The commission adopts amendments to §§80.105, 80.109, 80.115, 80.127, 80.251, 80.271, and 80.273, as well as new §80.254 and §80.274, concerning public participation and motions for rehearing. The purpose of this action is to establish a system for the commission's consideration of and response to public comments on applications and draft permits for federally authorized underground injection control (UIC), Texas Pollutant Discharge Elimination System (TPDES), and Resource Conservation and Recovery Act (RCRA) permit programs and to respond to recent legislative action. Section 80.127 is adopted with changes as published in the August 8, 1997, issue of the *Texas Register* (22 TexReg 7336). Sections 80.105, 80.109, 80.115, 80.251, 80.254, 80.271, 80.273, and 80.274 are adopted without changes and will not be republished.

EXPLANATION OF THE ADOPTED RULES

The commission adopts these rules to encourage public participation in the commission's proceedings. (see also the commission's adoption of rule changes in 30 TAC Chapters 55 and 305 in this edition of the *Texas Register*). This is consistent with state policy as shown in Texas Water Code, §5.112, which calls for the commission to develop public testimony policy. The rules are also intended to address public participation issues connected with federal permitting programs. Currently the commission's authorization to administer the federal programs for the UIC and RCRA permitting programs is under review by the United States Environmental Protection Agency (EPA). Private petitioners have filed a petition with the EPA seeking to decertify the commission's UIC program. Also, the commission has submitted to EPA an application for authorization to implement the National Pollutant Discharge Elimination System (NPDES) Program. The commission believes that Texas Water Code, Chapter 26, which contains numerous sections that are intended to satisfy authorization requirements, shows that the commission's application for NPDES authorization is consistent with state policy to obtain

authorization. The commission and its predecessor agencies have pursued NPDES authorization for several years. Public participation has been an issue in NPDES negotiations and has become an issue in the RCRA and UIC programs because it has proven difficult to harmonize the federal requirements with Texas state law and commission rules. However, in an effort to overcome these difficulties, the commission has worked with EPA and ultimately reached an agreement that the rules adopted here will satisfy authorization requirements. The commission and the EPA have exchanged letters on these issues, and the EPA letter shows its interpretation that the commission must meet the authorization requirements described as follows and that the adopted rules here meet those requirements. The discussion in the responses to public comment gives further explanation of the bases for the adopted rules.

The amendment to §80.105, concerning Preliminary Hearings, provides that a preliminary hearing is required for an enforcement matter under federally authorized UIC or TPDES permit programs. This will provide an opportunity for persons seeking to intervene to seek party status with limited rights to participate as a party in an enforcement proceeding in these federally authorized programs.

The amendment to §80.109, concerning Designation of Parties, provides that the parties to a contested enforcement case may include any other party granted permissive intervention by the State Office of Administrative Hearings (SOAH) administrative law judge in an enforcement proceeding concerning a UIC or TPDES permit under specified conditions.

The amendment to §80.115, concerning Rights of Parties, provides that only the executive director may seek to amend or add to the violations alleged in the initiating petition in an enforcement proceeding.

The amendment to §80.127, concerning Evidence, requires all public comment received during the public comment period on a proposed RCRA, UIC, or TPDES permit or amendment to be admitted into the evidentiary record. It also requires the executive director's responses to public comments to be admitted into the evidentiary record. The section also requires parties to be allowed to respond and to present evidence on each issue raised in public comment or the executive director's responses. The section was modified from the proposal to clarify that the subsection supersedes and controls any conflict between it and 30 TAC §80.111 (relating to Persons not Parties) concerning the admission of public comment into the evidentiary record.

The amendment to §80.251, concerning Judge's Proposal for Decision, provides that if a proposal for decision in a permitting case for a federally authorized RCRA, TPDES, or UIC program is adverse to a party, the decision must include proposed changes to the draft permit recommended by the judge in response to public comment.

New §80.254, concerning Settlement of Enforcement Cases, provides for an agreed settlement between the executive director and the respondent of an enforcement case. The section requires the executive director and the respondent to submit the settlement to the judge, and it requires the judge to submit the proposed agreement to the commission for consideration. The new section also requires the judge to provide time to a dissenting party to file comments, and provides for the commission's consideration of those comments. The section allows the commission, after notice and opportunity for comment, either to approve or to disapprove the agreement, or to remand it to SOAH for a hearing. This will provide for notice and comment on proposed settlements and for settlements by fewer than all the parties to an enforcement proceeding, with commission approval.

