

The commission adopts an amendment to §1.10, concerning Document Filing Procedures. The amendment is adopted without changes to the proposed text as published in the October 25, 1996, issue of the *Texas Register* (21 TexReg 10507) and will not be republished. The purpose of this action is to continue to consolidate and make clarifications to procedural rules. Other changes to agency procedural rules in Chapters 50, 55, 80, 116, 312, 321, 330, 332, and 337 are adopted concurrently.

#### EXPLANATION OF ADOPTED RULE

The amendment to §1.10, concerning Document Filing Procedures, changes subsection (c) to provide that documents may be filed by United States mail. This clarifies that documents may not be filed by electronic mail.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rule will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of this rule will not burden private real property which is the subject of the rule because it concerns commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to this rule: the action significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rule at commission offices in Austin on November 25, 1996. The public comment period closed November 25, 1996. No written or oral testimony was received on the proposed rule.

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

**§1.10. Document Filing Procedures.**

(a)-(b) (No change.)

(c) Documents shall be filed by United States mail, facsimile, or hand delivery. If a person files a document by facsimile, he or she must file with the chief clerk the appropriate number of copies by mail or hand delivery within three days.

(d)-(i) (No change.)

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

The commission adopts new §50.19 and §50.43, concerning motions for rehearing and returning applications. The commission also adopts amendments to §§50.31, 50.33, 50.37, 50.39, and 50.41, concerning procedural rules, executive director action on applications, and motions for reconsideration. The purpose of this action is to continue to consolidate and make clarifications to procedural rules, and recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation. Other changes to agency procedural rules in Chapters 1, 55, 80, 116, 312, 321, 330, 332, and 337 are adopted concurrently.

Sections 50.19, 50.31, 50.33, 50.39, and 50.43 are adopted with changes to the proposed text as published in the October 25, 1996, issue of the *Texas Register* (21 TexReg 10507). Sections 50.37 and 50.41 are adopted without changes and will not be republished.

#### EXPLANATION OF ADOPTED RULES

New §50.19, concerning Concerning Notice of Commission Action, Motion for Rehearing, requires the chief clerk to mail notice of the commission's final action on an application. It also provides that the procedures contained in §80.271 of this title (relating to Motion for Rehearing) apply if the commission acts on an application. The section requires a motion for rehearing to be filed within 20 days after the date of notification of the commission's final decision or order on an application. The section also provides for the appeal of a final decision under statute. The section was modified from the proposal to change the title and provide for the chief clerk's action. Additionally, a proposed sentence stating that the section does not apply to emergency or temporary orders or authorizations was removed. These changes were made to provide more clarification and remove an unnecessary provision.

The amendment to §50.31, concerning Purpose and Applicability, adds a new subsection (d) providing that when the rules governing a particular type of application allow a motion for reconsideration, §50.39(b)-(f) applies. This amendment provides a consistent process for reconsideration of executive director actions and was revised from the proposal for more clarity.

The amendments to §50.33, concerning Executive Director Action on Application, add new §50.33(a)(5), derived from old §50.33(a)(4)(A) and (B), to provide the executive director authority to act on an application if the application is uncontested because: no timely hearing requests are filed with the chief clerk; the applicant and the persons who filed timely requests have agreed in writing to the executive director's action; or any timely requests have been withdrawn in writing or denied. The amendments now provide consistent criteria for executive director action in all media. The amendments also add a new subsection (b), concerning the distribution of notices of the signed action by the chief clerk to interested persons, redesignate old subsection (b) as subsection (c), and correct a typographical error in the old subsection (b). The new subsection (b) was modified from the proposal to clarify that the chief clerk will give notice to persons who filed public comment, but only to those who timely filed public comment.

The amendment to §50.37, concerning Remand for Action of the Executive Director, would allow executive director action where all timely hearing requests have been withdrawn or denied. The amendment also provides that the general counsel may remand an application to the executive director.

The amendments to §50.39, concerning Motion for Reconsideration, delete that portion of subsection (b) stating that the commission will consider a late filed hearing request as a motion for reconsideration. This will allow the chief clerk to process applications in a more orderly fashion. The amendments also provide in subsection (d) that extensions of time will be by written order.

The amendment to §50.41, concerning Eligibility of Executive Director, clarifies that the section is effective upon national pollutant discharge elimination system (NPDES) program delegation.

New §50.43, concerning Withdrawing the Application, requires the executive director to allow the withdrawal of an application upon the applicant's request and file a written acknowledgment with the chief clerk before the application is submitted to the State Office of Administrative Hearings (SOAH). The section further provides for the removal of the application from a commission's agenda. In addition, it authorizes the return to an applicant the classified or confidential portion of the application under §1.5(d) of this title, relating to Records of the Agency. The section was modified from the proposal in response to comments and for further clarification.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public

Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to these rules: the action significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rules at commission offices in Austin on November 25, 1996. The public comment period closed November 25, 1996.

Written comments were received from: Henry, Lowerre, Johnson, Hess & Frederick and Public Citizen (Henry, Lowerre); Hutcheson & Grundy, L.L.P. (Hutcheson & Grundy); and the League of Women Voters of Texas (League of Women Voters).

The commission clarified §50.19, concerning motions for rehearing, by adding a subsection (a) that requires the chief clerk to mail notice of the commission's final action on an application. This clarifies the rule because the requirement to file a motion for rehearing is connected to being given notice of the commission action. Currently, the chief clerk gives this notice. Thus, the addition of the clarifying language will not change agency practice.

The commission deleted the last sentence of the proposed §50.19(b), which provided that the section does not apply to certain approvals. The sentence is not necessary because §50.2(b) specifies that the chapter does not apply to such approvals.

The commission made changes to §50.31(d) to clarify its meaning.

Henry, Lowerre objected to the proposed change to §50.33(a)(4), stating that the filing of a “protest” will no longer prevent the executive director from issuing final approval of an application. The change means that only the filing of a timely hearing request concerning an application will deem the application contested, and require the commission to review the application in open meeting. The commenter argued that this change calls on the public to understand legal terms such as “hearing request.”

**The commission has made no changes in response to this comment. The commission has adopted changes to 30 TAC Chapter 55, concerning the processing of hearing requests and public comment, which are published in this edition of the *Texas Register*. The revised Chapter 55 sets rules for the processing of public comment that will ensure the comment is reviewed by the executive director, the public interest counsel, and the Office of Public Assistance. The agency will give serious review to the commenter’s issues. If, on the other hand, a person desires to file a hearing request, he or she needs to follow the directions in the public notice. The commission’s public notices explain in plain language that if a person seeks to request a hearing, he or she**

**should file with the chief clerk the statement “I request a public hearing.” If a person timely files this statement, his or her hearing request will be considered by the commission.**

The commission has revised §50.33(b), concerning notice of the executive director taking action on an application. The changes clarify that the chief clerk will give notice to persons who filed public comment, but the chief clerk is required to mail notice only to those persons who timely filed public comment. Also, the changes allow the chief clerk to mail notice of the action rather than a copy of the actual approval document.

