments are procedural in nature and do not directly impact the cost of CCHs. It is not known how many applicants would be small or micro-businesses, but for those that are, there may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to a CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy

of their application, though these costs are not expected to be significant.

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 rulemaking is necessary to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rulemaking 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 rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is 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 55 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Rather, they are procedural in nature and implement changes made to the Texas Water Code in SB 709, and to the APA in SB 1267 by revising rules regarding requests for CCH by individual entities and groups or associations, determination of affected persons and disputed issues for CCH on certain applications, and commission action on requests for CCH.

The rulemaking is procedural in nature and 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 55 are procedural in nature and implement changes made to the Texas Water Code in SB 709, and to the APA in SB 1267 by amending rules regarding requests for CCH by individual entities and groups or associations, determination of affected persons and disputed issues for CCH on certain applications, and commission action on requests for CCH. 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 developed to meet the requirements of the law described in the Statutory Authority section of this rulemaking.

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 rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments to Chapter 55 revise rules regarding requests for CCH by individual entities and groups or associations, determination of affected persons and disputed

issues for CCH on certain applications, and commission action on requests for CCH and are procedural in nature. The primary purpose of the proposed rulemaking is to implement changes made to the Texas Water Code in SB 709, and to the APA in SB 1267. Promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed rules 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). Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do partially fulfill a federal mandate under 42 United States Code, §7410. Consequently, the exemption that applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendments affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are 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 September 15, 2015, at 2:00 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 Sherry Davis, 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://www1.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 2015-018-080-LS. The comment period closes on September 21,
2015. Copies of the proposed rulemaking can be obtained from the commission's
website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further
information, please contact Janis Hudson, Environmental Law Division, at (512) 239-
0466.

SUBCHAPTER E: PUBLIC COMMENT AND PUBLIC MEETINGS

§55.156

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 provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; and TWC, Subchapter M, concerning Environmental Permitting Procedures, which requires the commission to establish public participation procedures for certain permit applications. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011,

concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; and Texas Government Code, §2001.142, which prescribes requirements for the notification of decisions and orders of a state agency. In addition, the amendment to §55.156(e) is also proposed under Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements TWC, §5.115; and §5.1733; TWC, Subchapter M, including TWC, §5.5553; THSC, §382.012; Texas Government Code, §2001.142; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§55.156. Public Comment Processing.

(a) The chief clerk shall deliver or mail to the executive director, the Office of Public Interest Counsel, the Office of Public Assistance, the director of the Alternative Dispute Resolution Office, and the applicant copies of all documents filed with the chief clerk in response to public notice of an application.

(b) If comments are received, the following procedures apply to the executive director.

(1) Before an application is approved, the executive director shall prepare a response to all timely, relevant and material, or significant public comment, whether or not withdrawn, and specify if a comment has been withdrawn. Before any air quality permit application for a Prevention of Significant Deterioration or Nonattainment permit subject to Chapter 116, Subchapter B of this title (relating to New Source Review Permits) or for applications for the establishment or renewal of, or an increase in, a plant-wide applicability limit permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), filed on or after the effective date of this section, is approved, the executive director shall prepare a response to all comments received. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes.

(2) The executive director may call and conduct public meetings, under §55.154 of this title (relating to Public Meetings), in response to public comment.

(3) The executive director shall file the response to comments with the chief clerk within the shortest practical time after the comment period ends, not to exceed 60 days.

(c) After the executive director files the response to comments, the chief clerk shall mail (or otherwise transmit) the executive director's decision, the executive director's response to public comments, and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing. The chief clerk shall provide the information required by this section to the applicant, any person who submitted comments during the public comment period, any person who requested to be on the mailing list for the permit action, any person who timely filed a request for a contested case hearing in response to the Notice of Receipt of Application and Intent to Obtain a Permit for an air application, the Office of Public Interest Counsel, and the Office of Public Assistance. Instructions for requesting reconsideration of the executive director's decision or requesting a contested case hearing are not required to be included in this transmittal for the applications listed in:

(1) §39.420(e) of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision); and

(2) §39.420(f) and (g) of this title.