The amendments to §80.271, concerning Motion for Rehearing, and §80.273, concerning Decision Final and Appealable, make conforming changes to provide for new §80.274.

New §80.274, concerning Motion for Rehearing Not Required in Certain Cases, provides that if all parties to a contested case agree, the date for filing a motion for rehearing can be shortened, not to exceed 20 days beyond the order date. This change is in response to Senate Bill 637, 75th Legislature, 1997.

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 the rules is to establish a system for the commission's consideration of and response to public comments on applications and draft permits for certain federally authorized permit programs. 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 rule because it concerns commission procedural rules. A "taking" is defined under the Private Real Property Rights Preservation Act as a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action. These rules do not require or provide for any restriction of an owner's use of real property; they concern only procedures for public comment and agency response to comment. Also, the rules are under two exceptions to the Private Real Property Rights Preservation Act: first, the rules fulfill an obligation mandated by federal law, and second, the

rules advance health and safety, and impose no greater burden than is necessary to achieve the health and safety purpose.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The executive director has reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the rules are not subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the proposed rules was held in Austin on September 8, 1997. The comment period closed September 8, 1997. Written comments were received from Brown McCarroll and Oaks Hartline (Brown McCarroll), Eastman Chemical Company (Texas Eastman), Exxon Company USA (Exxon), Texas Chemical Council (TCC), and the commission's Office of Public Interest Counsel (OPIC). The following jointly submitted comments: Blackburn and Carter; Clean Water Action; Consumers Union; East Texas Communities Network; Environmental Defense Fund; Henry, Lowerre, Johnson, Hess & Frederick; League of Women Voters of Texas; Public Citizen; Sierra Club; Save Our Springs Alliance; Texas Center for Policy Studies; and the American Lung Association of Texas (Henry, Lowerre). An individual submitted oral comment at the public hearing.

The following description of public comment and the commission's responses frequently refer to "certain applications" or "certain enforcement actions." This is a reference to applications or

enforcement proceedings concerning UIC, TPDES, or RCRA facilities. References to "federally authorized programs" apply to the federal permitting program for each of these types of facilities, when and for so long as the commission is authorized to administer them by EPA.

TCC and Brown McCarroll requested that the commission revise the takings impact assessment that was prepared under Texas Government Code, §2007.043. The commenters did not believe the proposed rules are required by federal law, as is stated in the commission's takings impact assessment. Brown McCarroll also commented that the proposed changes on permissive intervention in administrative enforcement cases are not required by federal law. They argue that a state seeking authorization may satisfy the requirements of 40 CFR §123.27(d) and §145.13(d) by allowing permissive intervention in state court enforcement actions, that this is the case in Texas, and so there is no need to also allow for permissive intervention in administrative actions.

The commission believes that these rules fall under an exception to the Private Real Property Rights Preservation Act (the Act) because federal law mandates their adoption to accommodate requirements in the authorized programs. EPA interprets the Clean Water Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and Title 40 CFR §123.25(a) for NPDES, §145.11(a) for UIC, and §271.14(a) for RCRA to require authorized programs to provide for notice, opportunity for comment, consideration of comment, and appeal by the commenter as set out in 40 CFR §§124.10, 124.11, 124.17, and 123.30. Concerning intervention in administrative enforcement actions, the commission responds that Texas has chosen to satisfy authorization requirements for the NPDES and UIC programs by implementing §123.27(d)(2) and §145.13(d)(2) of the regulations; that is, by electing the option of permissive intervention rather

than the alternative of intervention as a right. EPA and federal courts have interpreted the Clean Water Act and these provisions of the CFR to mean that for a state to choose this option, its law or rules must actually offer a procedure for permissive intervention in both civil and administrative enforcement proceedings (see *Natural Resources Defense Council v. EPA*, 859 F.2d 156 (D.C. Cir. 1988)). Texas Water Code, §7.111, which supersedes the repealed §26.134, addresses intervention in civil enforcement in state court. These rules create the necessary avenue for permissive intervention in administrative enforcement hearings. The commission and the EPA have exchanged letters on these issues, and the EPA letter evidences both EPA's conviction that the commission must meet the authorization requirements described here and its agreement that the adopted rules meet those requirements.