The commission deleted the portion of §50.39(b), stating that the commission considers a late filed hearing request as a motion for reconsideration. The commission makes this change together with changes to Chapter 55 that are published in this edition of the *Texas Register*. As explained in the preamble to the Chapter 55 changes, the adopted rules allow the chief clerk to process applications in an orderly fashion.

Henry, Lowerre criticized §50.41, concerning the eligibility of the executive director to issue final approval of permits under the federal NPDES. The commenter said that it is not necessary for the executive director to be in a conflict of interest when issuing final approval of an application.

**The commission has made no changes in response to this comment. The adopted rule is as the commenter seeks, a requirement that the executive director not be in a conflict of interest when issuing final approval.**

Henry, Lowerre criticized the proposed new §50.43, concerning the withdrawal of an application before the application is referred for hearing to SOAH. The commenter criticized the rule because it requires the executive director to allow the applicant to withdraw the application. The commenter posed a scenario where there could be valid reasons for not allowing an applicant to withdraw its application at this stage of its processing. According to the commenter, the rule shows that permit processing is “dominated” by applicants, and may lead to an unclear record of events at the agency.

**The commission has made some changes in response to this comment. The adopted rule is intended to clarify agency procedure when an applicant seeks to withdraw the application before the application is referred to SOAH. (The commission already has a rule on withdrawing an application after it has been referred to SOAH, 30 TAC §80.25.) At this stage in the processing of an application it will be the commission’s own agency staff that will have expended the majority of resources reviewing the application, not the public. If there be any harm from the withdrawal, the majority of the harm would be suffered by the commission itself, and so the commission believes it may appropriately place this burden on itself. The commission does agree with the commenter to the extent that the record of the application and its withdrawal should be clear. The commission has revised the adopted rule to require the executive director to file a written withdrawal with the chief clerk. Also, the rule has been revised to clarify that an application “withdrawn” means agency staff will end its evaluation of the application. This does not mean an applicant may physically remove items from agency files, except for confidential documents. The commission notes that 30 TAC §281.18 (relating to Applications Returned) allows the executive director to return an application before it is administratively complete. Section 281.18 applies so**

**long as the application has not been declared administratively complete. The commission does not intend the new §50.43 to conflict with the operation of §281.18.**

**STATUTORY AUTHORITY**

The new section is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

## **SUBCHAPTER B: ACTION BY THE COMMISSION**

### **§50.19. Notice of Commission Action, Motion for Rehearing.**

(a) If the commission acts on an application, the chief clerk shall mail notice of the action to the applicant, executive director, public interest counsel, and to other persons who timely filed public comment or hearing requests in response to public notice. The notice shall explain the opportunity to file a motion under §80.271 of this title (relating to Motion for Rehearing). The chief clerk need not mail to persons submitting public comment or hearing requests who have not provided a return mailing address. The chief clerk may mail the information to a representative group of persons when a substantial number of public comments have been submitted.

(b) If the commission acts on an application, the procedures contained in §80.271 of this title apply. A motion for rehearing in such a case must be filed within 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 §80.271 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, 382.032, or 401.341.

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

### **SUBCHAPTER C : ACTION BY EXECUTIVE DIRECTOR**

The amendments and new section are adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

#### **§50.31. Purpose and Applicability.**

(a)-(c) (No change.)

(d) Notwithstanding subsections (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.39(b)-(f) of this title (relating to Motion for Reconsideration) applies. If the rules under which the executive director evaluates a registration application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.

#### **§50.33. Executive Director Action on Application.**

(a) The executive director may act on an application subject to this subchapter if:

(1)-(3) (No change.)

(4) the executive director's staff and public interest counsel do not raise objections; and

(5) the application is uncontested because:

(A) no timely hearing requests are filed with the chief clerk;

(B) the applicant and the persons who filed timely requests have agreed in writing to the action to be taken by the executive director; or

(C) any timely requests have been withdrawn in writing or have been denied.

(b) If the executive director acts on an application the chief clerk shall mail to the applicant, the public interest counsel, and to other persons who timely filed public comment in response to public notice, notice of the action, any response to public comment under §55.25 of this title (relating to Public Comment Processing), and an explanation of the opportunity to file a motion under §50.39 of this title (relating to Motion for Reconsideration), if applicable. The chief clerk need not mail to persons submitting public comment who have not provided a return mailing address. The chief clerk may mail the information to a representative group of persons when a substantial number of public comments have been submitted. If there were timely filed hearing requests that the commission denied, the chief clerk should also mail to the persons who timely filed hearing requests.

(c) If an application does not meet the requirements of subsection (a) of this section, the executive director shall refer the application to the chief clerk. The chief clerk shall schedule the application for consideration and action by the commission.

**§50.37. Remand for Action by Executive Director.**

At any time during the processing of an application, if all timely hearing requests concerning the application are withdrawn or denied, the commission or the general counsel, or the judge if SOAH holds jurisdiction over the application, may remand the application to the executive director. If the application has been scheduled for a commission meeting, the chief clerk shall remove it from the commission's agenda.

**§50.39. Motion for Reconsideration.**

(a) (No change.)

(b) A motion for reconsideration must be filed no later than 20 days after the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant.

(c) (No change.)

(d) Extension of time limits. With the agreement of the parties or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions for reconsideration and for taking action on the motions so long as the period for taking action is not extended beyond 90 days after the date the signed permit, approval, or other written notice of the executive director's action is mailed to the applicant.

(e)-(f) (No change.)

**§50.41. Eligibility of Executive Director.**

This section is effective upon delegation of national pollutant discharge elimination system (NPDES) permit authority. The executive director may issue Texas pollutant discharge elimination system (TPDES) permits or other TPDES-related approvals only if he or she does not receive, and has not during the previous two years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1)-(2) (No change.)

**§50.43. Withdrawing the Application.**

Upon a request by the applicant at any time before the application is referred to SOAH, the executive director shall allow the withdrawal of the application and shall file a written acknowledgment of the withdrawal with the chief clerk. If the application has been scheduled for a commission meeting, the chief clerk shall remove it from the commission's agenda. The agency may return to the applicant the classified or confidential portion of the application under §1.5(d) of this title (relating to Records of the Agency). For purposes of this rule, an application is referred to SOAH when the commission votes during a public meeting for referral or when the executive director or the applicant file a request to refer with the chief clerk under §55.26 of this title (relating to Hearing Request Processing).