(d) The instructions sent under §39.420(a) of this title regarding how to request a contested case hearing shall include at least the following statements, however, this subsection does not apply to post-closure order applications:

(1) [that] a contested case hearing request must include the requestor's location relative to the proposed facility or activity;

(2) [that] a contested case hearing request should include a description of how and why the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(3) [that] only relevant and material disputed issues of fact raised during the comment period can be considered if a contested case hearing request is granted for an application filed before September 1, 2015; [and]

(4) only relevant and material disputed issues of fact raised during the comment period by a hearing requestor who is an affected person and whose request is granted can be considered if a contested case hearing request is granted for an application filed on or after September 1, 2015; and

(5) [(4) that] a contested case hearing request may not be based on issues raised solely in a comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(e) The instructions sent under §39.420(c) of this title regarding how to request a contested case hearing shall include at least the following statements:

(1) [that] a contested case hearing request must include the requestor's location relative to the proposed facility or activity;

(2) [that] a contested case hearing request should include a description of how and why the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(3) [that] only relevant and material disputed issues of fact raised during the comment period can be considered if a contested case hearing request is granted for an application filed before September 1, 2015;

(4) only relevant and material disputed issues of fact raised during the comment period by a hearing requestor who is an affected person and whose request is granted can be considered if a contested case hearing request is granted for an application filed on or after September 1, 2015; and

(5) [(4) that] a contested case hearing request may not be based on issues raised solely in a comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(f) For applications referred to State Office of Administrative Hearings under §55.210 of this title (relating to Direct Referrals):

(1) for air quality permit applications filed on or after June 24, 2010 [the effective date of this section] subsections (c) and (d) of this section do not apply; and

(2) for all other permit applications, subsections (b)(2), (c), and (d) of this section do not apply.

(g) Notwithstanding the requirements in §39.420 of this title, the commission shall make available by electronic means on the commission's website [Web site] the executive director's decision and the executive director's response to public comments.

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR CONTESTED
CASE HEARING**

§§55.201, 55.203, 55.205, 55.210, 55.211

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 provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; and TWC, Subchapter M, concerning Environmental Permitting Procedures, which requires the commission to establish public participation procedures for certain permit applications. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; Texas Government Code, §2001.142, which prescribes requirements for the

notification of decisions and orders of a state agency; and Texas Government Code, §2003.047, which provides the authority for State Office of Administrative Hearings to conduct hearings on behalf of the commission.

The proposed amendments implement TWC, §5.115, Texas Government Code, §2001.142 and §2003.047; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, [and] may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) for applications filed:

(A) before September 1, 2015, list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; or [and]

(B) on or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by the requestor during the public comment

period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and

(5) provide any other information specified in the public notice of application.

(e) Any person, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title (relating to Definitions), may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title, who was provided notice as required

under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program);

(C) a permit issued under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions); or

(D) amendment, modification, or renewal of an air application 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 hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(8) of this title
(relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or
amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to
be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit
will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant
public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

(6) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine from [From] Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(7) 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 Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

(8) an application for a pre-injection unit registration under §331.17 of this title (relating to Pre-injection Units Registration);

(9) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen

project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(11) an application for a production area authorization, except as provided in accordance with §331.108 of this title (relating to Opportunity for a Contested Case Hearing on a Production Area Authorization Application).

§55.203. Determination of Affected Person.

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Except as provided by §55.103 of this title (relating to Definitions), governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; [and]

(6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and

(7) [(6)] for governmental entities, their statutory authority over or interest in the issues relevant to the application.

(d) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the commission may also consider the following:

(1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;

(2) the analysis and opinions of the executive director; and

(3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

§55.205. Request by Group or Association.

(a) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(b) For applications filed on or after September 1, 2015, a request by a group or association for a contested case may not be granted unless all of the following requirements are met:

(1) comments on the application are timely submitted by the group or association;

(2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;

(3) the interests the group or association seeks to protect are germane to the organization's purpose; and

(4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(c) [(b)] The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a) or (b) of this section. The request and reply shall be filed according to the procedure in §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing).

§55.210. Direct Referrals.

(a) The executive director or the applicant may file a request with the chief clerk that the application be sent directly to State Office of Administrative Hearings (SOAH) for a hearing on the application.

(b) After receipt of a request filed under this section and after the executive director has issued his preliminary decision on the application, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

(c) A case which has been referred to SOAH under this section shall not be subject to the public meeting requirements of §55.154 of this title (relating to Public Meetings). The agency may, however, call and conduct public meetings in response to public comment. A public meeting is intended for the taking of public comment, and is not a contested case proceeding under the Administrative Procedure Act. Public meetings held under this section shall be subject to following procedures.

(1) The executive director shall hold a public meeting when there is a significant degree of public interest in a draft permit, or when required by law.

(2) To the extent practicable, the public meeting for any case referred under this section shall be held prior to or on the same date as the preliminary hearing.

(3) Public notice of a public meeting may be abbreviated to facilitate the convening of the public meeting prior to or on the same date as the preliminary hearing,

unless the timing of notice is set by statute or a federal regulation governing a permit under a federally authorized program. In any case, public notice must be provided at least ten days before the meeting.

(4) The public comment period shall be extended to the close of any public meeting.