Texas Eastman noted that §80.105(a), requiring the administrative law judge to hold a preliminary hearing in enforcement cases concerning underground injection control or TPDES permits, does not apply to enforcement cases concerning RCRA permits. Texas Eastman requested that the commission's preamble on adoption of the rules acknowledge this exemption for RCRA permits. The commenter also suggested that the requirement in §80.105(a) not apply if no person submits a request to intervene as a party within 20 days prior to the proposed hearing date.

The commission believes the rule is specific in identifying that to which it applies. This requirement does not apply to RCRA permits because there is no similar federal requirement. The commission declines to require that requests to intervene be filed at least 20 days prior to the proposed hearing date, to avoid the necessity for additional notices and of hearings on whether or why a request may or may not have been timely filed. Intervention is a matter that can be

addressed at the preliminary hearing.

TCC and Brown McCarroll requested that the commission not adopt §80.109(b)(6)(C), concerning permissive intervention in certain administrative enforcement actions. They commented that federal law does not require the commission to adopt this provision to obtain federal authorization.

The commission responds that EPA and federal courts interpret the Clean Water Act and CFR §123.27(d) and §145.13(d) to allow states to choose between two options, to provide either intervention as of right or permissive intervention in enforcement hearings. Texas has chosen the permissive intervention option, under which the state agrees not to oppose intervention where it may be authorized by statute, regulation, or rule. To use this option, however, the state law or rules must allow some meaningful opportunity for permissive intervention in both civil and administrative enforcement actions (*Natural Resources Defense Council v. EPA*, 859 F.2d 156 (D.C. Cir. 1988)). Section 80.109 creates the intervention option at the administrative level. The commission and the EPA have exchanged letters on these issues, and the EPA letter evidences both EPA's conviction that the commission must meet the authorization requirements described here and its agreement that the adopted rules meet those requirements.

Henry, Lowerre commented that §80.109(b)(6)(C) does not give assurance that the commission will allow intervention by a third party in certain enforcement proceedings. The commenter argues that the rules also do not assure a third party will be able to participate in an effective manner.

The commission responds that the rules provide ample and meaningful intervention opportunity. It is confident that the SOAH judges will follow these rules as adopted.

An individual commented that while the UIC and TPDES programs were mentioned in §80.109(b)(6)(C), the RCRA program was not and expressed concern that there had been an oversight.

The federal regulations governing the RCRA program do not contain the same requirements compared to the regulations for the UIC and NPDES programs. Compare 40 CFR §123.27(d) with 40 CFR §271.17(d). The commission rules are intended to track the federal requirements.

An individual suggested that "permissive intervention" be defined in the rules, and commented that the standard for permissive intervention found in §80.109 does not have anything to do with justiciable interest because it appears to be whether or not the intervention will unduly delay or prejudice the rights of the original parties.

The commission has made no changes in response to this comment. The significance of "permissive intervention" is explained in the next sentence of the rule. The commission notes that the adopted rule is patterned after the federal rules of civil procedure, Rule 24(b). The commission's response to the comments on the takings analysis provides further analysis on why the commission adopts the permissive intervention standard.

TCC and Brown McCarroll requested that §80.115(a) be amended to state that no party except the executive director (that is, not the Public Interest Counsel, the respondent, nor permissive intervenors) may seek to amend or add to the penalties or technical requirements sought in an enforcement action. Brown McCarroll pointed out that as the state's enforcement authority, the commission has exclusive authority to assess penalties and recommend technical requirements and that nowhere in the Texas Water Code is any private party given such authority. Henry, Lowerre commented that the rule would mean that without the executive director's explicit approval, an intervenor could not present evidence of additional violations. An individual commented that the rule would not allow intervening parties to amend or add to the violations alleged in the petition. Texas Eastman and Exxon supported this provision as written.

The commission has made no changes in response to these comments. The purpose of the rule is to comply with the federal requirement for a meaningful opportunity to participate by intervention. The commission believes that such meaningful participation by individual members of the public is best directed toward the remedial aspects of the proceeding. Therefore, the rule allows the intervenors to seek to amend or add to the penalties and technical requirements to be imposed. Concerning the comment on an intervenor's offer of evidence of additional violations, the adopted rule does not address its admissibility. The administrative law judge will rule on any such offers of evidence based on other applicable law. Concerning the comment on allowing intervenors to amend or add violations alleged in the petition, the commission concludes that the proposed change would run afoul of due process requirements, statutory requirements, and other commission rules. Texas Water Code, §7.054 and §7.055 specify that the executive director shall prepare the preliminary report that specifies the alleged violations and that the executive director

shall give notice of the preliminary report to the person charged within ten days. The person charged may request a hearing on the alleged violations in the preliminary report under §7.058. Commission rules at §80.105 similarly state that the scope of a hearing on an enforcement matter is set by the executive director's preliminary report. The commission believes that allowing for the consideration of additional alleged violations added outside of these procedures would violate these requirements.