This agency hereby certifies that the sections as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

The commission adopts amendments to §§55.21, 55.25, 55.27, and 55.31, concerning procedural rules and hearings requests. The commission also adopts new §55.26, concerning hearing requests. The purpose of this action is to continue to consolidate and make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the consistent processing of hearing requests. Other changes to agency procedural rules in Chapters 1, 50, 80, 116, 312, 321, 330, 332, and 337 are adopted concurrently.

All of the amendments and the new section are adopted with changes to the proposed text as published in the October 25, 1996, issue of the *Texas Register* (21 TexReg 10507).

#### EXPLANATION OF ADOPTED RULES

The commission modified the proposal to change the title of Chapter 55 from "Request for Contested Case Hearings" to "Request for Contested Case Hearings; Public Comment." The proposal was also modified to make a conforming change to the title of Subchapter B to reflect the new chapter title.

The amendments to §55.21, concerning Requests for Contested Case Hearings, Public Comment, change the title of the section, provide that hearing requests must be in writing and be filed by United States mail, facsimile, or hand delivery, and prescribe certain content requirements to aid in the processing of requests. The section was modified from the proposal to clarify that a commissioner, acting alone, cannot request a hearing, and to provide that the deadline for filing hearing requests and public comment runs from the last publication date. The commission also modified the proposal to add a new subsection (e), providing that documents that are filed with the chief clerk which contain

comments on an application but do not contain a request for hearing will be treated as public comment.

A new subsection (f) provides that late filed hearing requests and public comment shall not be processed, and incorporates the previous §55.21(e). Finally, the proposal was modified to add a new subsection (g), which provides that there is no right to a hearing concerning a minor amendment or Class 1 or Class 2 modification. These changes were made in response to comments and for further clarification.

The amendments to §55.25 change the name of the section from “Hearing Request Processing” to “Public Comment Processing.” The amendments also provide for the delivery of all documents filed with the chief clerk in response to the public notice of an application to the Offices of Public Assistance and Alternative Dispute Resolution. The proposal was modified to move the requirements of the previous §55.25(b), concerning hearing requests processing, to §55.26(d).

New §55.26, concerning Hearing Request Processing, incorporates language concerning hearing requests previously in §55.25, and provides that the process only applies to timely hearing requests. The amendment also removed an earlier provision that one commissioner, acting alone, could refer a case to the State Office of Administrative Hearings (SOAH). The section was modified as proposed to restate the requirement that the chief clerk must mail notice of the commission meeting to evaluate hearing requests, correct an incorrect cross-reference, and clarify that the executive director or applicant may directly refer an application to SOAH for a hearing. These changes were made for further clarification.

The amendment to §55.27, concerning Commission Action on Hearing Request, provides that 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 modified the proposal to provide that the commission may deny hearing requests and refer an application for a public meeting to develop public comments. This change is intended to provide another option for public participation. The section was further modified from the proposal, in response to comments, to provide that a hearing request referred to SOAH must be processed as a contested case under the APA.

The amendment to §55.31, concerning Determination of Reasonableness of Hearing Request, continues to consolidate commission procedures. It provides for a consistent set of criteria to be applied to hearing requests in all media, and expressly allows certain criteria that were formerly applicable only to air quality applications to be applied to all hearing requests. The adopted section includes revisions to §55.31(a)(3) to clarify the concept of a reduction project, as applied to the various types of applications considered by the commission.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property

which is the subject of the rules because they concern commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to these rules: the action significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rules at commission offices in Austin on November 25, 1996. The public comment period closed November 25, 1996.

Written comments were received from: Henry, Lowerre, Johnson, Hess, & Frederick and Public Citizen (Henry, Lowerre); Hutcheson & Grundy, L.L.P. (Hutcheson & Grundy); and the League of Women Voters of Texas (League of Women Voters).

The commission has revised the title of Chapter 55 (and the title of Subchapter B) to clarify that it concerns the processing of both hearing requests and public comment.

The commission has revised §55.21(a)(1) and §55.27(b)(1) to clarify that a commissioner (acting alone) may not request a hearing. The change is intended to correspond to the change made in §55.26(g), which no longer allows for a commissioner to directly refer an application to SOAH for hearing.

Henry, Lowerre objected to the proposed revision to §55.21(c)(2), which requires a hearing requester to include in his or her hearing request a brief but specific explanation of how he or she is affected by

the application. The commenter finds objectionable the portion of this requirement that calls on the requester to explain his or her location in relation to the proposed permitted activity. Some persons may be affected by a permitted activity based on their use of a resource that has nothing to do with the location of his or her residence.

**The commission makes no changes in response to this comment. The commission has in the past granted hearing requests based on the hearing requester's use of a resource that is affected by a permitted activity. But in the majority of cases, the hearing requester's complaint has to do with the use of his or her residence located somewhere near the permitted activity. The commission sees no harm in specifying in its rules a requirement for general information because in most instances this will assist the requester with providing the type of information the commission seeks.**

The League of Women Voters urged that the deadline for filing hearing requests in §55.21(d) should be calculated from the last publication date (not the first) for all types of applications or the deadline should be specified in the notice as a date certain. Henry, Lowerre made a similar comment in another rulemaking matter, concerning the commission's recently adopted rules on public notice (see the December 27, 1996, issue of the *Texas Register* (21 TexReg 12552)).

**The commission responds by making the deadline for filing hearing requests run from the last publication date. The commission makes this change because in many instances the applicant must publish notice more than once to meet notice requirements, either because there is an explicit**

**requirement to publish more than once or because no one newspaper covers all of the territory in which notice must be published. The text of notice will specify the deadline for filing hearing requests and public comment that is so many days (usually 30) after publication, and the person reading the notice normally will assume the publication date that will be used to calculate the deadline is taken from the publication he or she is reading. The commission agrees that it is best that the deadline is calculated from the last publication date, because a person reading a newspaper notice will then have all the information he or she needs to file a timely a hearing request -- the date of the publication, and the number of days specified in the notice for filing a hearing request. The commission believes that this gives fair notice of the deadline to the public, while at the same time avoiding the administrative difficulties of specifying in the notice a deadline that is a date certain (see the December 27, 1996, issue of the *Texas Register* (21 TexReg 12553)). The commission acknowledges that the “last” publication will for many applications be the one required newspaper publication. The notice requirements vary for the different types of applications, and the required notice for some types of applications is satisfied with one newspaper publication. The commission intends that the chief clerk will calculate the deadline for hearing requests using §55.21(d). The commission’s rules on public notice in 30 TAC Chapter 39 identify the deadline for hearing requests and public comment, but only in more general terms.**

The commission amended §55.21(d), concerning the deadline for hearing requests, to clarify that this deadline applies to public comment too. The deadline for public comment signifies the end of the “public comment period.”

The commission added §55.21(e), concerning the definition of public comment. Any document that contains comments on an application that is not a hearing request will be processed as public comment.