(5) The applicant shall attend any public meeting held.

(6) A tape recording or written transcript of the public meeting shall be filed with the chief clerk and will be included in the chief clerk's case file to be sent to SOAH as provided by §80.6 of this title (relating to Referral to SOAH).

(d) A case which has been referred to SOAH under this section shall be subject to the public comment processing requirements of §55.156(a) and (b)(1) and (3) of this title (relating to Public Comment Processing).

(e) For applications filed before September 1, 2015, if [If] Notice of Application and Preliminary Decision is provided at or after direct referral under this section, this notice shall include, in lieu of the information required by §39.411(c) and (e) of this title (relating to Text of Public Notice), the following:

(1) the information required by §39.411(b)(1) - (3), (4)(A), (6) - (11), and (13) and (e)(10), (11)(A), (C) and (D), (13) and (14) of this title;

(2) the information required by §39.411(c)(4) and (5) of this title; and

(3) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted, the deadline to file public comments or request a public meeting, and a statement that a public meeting will be held by the executive director if there is significant public interest in the proposed activity. These public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice.

(f) For applications filed on or after September 1, 2015, the administrative law judge may not hold a preliminary hearing until after the issuance of the executive director's response to comment.

§55.211. Commission Action on Requests for Reconsideration and Contested Case Hearing.

(a) Commission consideration of the following items is not itself a contested case subject to the Administrative Procedure Act (APA) [APA]:

- (1) public comment;
- (2) executive director's response to comment;
- (3) request for reconsideration; or
- (4) request for contested case hearing.

(b) The commission will evaluate public comment, executive director's response to comment, requests for reconsideration, and requests for contested case hearing and may:

- (1) grant or deny the request for reconsideration;
- (2) determine that a hearing request does not meet the requirements of this subchapter, and act on the application; or

(3) determine that a hearing request meets the requirements of this subchapter and:

(A) if the request raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment, and that are relevant and material to the commission's decision on the application:

(i) specify the number and scope of the specific factual issues to be referred to State Office of Administrative Hearings (SOAH) [SOAH];

(ii) specify the maximum expected duration of the hearing;
and

(iii) direct the chief clerk to refer the issues to SOAH for a hearing; or

(B) if the request raises only disputed issues of law or policy, make a decision on the issues and act on the application; 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 requestor is an affected person. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the APA. If the commission determines that a requestor is an affected person, SOAH may proceed with a contested case hearing on the application if either the commission has specified, or the parties have agreed to, the number and scope of the issues and maximum expected duration of the hearing.

(c) 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 on an application filed:

(i) [A] before September 1, 2015, raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the

executive director's response to comment, and that are relevant and material to the commission's decision on the application; or

(ii) on or after September 1, 2015, raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

(B) is timely filed with the chief clerk;

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

(D) complies with the requirements of §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing).

(d) Notwithstanding any other commission rules, the commission may refer an application to SOAH if the commission determines that:

(1) a hearing would be in the public interest; or

(2) the application is for an amendment, modification, or renewal of an air permit under Texas Health and Safety Code, §382.0518 or §382.055 that 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.

(3) the application is for renewal of a hazardous waste permit, subject to §305.65(8) [§305.65(a)(8)] of this title (relating to Renewal) and the applicant's compliance history as determined under Chapter 60 of this title (relating to Compliance History) raises an issue regarding the applicant's ability to comply with a material term of its permit.

(4) the application is for renewal or amendment of a wastewater discharge permit and the applicant's compliance history as determined under Chapter 60 of this title raises an issue regarding the applicant's ability to comply with a material term of its permit.

(e) If a request for a contested case hearing is granted, a decision on a request for reconsideration or contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under

§80.109 of this title (relating to Designation of Parties) or the issues referred to SOAH under this section. A judge may consider additional issues beyond the list referred by the commission as provided by §80.4(c)(16) of this title (relating to Judges). A person whose request for reconsideration or contested case hearing 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 request for reconsideration or hearing request.

(f) If all requests for reconsideration or contested case hearing are denied, §80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed not later than 25 [no more than 20] days after the date that [the person or attorney of record is notified of] the commission's final decision or order is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, §2001.142 and §80.276 of this title, by agreement under Texas Government Code, §2001.147, or by the commission's written order issued pursuant to Texas Government Code, §2001.146(e). [A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail.] If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and 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 or §382.032, or under the APA.

(g) If all hearing requestors whose requests for a contested case hearing were granted with regard to an issue, withdraw in writing their hearing requests with regard to the issue before issuance of the notice of the contested case hearing, the scope of the hearing no longer includes that issue except as authorized under §80.4(c)(16) of this title.