TCC and Brown McCarroll requested that the commission not adopt proposed §80.127(f) concerning admitting public comment and the executive director's responses into the evidentiary record for certain applications. The commenters assert that this action is inappropriate because the comments are not sworn testimony, nor subject to cross-examination. Brown McCarroll pointed out that there is no requirement that public comment or the responses thereto meet the requirements for the admissibility of evidence set out in §80.127(a) or the Texas Rules of Civil Evidence. They argue that the admission of public comment would violate requirements for the admissibility of evidence, including the requirements in the APA, Texas Government Code, §2001.081. The commenters suggested that a separate rule should be proposed that simply calls for public comment to be part of the record in a case. Henry, Lowerre commented that a rule that would allow the commission to consider public comment in a contested case hearing would violate Texas law. OPIC also questioned whether the commission may adopt a rule that has the effect of directing that public comment shall be admitted into the evidentiary record. OPIC commented that the proposed §80.127(f) creates a tension between that subsection and §80.127(a)(2) and (3) that testimony may be received only from persons under oath. OPIC expressed its concern that a person, wishing to avoid the requirements imposed on the admissibility of evidence, could offer its case as public comment. An individual commented that because public comments cannot

be considered as evidence in the contested case that the commission's efforts in the proposed rules are meaningless in that the comments will not really be considered.

The commission responds to the comments on §80.127(f) by making some changes to the proposed rule, as explained in the following paragraphs. Generally, however, the commission declines to make changes in response to public comment because the commission concludes the subsection is necessary to meet authorization requirements and because the subsection is consistent with Texas law. Under authorization requirements, the person who makes the final decision on a permit application must consider the public comment and respond to it. Under Texas law if there is a contested case hearing on the application, it is the commission (not the executive director) who makes the final decision on the permit application. Thus, to satisfy authorization requirements, the commission must consider the public comment and make a response to it. The adopted §80.127(f) ensures that the public comment and the executive director's responses are made part of the evidentiary record so that the commission's consideration of both is consistent with APA, §2001.141(c), which requires that findings of fact may be based only on the evidence and on matters that are officially noticed.

The commission disagrees that the adopted rule violates the requirements of APA, §2001.081 concerning the admission of evidence in a contested case hearing. The APA provides that the rules of evidence as applied in a nonjury civil case in a district court of the state apply to a contested case. The commenters are concerned that the admission into the evidentiary record of public comment and the executive director's responses violates the prohibition against hearsay found in the Texas rules of civil evidence. The commission concludes, however, that §80.127(f) is

consistent with Texas law because the manner of admitting the evidence is consistent with the limited purpose for which it is admitted. Public comment will be admitted to show that public comment was received and how the executive director considered and responded to each comment in formulating the draft permit or revisions to the draft permit. Legal and policy arguments made in public comment will be considered by the judge and the commission in making the permit decisions. The executive director's responses to public comment, when properly offered under applicable standards governing administrative proceedings, will be admitted into evidence under §80.127(f) for all purposes, including for the truth of the matters stated therein. In contrast, the text of public comment, as it relates to fact issues, will be admitted under §80.127(f) for the limited purpose of establishing what public comment was received, so that the judge and commission can evaluate the responses and evidence offered and received from the parties on those issues. Unless also offered by a party to the proceeding for other purposes and admitted by the judge under other commission rules, the public's comments will not be evidence of the truth of the facts asserted in them.

The commission concludes that the executive director's response to comments is admissible under Texas Rule of Civil Evidence 803(8), the hearsay exception for public records and reports. The executive director's responses qualify under two of the exceptions in that rule: specifically, the responses are matters observed under a duty imposed by law as to which matters there is a duty to report, and the responses are factual findings resulting from an investigation made pursuant to authority granted by law. Moreover, the staff members who prepare the responses will be available at the hearing for cross-examination.