The League of Women Voters commented on the deadlines for hearing requests specified in §55.21(d) in connection with the proposed §55.26(a) that specified that late hearing requests shall be processed as public comment. The commenter also asked how to reconcile the processing of timely hearing requests separately from late hearing requests when the commission may extend the deadline for filing a hearing request (see §55.21(f)(3)).

**The commission has made several changes in response to this comment to clarify the rules. The commission does not adopt the proposed §55.26(a) in its entirety. The adopted §55.21(f) is intended to give the chief clerk clear direction on how to process documents that are filed in response to public notice of an application. The timely hearing requests and public comment are processed under §55.26 (concerning hearing request processing) or under §55.25 (concerning public comment processing), respectively. The rule requires the chief clerk to accept for filing late hearing requests and public comment, but the chief clerk shall not process them. The late hearing requests and public comment will be available for staff and public review. This allows for the orderly processing of applications and avoids the chief clerk having to make daily judgment calls on what to do with hearing requests and public comment. The commission may issue instructions to the agency on how to deal with late hearing requests and public comment so as to provide information to the public. The commission concludes that such instructions should not be part of the rules, because the rules are intended to specify procedural rights.**

**Concerning the commenter's second question, the commission responds that there is no conflict in these provisions. The rules the commenter first points out are for the chief clerk's orderly processing of applications. Only the commission may make an exception to these rules and extend the deadline for hearing requests when the commission deems it appropriate. There are several appropriate ways for the executive director, the public interest counsel, or the Office of Public Assistance to bring to the commission's attention a late-filed hearing request. When this happens, the commission may agree that the deadline should be extended and grant the request.**

Henry, Lowerre objected to the rules, arguing that they do not allow for extensions of the deadlines to file hearing requests or to file public comment. The commenter raised the issue a second time of extending the deadline for hearing requests, and suggested that this be added to §55.26.

**The commission makes no changes in response to this comment. Section 55.21(e) (now §55.21(f)(2)) allows the commission to extend the deadline for hearing requests.**

The commission added §55.21(g), providing that there is no right to a hearing concerning a minor amendment or a Class 1 or Class 2 modification. The commission recently recodified Chapter 305, Subchapter E, into Chapter 39, and the provisions in the repealed §305.92 and §305.96 were mistakenly not readopted at that time (see the December 27, 1996, issue of the *Texas Register* (21 TexReg 12550)).

The League of Women Voters questioned why the publication of the proposed rules did not contain §55.23, concerning hearing requests by a group or association.

**The section was not published because the commission did not propose changes to it.**

The League of Women Voters suggested that the title of §55.25 should be clarified.

**The commission has made no changes in response to this comment because the content of the adopted rule has been revised (as explained in the following paragraph) so that the title of the section and its contents correspond.**

The commission moved the requirements of §55.25(b) to §55.26(d), concerning the chief clerk's mailed notice to hearing requesters because the requirements concern hearing request processing, the subject of §55.26.

The League of Women Voters made several comments about the commission's rules on public participation and the Office of Public Assistance (OPA). The commenter urged the commission to use OPA to encourage public participation and to make public participation an integral part of the permitting process. The commenter urged the commission at the same time to make the contested case hearing process more accessible to the public. Henry, Lowerre argued that the rules should be revised to make them more user friendly, and to clearly provide for public comment.

**The commission responds that one of the intended results of this rulemaking project is to clarify how the agency processes public comment. The proposed changes published in the *Texas Register* revised §50.33 and §55.25 to identify the role of OPA to respond to public comment. (The rules speak of an “agency office” designated by the commission. By resolution, the commission has already designated OPA.) The changes specify the processing of public comment as an integral part of permit processing. In response to the commenters, the commission has amended §55.25 to clarify the requirements for the holding of a public meeting. The new requirements codify the requirements for holding a public meeting that are in the commission’s resolution concerning OPA. The codification of the resolution should more thoroughly establish its requirements with agency staff and the public. The commission also added a requirement that the applicant shall attend any public meeting held by the designated office. The processing of public comment under the new rule should ensure that the evaluation of public comment is a meaningful part of the agency’s review of an application. Concerning the League of Women Voters’ comment on the contested case hearing process, the commission has not made any changes. The commission’s rules on the evaluation and granting of requests for contested case hearings follow the statutory requirements and so there do not seem to be any changes that may address the commenter’s concerns. The commenter did not propose any specific changes to the rules.**

Henry, Lowerre and Browning-Ferris Industries (BFI) filed comments in the recent rulemaking project on public notice of applications. The comments related to the proposed recodification of 30 TAC §305.106, concerning the agency responding to public comment on an application. The commission determined not to recodify this provision in Chapter 39 on public notice. The commission did,

however, state that it would respond to the commenters later because the provision would best be recodified in Chapter 55 (see the December 27, 1996, issue of the *Texas Register* (21 TexReg 12554)).

**The commission responds that §305.106 cannot be recodified into Chapter 55 at this time because this rule was not proposed for repeal. As explained previously, the commission has determined to further codify its resolution on public participation.**

The League of Women Voters commented that §55.26(b), concerning the processing of hearing requests will begin only after the executive director files notice that the technical review of the application is complete. The comment concerned the timing of public notice of the application.

**The commission has not made changes in response to the comment because the timing of public notice of the application is not controlled by this rule.**

The commission added a new §55.26(d) (and relettered subsequent paragraphs) to restate the requirement that the chief clerk must mail notice of the commission meeting to evaluate hearing requests. This requirement is already in Chapter 39, §39.21, but the commission restated the notice requirement here because it is part of the processing required under §55.26.

The commission corrected a cross-reference in §55.26(e).

The League of Women Voters commented on §55.26(g) and suggested that when the executive director or the applicant refers an application directly to SOAH for hearing, then such referrals should be made part of the public record.

**The commission has made no changes in response to this comment. The rule already requires the executive director or the applicant to file the direct referral with the chief clerk, so this action is already documented in the public record. Also, commission rules already require public notice of the hearing.**

The commission revised §55.26(g) to clarify that the executive director or applicant may directly refer an application to SOAH for hearing. When either takes this action, the case is referred for a hearing on the merits of the application.

Henry, Lowerre criticized the proposed revision to §55.27(a), which states that the determination of the validity of hearing request is not, in itself, a contested case subject to the APA (Texas Government Code, Chapter 2001). The commenter suggested the that commission seek an attorney general's opinion on the subject.

**The commission makes no changes in response to this comment because the adopted rule reflects current law. Moreover, the law is sufficiently clear so that an attorney general's opinion is not needed. The APA sets certain procedural requirements for processing "contested cases," which is a term defined in the APA. A contested case means a proceeding in which the legal rights, duties,**

**or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing (see the APA, §2001.003(1)). Here, the commission’s rules concern the evaluation of hearing requests under which there is no opportunity for adjudicative hearing by statute or rule. Thus, when the commission evaluates hearing requests during a public meeting, the evaluation is not under the APA (see *Best & Company v. Texas State Board of Plumbing Examiners*, 927 S.W.2d 306 (Tex. App.--Austin 1996, writ denied)).**

The commission has added §55.27(a)(2) (and renumbered subsequent paragraphs), which states that the commission may deny hearing requests and refer an application for a public meeting to develop public comment. The section is intended to allow the commission an additional option for public participation when appropriate.

Hutcheson & Grundy proposed revisions to §55.27(a) and (c), concerning whether the commission’s evaluation of hearing requests is a “contested case” under the APA when the request is referred to SOAH. Henry, Lowerre argued that the proposed language in §55.27(c), concerning the commission’s directions to SOAH on procedures to evaluate hearing requests, violates SOAH’s authority to manage cases.

**The commission agrees that the issue raised by Hutchison & Grundy should be clarified and has revised the rule. The revision clarifies that when the commission refers the evaluation of a hearing request to SOAH, it shall be processed as a contested case under the APA. As opposed to the discussion in this preamble concerning the commission itself evaluating hearing requests**

**during a public meeting, the commission here by rule grants hearing requesters an opportunity for adjudicative hearing when the requests are referred to SOAH. As pointed out by Hutcheson & Grundy, this clarifies the standard of review in court if a person ultimately appeals the commission's decision on the hearing request. Commission decisions on cases that are processed under the APA are reviewed by a court under the substantial evidence rule (Texas Government Code, §2001.174). The commission believes that this revision should satisfy the concerns raised by Henry, Lowerre too. The commission notes, however, that the commission has the authority to set the scope of a hearing it refers to SOAH.**

The League of Women Voters commented on the definition of "affected person" in the rules. While the commenter mentioned §55.21, the definition is in §55.29.

**The commission has not proposed changes to §55.29, and so this section is outside the scope of this project.**

Henry, Lowerre made extensive comments on §55.31, concerning the factors used to determine the reasonableness of a hearing request. The commenter correctly pointed out that the proposed rules would expand the application of these factors. Factors (3) through (9) applied only to air quality applications, but with the adopted changes the factors apply to all applications. The commenter made the following points: the commenter objected to the application of these factors to the federally delegated programs, arguing that the factors violate United States Environmental Protection Agency requirements; the commenter argued that the rule does not contain guidance on how to balance the

factors or resolve differences between them; the commenter called the factors an “excuse to deny requests”; and the commenter argued that a SOAH judge using the rule would have little guidance and so would feel compelled to use extensive hearing resources to investigate its meaning and application.

**The commission makes no revisions in response to this comment. The commission makes the following comments: the commission disagrees with the commenter on this issue. As discussed previously, §55.25 specifies the requirements for responding to public comment, including the holding of public meetings. In contrast, §55.31 concerns the evaluation of requests for a contested case hearing. Such hearings are in addition to the public meetings the commission may hold; the commission acknowledges that the rule does not contain guidance on how to balance the factors or resolve differences between them. But the commission believes the rule is sufficient for the purpose it serves, to give notice of the factors the commission may consider when it evaluates the reasonableness of a hearing request. The types of applications and the hearing requests the commission considers are so varied it would take pages of rules to accomplish what the commenter proposes, if it could ever be accomplished; the commission also believes that the rule is not used simply as a reason to deny hearing requests. The commission adopted the rule because Texas statutes call for the commission to determine the reasonableness of hearing requests. In the past, the application of the rule has come into play, especially when the applicant seeks approval of changes to a facility that is already in operation. When this is the case, there will be many considerations that affect whether a hearing would be helpful or not, and the commission should have the latitude to use its judgment on evaluating the hearing requests; the commission agrees that the rule’s very general language could give a SOAH judge some pause, and require all of his**

**or her expertise. In any case, in the future it is more likely that the commission will rely on its own expertise and judgment and not refer these questions to SOAH.**

The League of Women Voters commented on §55.31(a)(2), concerning one of the factors for determining the reasonableness of a hearing request. The commission may consider whether the hearing requester's concerns are related to other media that cannot be addressed by the pending application. The commenter called this provision unrealistic and unreasonable because many times a permitted activity will affect more than one media.

**The provision the commenter speaks of is in the current rules. The commission acknowledges that a permitted activity can affect media other than the media that is the focus of the permit, and the commission by this rule does not intend to ignore this. On the other hand, there are times when a permitted activity will have no effect on the issues raised by a hearing requester concerning other media. This rule identifies the "other media" issue as an issue that will affect the reasonableness of a hearing request, and that the commission will consider it. When the commission evaluates a hearing request it will consider this factor (along with many others), but this does not mean the rule compels the commission to rule in favor or against a particular request.**

The commission made revisions to §55.31(a)(3) to clarify the concept of a reduction project, as applied to the various types of applications considered by the commission.

The League of Women Voters commented on §55.31(b), concerning additional factors for determining the reasonableness of a hearing request on an application for an air quality permit. The commenter wrote in favor of one provision and against another.

**The commission responds that the provisions in §55.31(b) reflect statutory requirements in Health and Safety Code, §382.056(d) and (e), so the rule cannot be changed.**

#### STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

**SUBCHAPTER B : HEARING REQUESTS, PUBLIC COMMENT**

**§55.21. Requests for Contested Case Hearings, Public Comment.**

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

(1) the commission;

(2) the executive director;

(3) the applicant;

(4) affected persons, when authorized by law; and

(5) for applications for air quality permits, or standard exemptions required to provide public notice, a legislator from the general area of the proposed facility.

(b) A request for a contested case hearing by an affected person 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 (d) of this section.

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

(1) (No change.)

(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 activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;

(3)-(4) (No change.)

(d) Deadline for hearing requests; public comment period. A hearing request must be filed with the chief clerk within the time period specified in the notice. The public comment period shall also end at the end of this time period. The time period shall end 30 days after the last publication of the notice of application, except that the time period shall end:

(1) 60 days after the last publication of the notice of a Class 3 modification of a solid waste permit under the TSWDA;

(2) 30 days after last publication for a new permit or permit amendment under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(3) 15 days after the last publication for a permit renewal or standard exemption for a concrete plant under Chapter 116 of this title;

(4) ten days after the mailing of notice of the application for the transfer of a permit;

(5) no less than 30 days after the last publication of the notice of draft permit for an application for a municipal solid waste permit or to amend, extend, or renew such a permit;

(6) no less than 30 days after the last publication of the notice of draft permit for an application for an industrial waste facility permit or to amend, extend, or renew such a permit;

(7) no less than 45 days after the last publication of the notice of draft permit for an application for a hazardous waste facility permit or to amend, extend, or renew such a permit;

(8) no less than 30 days after the last publication of the notice of draft permit for an application for a wastewater discharge permit except as provided in paragraph (9) of this subsection;

(9) no less than ten days after the mailing of the notice of draft permit for an application to amend a wastewater discharge permit where the application is to improve the quality of waste authorized to be discharged and does not seek to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge;

(10) no less than 30 days after the last publication of the notice of draft permit for an application for an injection well permit or to amend, extend, or renew such a permit;

(11) no less than 30 days after the mailing of the notice of draft production area authorization under Chapter 331 of this title (relating to Underground Injection Control); or

(12) the time specified in commission rules for other specific types of application.