The commission concludes that public comment is admissible under the Texas rules of civil evidence for the limited purposes allowed under §80.127(f). In *Lewis v. Southmore Savings Association*, the Texas Supreme Court commented that the hearsay rule applies in administrative hearings but that considerable discretion is permitted in allowing evidence to be introduced by virtue of the liberal exceptions to the rule (480 S.W.2d 180, 186 (Tex. 1972)). In that case, the court ruled that the administrative agency had properly admitted into evidence expert testimony including the "expert's hearsay," in the form of the expert recounting his earlier interviews with persons that formed a part of the basis of his expert opinion. The court noted that the expert's hearsay is not evidence of the fact but only bears on his opinion, and that the administrative agency should acknowledge its limited purpose and observe it. In commission proceedings on certain applications the commission rules require that the executive director consider public comment and make a response to it, and so public comment will necessarily form some part of the executive director's "expert's hearsay."

The commission concludes that in the certain proceedings not only should public comment and the executive director's responses be admitted into the evidentiary record, but also that admission should be by rule rather than rely on a case-by-case ruling. The commission reaches this conclusion because it is necessary for authorization purposes that public comment will be considered. Also, a rule is preferable because it adds predictability to the contested case process. The commission concludes that it is not creating a hearsay exception but merely recognizing exceptions that already exist. The adoption of the rule makes sure that all persons know that public comment and the executive director's responses will be admitted into evidence for the

purposes stated previously and that the parties will have an opportunity to respond and to present whatever rebuttal or supporting evidence they choose.

The commission does make some changes in response to the commenters. The commission clarified §80.127(f) to state that the public comment and the executive director's responses shall be admitted into the evidentiary record. Also, the rule was clarified by deleting some of the proposed rule language so that it is clear that responses other than the executive director's will not be by rule admitted into the evidentiary record. However, the commission believes that the parties must be afforded an opportunity to respond and present evidence (as is required by APA, §2001.051), and so this language is added here as a reminder of the parties' rights.

The commission believes that the previous discussion should address OPIC's concerns as well. A person would likely not attempt to avoid the requirements for the admissibility of evidence by submitting his case as public comment. While the person's public comment would be admitted into evidence under §80.127(f) it would be admitted for the limited purposes of putting before the judge and commission the policy and legal arguments made therein and, if facts were alleged, of showing that the comment was made; it would constitute no evidence that the facts in the comment were true. The person's submission of public comment would be successful in the sense that the executive director considered it in preparing the draft permit, any proposed changes to the draft permit, and his responses to public comment. But, if the person wished to rebut the truth of the matters asserted in the contested case hearing the person would still have to become a party and offer admissible evidence to establish the truth of the comment.

Henry, Lowerre commented that if the commission adopts the proposed rules, then Texas Health and Safety Code, §361.069, would improperly limit participation by state and federal agencies. Section 361.069 provides that in making a determination on the question of land use compatibility, the commission shall not consider the position of a state or federal agency unless the position is fully supported by credible evidence from that agency during the public hearing.

The commission acknowledges that there could be some confusion raised by the fact that both authorization requirements and Texas Health and Safety Code, §361.069, speak of "considering" information. The commission's responses to commenters in this preamble explain how the commission will "consider" public comment under the adopted rules, which also applies to public comment by governmental agencies. In contrast, the commission concludes that in the limited circumstances that §361.069 applies, the commission will "consider" the position of a state or federal agency only if the position is fully supported by credible evidence from that agency. The commission concludes that this requirement means that the commission may adopt the position of an agency only if the position is supported by evidence that was offered by the agency and admitted for the truth of the matters stated therein.

Texas Eastman requested that §80.127(f) be harmonized with §55.25(b)(1) so that it states that the executive director must place into the record his or her responses to the "significant" public comment.

The commission has made no changes in response to this comment. The commission believes that the change is unnecessary because §55.25 in part defines what is the required response to public comment. Thus, there is no need to define the requirement again in §80.127(f).

OPIC commented that the proposed §80.127(f) conflicts with the current rule §80.111, which provides that public comment shall not be considered as evidence in the record.

The commission agrees with OPIC that §80.127(f) as proposed could have created confusion. The commission adopts a revised §80.127(f) that specifies that the subsection supersedes and controls any conflict between the subsection and §80.111 (relating to Persons not Parties) concerning the admission of public comment into the evidentiary record.

TCC requested that the proposed changes to §80.251 concerning the judge's proposal for decision on certain types of applications not be adopted. TCC referred to its comments on proposed §80.127(f) that public comment should not be part of the evidentiary record and stated that therefore public comment should not be a basis for the judge recommending changes to the draft permit. Henry, Lowerre commented that the proposed changes would violate Texas law. Brown McCarroll commented that the proposed rule seems to contemplate a judge's proposed order that recommends changes to the draft permit that are separate and apart from the judge's proposed findings of fact and conclusions of law. Brown McCarroll commented that this would violate APA, §2001.141, which states that findings of fact must be based on evidence and on matters that are officially noticed. OPIC requested clarification on §80.251 as to the legal authority for treating public comment as evidence for the purposes of creating an administrative law judge's record of decision, or other clarification as to how public comment is to be included in the record pursuant to the APA.

The commission has made no changes in response to these comments. The commission believes that the previous response to the comments on §80.127(f) also responds to the comments here, but supplements the response to explain the use of public comment in contested case hearings.

As noted previously, the commission concludes that the admission into the evidentiary record of public comment and the executive director's responses under §80.127(f) is a proper exercise of the commission's authority. Once public comment and the executive director's responses are in the evidentiary record, it is appropriate for the SOAH judge to recommend proposed changes to the draft permit after considering the public comment and the executive director's responses to public comment. Such proposed changes would be made consistent with the requirements of APA, §2001.141 that findings of fact must be based on evidence and on matters that are officially noticed. Public comment is admitted in evidence under §80.127(f) for the limited purposes of establishing what public comment was received.

Public comment will be admitted for consideration of the legal and policy arguments made in public comment. Public comment will be admitted to show that public comment was received and how the executive director considered and responded to each comment in formulating the draft permit or revisions to the draft permit. The executive director's responses will be admitted in evidence under §80.127(f) for all purposes. The parties will be allowed to respond and present evidence on the issues raised in public comment, and such offers of evidence will be admitted in evidence if the judge (and ultimately the commission) rules that the evidence should be admitted under applicable law. These latter rulings on offers of evidence will not be considered under §80.127(f). On the basis of all of this evidence the judge may properly recommend changes to the

draft permit. The judge (and ultimately the commission) will consider the law and policy arguments made in public comment. Any recommendation based on evidence must be consistent with the purposes for which the evidence was admitted. Public comment is not admitted in evidence under §80.127(f) for the truth of factual matters stated therein and so the judge (and ultimately the commission) may not base his or her recommendations on the factual allegations in public comment. Of course, the judge may base his or her recommendations on other evidence properly offered by a party and admitted for the truth of the matters stated therein.

Finally, to respond to the question posed by Brown McCarroll, the commission intends that a judge's recommendations shall be made in the traditional fashion under the APA, that is, by submitting a proposal for decision together with a draft order containing findings of fact and conclusions of law, all based on the evidence. There will be no separate procedure for considering public comment. When the commission issues its final order, it will be accompanied by the commission's responses to public comment which will be consistent with the findings of fact and conclusions of law.

Brown McCarroll and TCC objected to the adoption of §80.254. They commented that permissive intervention in administrative enforcement hearings is not required for authorization, thus this section on processing a settlement agreement in an enforcement case and comments on the settlement is not necessary. Henry, Lowerre commented that §80.254 does not define "settlement."

The commission responds to the first comment in its response to comment on the takings analysis. Concerning the definition of "settlement," the commission does not believe that a definition is needed because the term has a well understood meaning--the resolution of issues in controversy by agreement instead of adjudication. The commission notes that the commenter did not suggest a definition for the commission's consideration.

Exxon commented on §80.254 and requested that this section be amended to allow the commission to remand an enforcement case for further negotiations if the commission does not approve of a proposed settlement. The commenter argued that the commission's options should not be limited to approving the settlement or remanding for a hearing.

The commission has made no changes in response to this comment. If the commission does not approve of a settlement, then the case should proceed to hearing. After the referral for hearing, the parties can always investigate a new settlement.

Texas Eastman commented on §80.254 concerning the commission's review of a settlement agreement in an enforcement case. The commenter suggested the section specify the standard of review and recommended a standard that is deferential to agreements. The commenter also noted that the proposal published in the *Texas Register* did not publish this section in bold type, and suggested the commission ensure that the section published in the *Texas Register* showing the adopted rules be in bold.

The commission has made no changes in response to this comment. A specified standard of review is not appropriate under these circumstances because the commission must assure itself

that any recommended settlement is consistent with law and commission policy and is in the best interest of the state.