(e) Documents that are filed with the chief clerk that comment on an application but that do not request a hearing will be treated as public comment.

(f) Late filed hearing requests and public comment, extensions.

(1) A hearing request or public comment shall be processed under §55.26 of this title (relating to Hearing Request Processing) or under §55.25 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline for hearing requests and public comment. The chief clerk shall accept a hearing request 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 file for the application.

(2) The commission may extend the time allowed for filing a hearing request.

(g) There is no right to a hearing on an application for a minor amendment of a permit or a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Modifications, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits).

**§55.25. Public Comment Processing.**

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

(b) The commission may designate an agency office to process public comment under this subsection.

(1) The designated office may evaluate and respond to public comment, other than timely hearing requests, when appropriate.

(A) If the application and timely hearing requests are considered by the commission the designated office should prepare any response to public comment no later than ten days

before the commission meeting at which the commission will evaluate the hearing requests. The response shall be made available to the public and filed with the chief clerk

(B) If the application is approved by the executive director under Chapter 50, Subchapter C of this title (relating to Action by the Executive Director) any response to public comment should be made no later than the time of the executive director's action on the application.

(2) The designated office shall hold a public meeting when there is a significant degree of public interest or when otherwise appropriate to assure adequate public participation. A public meeting is intended for the taking of public comment, and is not a contested case proceeding under the APA. The applicant shall attend any public meeting held by the designated office. When the designated office holds a public meeting it shall respond to public comment either by giving an immediate oral response or by preparing a written response. The response shall be made available to the public.

**§55.26. Hearing Request Processing.**

(a) The requirements in this section and §55.27 of this title (relating to Commission Action on Hearing Request) apply only to hearing requests that are filed within the time period specified in §55.21(d) of this title (relating to Requests for Contested Case Hearings, Public Comment).

(b) The executive director shall file a statement with the chief clerk indicating that technical review of the application is complete. The executive director may file the statement with the chief clerk either before or after public notice of the application is issued.

(c) After a hearing request is filed and the executive director has filed a statement that technical review of the application is complete, the chief clerk shall process the hearing request by both:

(1) referring the application and hearing request to the alternative dispute resolution director. The alternative dispute resolution director shall try to resolve any dispute between the applicant and the person making the request for hearing; and

(2) scheduling the hearing request for a commission meeting. The chief clerk should try to schedule the request for a commission meeting that will be held approximately 40 days after the later of the following:

(A) the deadline to request a hearing specified in the public notice of the application; or

(B) the date the executive director filed the statement that technical review is complete.

(d) The chief clerk shall mail notice to the applicant, executive director, public interest counsel, and the persons making a timely hearing request at least 30 days before the first meeting at which the commission considers the request. The chief clerk shall explain how the person may submit public comment to the executive director, describe alternative dispute resolution under commission rules, explain that the agency may hold a public meeting, and explain the requirements of this chapter.

(e) The executive director, the public interest counsel, and the applicant may submit written responses to the hearing request no later than 20 days before the commission meeting at which the commission will evaluate the hearing request. Responses shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, the director of the Office of Public Assistance, the applicant, and any persons filing hearing requests.

(f) The person who filed the hearing request may submit a written reply to a response no later than six days before the scheduled commission meeting at which the commission will evaluate the hearing request. A reply may also contain additional information responding to the letter by the chief clerk required by subsection (d) of this section. A reply shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, and the applicant.

(g) The executive director or the applicant may file a request with the chief clerk that the application be sent directly to SOAH for a hearing on the application. If a request is filed under this subsection, the commission's scheduled consideration of the hearing request will be canceled.

**§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 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 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);

(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 subsection (c)(2)-(4);

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

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

(c)-(f) (No change.)

(g) If a hearing request is denied, the procedures contained in §80.271 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 §80.271 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, 382.032, or 401.341.

**§55.31. Determination of Reasonableness of Hearing Request.**

(a) The reasonableness of a hearing request shall be based on all relevant factors including the following:

(1) whether the request is based solely on concerns outside of the jurisdiction of the commission; and

(2) whether the request is based on concerns related to other media that cannot be addressed by the pending application, even though within the jurisdiction of the commission;

(3) whether the project is an emissions, pollutant, or source reduction project or a project to improve the quality of waste to be discharged, including:

(A) whether there are no increases in emissions of any contaminants or no increases in discharges of any pollutants;

(B) the project is not driven by a noncompliance situation; and

(C) whether the project will have both emission, source, or pollutant discharge reductions and incidental increases, where the net effect is an emission, source, or pollutant discharge reduction;

(4) whether the project is mandated by commission rule;

(5) the location of the proposed project;

(6) whether the applicant requests authority to substitute an equivalent or more efficient control device;

(7) whether the hearing request is based solely on something other than concerns about pollution;

(8) the extent to which the person requesting a hearing is likely to be impacted by the emissions, discharge, or waste; and

(9) the applicant's compliance history.

(b) The commission shall consider the following additional factors for hearing requests on air quality applications.

(1) A request concerning an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted is unreasonable.

(2) Notwithstanding paragraph (1) of this subsection, a request may be determined reasonable 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.

This agency hereby certifies that the sections as adopted have been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on April 16, 1997.

The commission adopts amendments to §§80.25, 80.101, 80.131, and 80.271, concerning procedural rules, withdrawing applications, and remands to the executive director. The amendments are adopted without changes to the proposed text as published in the October 25, 1997, issue of the *Texas Register* (21 TexReg 10507) and will not be republished. The purpose of this action is to continue to consolidate and make clarifications to procedural rules and provide for the consistent processing of hearing requests. Other changes to agency procedural rules in Chapters 1, 50, 55, 116, 312, 321, 330, 332, and 337 are adopted concurrently.

#### EXPLANATION OF ADOPTED RULES

The amendment to §80.25, concerning Withdrawing the Application, provides that applications may be withdrawn before parties are named, and that they may be withdrawn without prejudice with the consent of the executive director and public interest counsel if no parties have been named.

The amendment to §80.101, concerning Remand to Executive Director, clarifies that a case referred to the State Office of Administrative Hearings may be settled and remanded to the executive director before parties are named.

The amendment to §80.131, concerning Interlocutory Appeals and Certified Questions, amends subsection (c) to clarify that a motion to certify a question is directed to the administrative law judge, and that the judge will file a request to answer a certified question with the commission if the motion is granted.

The amendment to §80.271, concerning Motion for Rehearing, amends subsection (d) to provide that extensions of time will be by written order.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to these rules: the action significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rules at commission offices in Austin on November 25, 1996. The public comment period closed November 25, 1996.

Written comment was received from Henry, Lowerre, Johnson, Hess, & Frederick and Public Citizen (Henry, Lowerre) on the proposal.

Henry, Lowerre commented on §80.25, concerning the withdrawal of an application after it has been referred to SOAH. The commenter listed this section in connection with comments on 30 TAC Chapter 50, §50.43, concerning the withdrawal of an application before it is referred to SOAH. (The commission adopts new §50.43 in this edition of the *Texas Register*.) Although the commenter listed §80.25, their comments concerned §50.43.

**The commission has made no changes to §80.25 in response to this comment.**

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

## **SUBCHAPTER A : GENERAL RULES**

### **§80.25. Withdrawing the Application.**

(a)-(b) (No change.)

(c) If the parties agree in writing to the withdrawal of the application without prejudice or if the request to withdraw is filed before parties are named, the judge shall remand the application and request to the executive director, who shall enter an order dismissing the application without prejudice, on the terms agreed to by the parties, or by the applicant, executive director, and public interest counsel if no parties have been named.

(d) (No change.)

(e) An applicant is entitled to an order dismissing an application without prejudice if:

(1) the parties, or the applicant, executive director, and public interest counsel if no parties have been named, agree in writing;

(2)-(3) (No change.)

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

### **SUBCHAPTER C : HEARING PROCEDURES**

The amendments are adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

#### **§80.101. Remand to Executive Director.**

At the request of the applicant, a judge shall remand an application to the executive director if all timely hearing requests have been withdrawn or denied or, if parties have been named, all parties to a contested case reach a settlement so that no facts or issues remain controverted. After remand, the application shall be uncontested and the applicant is deemed to have agreed to the action of the executive director. The executive director may act on the application or set it for a commission meeting.

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

(a)-(b) (No change.)

(c) If a question is certified the judge shall file a request to answer the certified question with the chief clerk and serve copies on the parties. Within five days after the request is filed, parties to the proceeding may file briefs or replies. The chief clerk shall provide copies of the request and any briefs or replies to the general counsel and commission. Upon the request of the general counsel or a commissioner to the general counsel, the request will be scheduled for consideration during a commission meeting. The chief clerk shall give the judge and parties notice of the meeting. The judge may abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party will be substantially harmed. If the chief clerk does not receive a request from the general counsel to set the question for consideration within 15 days after filing, the request is denied by operation of law.

This agency hereby certifies that the sections as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1996.

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

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

### **§80.271. Motion for Rehearing.**

(a)-(c) (No change.)

(d) Extension of time limits. With the agreement of the parties or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions for rehearing and replies and for taking action on the motions so long as the period for taking agency action is not extended beyond 90 days after the decision or order.

(e) (No change.)

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

The commission adopts an amendment to §116.136, concerning public comment procedures on applications for air quality permits. The amendment is adopted with changes to the proposed text as published in the October 25, 1996, issue of the *Texas Register* (21 TexReg 10507). The purpose of this proposed action is to continue to consolidate and make clarifications to procedural rules and provide for the consistent processing of hearing requests. Other changes to agency procedural rules in Chapters 1, 50, 55, 80, 312, 321, 330, 332, and 337 are adopted concurrently.

#### EXPLANATION OF THE ADOPTED RULE

The amendment to §116.136, concerning Public Comment Procedures, removes provisions in subchapter (a) relating to the content and handling of hearing requests. These provisions are redundant and duplicative of provisions contained in the commission's procedural rules.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rule will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of this rule will not burden private real property which is the subject of the rule because it concerns commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to this rule: the action

significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rule at commission offices in Austin on November 25, 1996. The public comment period closed November 25, 1996.

The commission made one change in subsection (a) to the reference to Chapter 55, Subchapter B, since the title was modified in the adopted version. The commission made one change to subsection (b) to delete a reference to the Texas Air Control Board.

Henry, Lowerre, Johnson, Hess, and Frederick (Henry, Lowerre) and Public Citizen submitted joint comments on the proposal. Henry, Lowerre objected to the portion of §116.136(b) that calls on the agency to consider all written comments when determining to issue or not issue a permit. The commenter argued that the agency should analyze the comments to determine also whether permit conditions should be changed.

**The commission makes no changes in response to this comment. The commission published proposed changes to §116.136(a), concerning responding to hearing requests. The commission had not proposed changes to subsection (b) on responding to public comment, and concludes that this subsection is sufficient, as it already required an agency analysis of public comment.**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

## **SUBCHAPTER B : NEW SOURCE REVIEW PERMITS**

### **PUBLIC NOTIFICATION AND COMMENT PROCEDURES**

#### **§116.136. Public Comment Procedures.**

(a) Comment period. Interested persons may submit written comments, including requests for public hearings pursuant to Texas Clean Air Act, §382.056, on the permit application and on the executive director's preliminary decision to issue or not to issue the permit. The public comment and timely hearing requests shall be processed under Chapter 55, Subchapter B of this title (relating to Hearing Requests, Public Comment).

(b) Consideration of comments. All written comments received by the executive director during the period specified in subsection (a) of this section shall be considered in determining whether to issue or not to issue the permit. The executive director shall make record of all comments received together with the agency analysis of such comments available for public inspection during normal business hours at the Austin office of the commission and appropriate regional office.

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

The commission adopts an amendment to §312.13, concerning motions for reconsideration on certain sludge applications. The amendment is adopted without changes to the proposed text as published in the October 25, 1996, issue of the *Texas Register* (21 TexReg 10507) and will not be republished. The purpose of this action is to continue to consolidate and make clarifications to procedural rules. Other changes to agency procedural rules in Chapters 1, 50, 80, 116, 321, 330, 332, and 337 are adopted concurrently.

#### EXPLANATION OF ADOPTED RULE

The amendments to §312.13, concerning Actions on Notice, provide that §50.39(b)-(f) applies to motions for reconsideration of executive director actions, limit reconsideration to issues required to be considered by the executive director, and make conforming changes.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rule will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of this rule will not burden private real property which is the subject of the rule because it concerns commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to this rule: the action

significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rule at commission offices in Austin on November 25, 1997. The public comment period closed November 25, 1997. No written or oral testimony was received on the proposed rule.