Additionally, the proposal as published was in accordance with the *Texas Register* Form and Style Manual, that is, the text of whole new sections is not bolded. Only those amendments that consist of new language to current sections are bolded. However, as mandated by Senate Bill 1715, 75th Legislature, the *Texas Register* will begin underlining all new language in rule proposals, including the text of new sections, once the Secretary of State's Office adopts final rules (the rules were proposed in the October 17, 1997, issue of the *Texas Register* (22 TexReg 10203)).

OPIC requested that §80.254 be amended so that OPIC has the opportunity to file comment on a proposed settlement of a contested enforcement case, even when a judge has not yet been assigned to the case. OPIC also commented that current §70.5 should be amended so that it is consistent with §80.254.

The commission has made no change in response to this comment. The commission believes the proposed change is unnecessary in light of Texas Water Code, §7.075, as created by Senate Bill 1876, 75th Legislature, which requires publication in the *Texas Register* and a 30-day period for public comment on all proposed settlements of administrative enforcement cases. This should give OPIC ample opportunity to submit comment. The commission disagrees that the statement in §70.5 that an enforcement case may be "resolved informally" is in need of amendment. This section merely suggests that an enforcement case may be resolved by settlement rather than by following all of the requirements of a contested case hearing. This is consistent with §80.254.

An individual commented on the restrictions in §80.254 on how a person granted permissive intervention in an enforcement case may participate. The commenter suggested that the restrictions violate Texas law. The commenter recommended changes so that an intervenor could object and present evidence on a settlement proposed by the executive director and the respondent.

The commission has made no changes in response to the comment, but takes this opportunity to clarify the participation of intervenors in enforcement cases. Under §80.254 the judge must give an intervenor who dissents from a proposed settlement a reasonable time to file comments. The judge will then forward the settlement and the comments to the commission for the commission's consideration and decision. The commission's decision will be based on the settlement and the other evidence in the record, just as in any other contested case. Texas law does not require permissive intervention in an enforcement case by the executive director against a respondent. As stated in the explanation of the adopted rules, the commission adopts these rules (including §80.109(b)(6)(C) and §80.254) because the EPA is resolute that the authorization requirements include these requirements and convinced that the rules adopted here meet those requirements. The commission intends that the rules specify all of the permissive intervenors' rights; that is, that the right of an intervenor to participate in the contested case hearing is limited to those actions specifically authorized in the rules and amendments adopted today.

Texas Eastman commented on §80.274, concerning agreement by the parties to waive the requirement to file a motion for rehearing. The commenter argued that the section should be revised to specify that the parties' agreed effective date for the order must be no earlier than the date the order is signed. The commenter also noted that the proposal published in the *Texas Register* did not publish this section in

bold type, and suggested the commission ensure that the section published in the *Texas Register* showing the adopted rules be in bold.

The commission responds that the proposal published in the *Texas Register* specified that the agreed effective date must be no earlier than the date the order is signed, and that the adopted rule also contains the requirement. The commission notes that this section allows the parties to agree to an effective date for a commission order, which has the effect of waiving the requirement to file a motion for rehearing. This section, and SB 637, 75th Legislature, on which it is based, do not allow the parties to agree to shorten the time period for filing a motion for rehearing as was suggested by the commenter. Regarding the latter comment, please see the response to §80.254 regarding the publication of the proposal.

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; and under Texas Government Code, §2001.144 and §2001.145.

CHAPTER 80

SUBCHAPTER C: HEARING PROCEDURES

§§80.105, 80.109, 80.115, 80.127

§80.105. Preliminary Hearings.

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required in an enforcement matter, except in those under federally authorized underground injection control (UIC) or Texas Pollutant Discharge Elimination System (TPDES) programs.

(b) - (d) (No change.)

§80.109. Designation of Parties.

(a) (No change.)

(b) Parties.

(1) - (5) (No change.)

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

(A) the respondent(s);

(B) any other parties authorized by statute; and

(C) in proceedings alleging a violation of or failure to obtain a UIC or TPDES permit, or a state permit for the same discharge covered by a National Pollutant Discharge Elimination System (NPDES) permit that has been assumed by the state under NPDES authorization, any other party granted permissive intervention by the judge. In exercising discretion whether to permit intervention, the judge shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(7) - (8) (No change.)

(c) - (d) (No change.)

§80.115. Rights of Parties.

(a) A party has the right to conduct discovery, present a direct case, cross-examine witnesses, make oral and written arguments, obtain copies of all pleadings, motions, replies, and other filed documents, receive copies of all notices issued by the commission concerning the proceeding to which the person is a party, and, as directed by the judge, otherwise fully participate as a party in the proceeding. In an enforcement proceeding, no party except the executive director may seek to amend or add to the violations alleged in the petition that initiated the case.