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

**SUBCHAPTER A : GENERAL PROVISIONS**

**§312.13. Actions and Notice.**

(a)-(d) (No change.)

(e) Motion for reconsideration.

The applicant or a person affected may file with the chief clerk a motion for reconsideration, under §50.39(b)-(f) of this title (relating to Motion for Reconsideration), of the executive director's final approval of an application.

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

The commission adopts an amendment to §321.97, concerning motions for reconsideration on applications by certain small and medium shrimp packers for certificates of registration. The amendment is adopted without changes to the proposed text as published in the October 25, 1996, issue of the *Texas Register* (21 TexReg 10507) and will not be republished. The purpose of this action is to continue to consolidate and make clarifications to procedural rules. Other changes to agency procedural rules in Chapters 1, 50, 55, 80, 116, 312, 330, 332, and 337 are adopted concurrently.

#### EXPLANATION OF ADOPTED RULE

The amendments to §321.97, concerning Appeal of Decisions by Executive Director, provide that §50.39(b)-(f) applies to motions for reconsideration of executive director actions, limit reconsideration to issues required to be considered by the executive director, and make conforming changes.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rule will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of this rule will not burden private real property which is the subject of the rule because it concerns commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to this rule: the action

significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rule at commission offices in Austin on November 25, 1997. The public comment period closed November 25, 1997. No written or oral testimony was received on the proposed rule.

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

**SUBCHAPTER F : SHRIMP INDUSTRY**

**§321.97. Motion for Reconsideration.**

Any person aggrieved by a decision of the executive director under this subchapter may file with the chief clerk a motion for reconsideration under §50.39(b)-(f) of this title (relating to Motion for Reconsideration).

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

The commission adopts amendments to §330.70, concerning motions for reconsideration on applications for certain municipal solid waste facilities and §330.802, concerning motions for reconsideration on applications for certain scrap tire facilities. The purpose of this action is to continue to consolidate and make clarifications to procedural rules and provide for the consistent internal processing of hearing requests. Other changes to agency procedural rules in Chapters 1, 50, 55, 80, 116, 312, 321, 332, and 337 are adopted concurrently.

#### EXPLANATION OF ADOPTED RULES

The amendments to §330.70, concerning Registration of Facilities that Recover Gas for Beneficial Use, and §330.802, concerning Applicability, provide that §50.39(b)-(f) applies to motions for reconsideration of executive director actions, limit reconsideration to issues required to be considered by the executive director, and make conforming changes.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to these rules: the

action significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rules at commission offices in Austin on November 25, 1997. The public comment period closed November 25, 1997. No written or oral testimony was received on the proposed rules.

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

**SUBCHAPTER E : PERMIT PROCEDURES**

**§330.70. Registration of Facilities that Recover Gas for Beneficial Use.**

(a)-(e) (No change.)

(f) Motion for reconsideration.

The applicant or a person affected may file with the chief clerk a motion for reconsideration, under §50.39(b)-(f) of this title (relating to Motion for Reconsideration), of the executive director's final approval of an application.

This agency hereby certifies that the sections as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

**SUBCHAPTER R : MANAGEMENT OF WHOLE USED OR SCRAP TIRES**

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

**§330.802. Applicability.**

(a)-(j) (No change.)

(k) Motion for reconsideration.

The applicant or a person affected may file with the chief clerk a motion for reconsideration, under §50.39(b)-(f) of this title (relating to Motion for Reconsideration), of the executive director's final approval of an application for a registration under this subchapter.

The agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

The commission adopts an amendment to §332.35, concerning motions for reconsideration on applications for registration of certain composting facilities. The amendment is adopted without changes to the proposed text as published in the October 25, 1996, issue of the *Texas Register* (21 TexReg 10507) and will not be republished. The purpose of this action is to continue to consolidate and make clarifications to procedural rules. Other changes to agency procedural rules in Chapters 1, 50, 55, 80, 116, 312, 321, 330, and 337 are adopted concurrently.

#### EXPLANATION OF ADOPTED RULE

The amendments to §332.25, concerning Motion for Reconsideration, provide that §50.39(b)-(f) applies to motions for reconsideration of executive director actions, limit reconsideration to issues required to be considered by the executive director, and make conforming changes.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rule will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of this rule will not burden private real property which is the subject of the rule because it concerns commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to this rule: the action

significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rule at commission offices in Austin on November 25, 1997. The public comment period closed November 25, 1997. No written or oral testimony was received on the proposed rule.

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

**SUBCHAPTER C : OPERATIONS REQUIRING A REGISTRATION**

**§332.35. Registration Application Processing.**

(a)-(d) (No change.)

(e) Motion for reconsideration.

The applicant or a person affected may file with the chief clerk a motion for reconsideration, under §50.39(b)-(f) of this title (relating to Motion for Reconsideration), of the executive director's final approval of an application.

The agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.

The commission adopts the repeal of §337.11, concerning Installment Payment of Administrative Penalty. The repeal is adopted without changes to the proposed text as published in the October 25, 1996, issue of the *Texas Register* (21 TexReg 10507) and will not be republished. The purpose of this action is to continue to consolidate and make clarifications to procedural rules. Other changes to agency procedural rules in Chapters 1, 50, 55, 80, 116, 312, 321, and 330 are adopted concurrently.

#### EXPLANATION OF ADOPTED RULE

The repeal eliminates §337.11, concerning Installment Payment of Administrative Penalties, the requirements of which are duplicated in 30 TAC §70.9. This will complete the repeal of 30 TAC Chapter 337 initiated in Phase II of the Procedural Rule changes.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make clarifications to procedural rules, recognize the creation of the commission's Office of Public Assistance and its role in facilitating public participation, and provide for the processing of hearing requests. The rule will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of this rule will not burden private real property which is the subject of the rule because it concerns commission procedural rules. The following exceptions to the application of Texas Government Code, Chapter 2007, apply to this rule: the action significantly advances the health and safety purpose and imposes no greater burden than is necessary to achieve the health and safety purpose.

#### HEARING AND COMMENTERS

A public hearing was held to receive oral and written comment on the proposed rule at commission offices in Austin on November 25, 1996. The public comment period closed November 25, 1996. No written or oral testimony was received on the proposed rule.

#### STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code, §§5.103, 5.105, 13.041, 26.011, 27.019, 32.009, 33.007, and 34.006 and Texas Health and Safety Code, §§341.002, 341.031, 361.011, 361.017, 361.024, 366.012, 382.017, 401.011, 401.051, and 401.412, which authorize the commission to adopt any rules necessary to carry out its powers and duties under the Water Code and other laws of Texas and to establish and approve all general policy of the commission.

**SUBCHAPTER A : ENFORCEMENT GENERALLY**

**§337.11. Installment Payment of Administrative Penalty.**

This agency hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on April 16, 1997.