(b) (No change.)

§80.127. Evidence.

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

(f) Public comment. In Resource Conservation and Recovery Act, underground injection control, and Texas Pollutant Discharge Elimination System permit cases for which the commission has permitting authority by authorization from the federal government, all public comment on the application received by the commission during the public comment period and the executive director's responses shall be admitted into the evidentiary record. The parties shall be allowed to respond and to present evidence on each issue raised in public comment or the executive director’s responses. This subsection supersedes and controls any conflict between this subsection and §80.111 of this title (relating to Persons not Parties) concerning the admission of public comment into the evidentiary record.

(g) Invoking the "rule." At the request of the party, and subject to the discretion of the judge, witnesses may be placed under "the rule" as provided by, and subject to the conditions of, Texas Rule of Civil Procedure 267 and Texas Rule of Evidence 613.

SUBCHAPTER F: POST HEARING PROCEDURES

§§80.251, 80.254, 80.271, 80.273, 80.274

§80.251. Judge's Proposal for Decision.

(a) (No change.)

(b) Proposal for decision: adverse to a party. A proposal for decision shall be filed by the judge who conducted the hearing or by a substitute judge who has read the record. If the proposal for decision is adverse to a party to the proceeding, it shall contain a statement of the reasons for the proposal and, in underground injection control, Texas Pollutant Discharge Elimination System, and Resource Conservation and Recovery Act permitting cases for which the commission's permitting authority is authorized by the federal government, proposed changes to the draft permit recommended by the judge in response to public comment, as well as findings of fact and conclusions of law which support the proposal. If any party has filed proposed findings of fact upon the judge's request, the judge shall include with the proposal for decision recommended rulings on all findings of fact so proposed. Where more than one judge has been assigned to hear a particular proceeding, the presiding judge will issue the proposal for decision and the other assigned judge or judges may file comments.

(c) (No change.)

§80.254. Settlement of Enforcement Cases.

Where the executive director and the respondent have reached an agreed settlement of an enforcement case, they shall submit the settlement agreement to the judge in writing. The judge shall forward the proposed settlement agreement to the commission for consideration. If there is a party to the case that dissents from the proposed settlement, the judge shall give such party a reasonable time to file comments, and shall forward all timely filed comments to the commission together with the proposed settlement. After any required public notice and opportunity for comment on proposed settlements and consideration of the record, the commission may either approve the proposed settlement, or disapprove it and remand the case to SOAH for hearing.

§80.271. Motion for Rehearing.

(a) Filing motion. A motion for rehearing is a prerequisite to appeal. The motion shall be filed with the chief clerk within 20 days after the date the party or his attorney of record is notified of the decision or order. A party or attorney of record is presumed to have been notified on the date that the decision or order is mailed by first-class mail. On or before the date of filing of a motion for rehearing, a copy of the motion shall be mailed or delivered to all parties with certification of service furnished to the commission. The motion shall contain:

(1) - (4) (No change.)

(b) - (e) (No change.)

§80.273. Decision Final and Appealable.

Except as provided in §80.274 of this title (relating to Motion for Rehearing not Required in Certain Cases), in the absence of a timely motion for rehearing, a decision or order of the commission is final on the expiration of the period for filing a motion for rehearing. If a party files a motion for rehearing, a decision or order of the commission is final and appealable on the date of the order overruling the motion for rehearing or on the date the motion is overruled by operation of law.

§80.274. Motion for Rehearing not Required in Certain Cases.

(a) When APA, §2001.144(a)(3) or (4) applies, a commission order is final as specified in the APA, a motion for rehearing is not required, and §80.271 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) do not apply.

(b) The commission may issue an order that is final under APA, §2001.144(a)(4) if all parties agree to the specified date in writing or on the record, and if the specified date is not before the date the order is signed or later than the 20th day after the date the order was rendered. For purposes of this subsection, the order is rendered on the date the chief clerk mails the decision or order by first-class mail to the parties. The commission is not required to issue an order under APA, §2001.144(a)(4) even when requested by all parties. When the parties request, and the commission agrees, to issue a final order under APA, §2001.144(a)(4), each party shall thereby waive any allegations of error not in the party's exceptions to the proposal for decision, reply to exceptions, or discussed as an issue in the judge's proposal for decision.

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 November 5, 1997.