The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§50.115, 50.119, and 50.143.

Section 50.115 and §50.143 are adopted *with changes* to the proposed text as published in the August 21, 2015, issue of the *Texas Register* (40 TexReg 5235) and will be republished. Section 50.119 is adopted *without change* to the proposed text as published and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking is adopted to implement Senate Bills (SB) 709 and 1267, both adopted by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. Concurrently with this adoption, and published in this issue of the *Texas Register*, the commission is adopting revisions to 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 39, Public Notice; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings. SB 709 is implemented by rules adopted in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9, is implemented by rules adopted in Chapters 1, 50, 55, 70, and 80.

SB 709

SB 709 makes several changes to the current contested case hearing (CCH) process for applications for air quality; water quality; municipal solid waste; industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public, or interested groups or associations, who request a CCH must make timely comments on the application to be considered as an affected person. For issues to be eligible for a CCH referred to the State Office of Administrative Hearings (SOAH), the issues must have been raised by the affected person in a comment made by that affected person. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications filed on or after September 1, 2015; this is required until the rules implementing SB 709 become effective December 31, 2015.

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

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

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft

permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named previously.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. SB 709 allows for extensions beyond 180 days based upon agreement of the parties with the ALJ's approval or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For applications directly referred under §55.210, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

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

The changes to the APA for which TCEQ rulemaking is necessary are as follows.

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

Section by Section Discussion

In addition to the amendments associated with this rulemaking, the adopted rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§50.115, Scope of Contested Case Hearings

The amendment to §50.115(c)(1) and (2) is adopted to implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1. The amendment provides that the commission may not refer an issue to SOAH for a CCH unless the commission determines that, for applications filed on or after September 1, 2015, the issue involves disputed question of fact or a mixed question of law and fact that was timely raised in public comment made by an affected person whose request is granted. Adopted §50.115(c)(2) clarifies that the referred issues must be raised by a person who hearing request is granted.

The amendment to §50.115(d) is adopted to implement new Texas Government Code, §2003.047(e-2) and (e-3) in SB 709, Section 1 and Section 5(a)(1). Subsection (d)(1) is adopted to add the date applicability for applications filed before September 1, 2015, to the existing rule. Subsection (d)(2) is adopted to provide that, for applications received by the commission on or after September 1, 2015, the maximum length of the hearing is 180 days (reduced from the current maximum length of one year) from the first day of the preliminary hearing, unless the commission specifies a shorter duration, or the hearing is extended by the judge. The amendment also provides that a judge may extend any hearing if the judge determines that failure to grant an extension will unduly deprive a party of due process or another constitutional right, or by agreement of the parties with approval of the judge.

Adopted subsection (g) is added in response to comments to provide that, when referring a case to SOAH under Texas Water Code (TWC), §5.556 for applications filed on or after September 1, 2015, the commission shall submit a list of detailed and complete issues as required by Texas Government Code, §2001.047(e-i).

§50.119, Notice of Commission Action, Motion for Rehearing

The amendment to §50.119 is adopted to implement changes to Texas Government Code, §2001.146(a), as amended in SB 1267, Section 9**.** The commission adopts the amendment to subsection (b) to change the deadlines for filing a motion for rehearing from within 20 to not later than 25 days after the date of the commission's final decision or order on the application is signed, unless the time for filing the motion for rehearing has been extended under the APA. The amendment also removes text regarding the presumption of notice.

The amendment to §50.119 is also adopted to implement changes to Texas Government Code, §2001.146(g), as amended in SB 1267, Section 9. Adopted subsection (d) provides that a motion for rehearing must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The motion must also state the legal and factual basis for the claimed error.

§50.143, Withdrawing the Application

The existing rule text is adopted to be designated as subsection (a). Subsection (b) is adopted to implement SB 709, Section 5(a)(1) and (b). Applications filed before September 1, 2015, for which the chief clerk mailed the executive director's preliminary decision and notice of a draft permit that are withdrawn by the applicant are governed by the commission's rules as they existed immediately before September 1, 2015, and those rules are continued in effect for that purpose if the application is refiled with the commission, and the executive director determines the refiled application is substantially similar. At adoption, the commission removes the phrase "before September 1, 2015," and adds text to clarify that the determination of substantially similar is based on a comparison of the refiled application to the withdrawn application in subsection (b).

The information that the executive director may consider in making a determination of a substantially similar application is listed in subsection (b)(1) - (8). In response to comment, adopted subsection (b)(7) "changes in method of treatment or disposal of waste," is added and proposed subsection (b)(7) is re-designated as subsection (b)(8).

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis

requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendments to Chapter 50 are procedural in nature and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Rather, they implement requirements for CCHs and for motions for rehearing of commission action, ensuring that the rules are consistent with the APA and the requirements of SB 709 and SB 1267.

As defined in Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely

under the general authority of the commission. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the adopted amendments to Chapter 50 are procedural in nature and implement changes made to the Texas Government Code §2003.047, and TWC in SB 709, and to APA in Texas Government Code, Chapter 2001 in SB 1267 by amending rules regarding the scope and length of CCHs and criteria for reviewing substantially similar permit applications. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment on the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive any comments regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendments to Chapter 50 are procedural in nature and implement requirements for CCHs and for motions for rehearing of commission action, ensuring that the rules are consistent with the APA and the requirements of SB 709 and SB 1267. The change in procedure will not burden private real property. The adopted amendments do not affect private property in a manner that restricts or limits an owner's right to the property that

otherwise exists in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The adopted amendments do not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

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

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive any comments regarding the CMP.

Public Comment

The commission held a public hearing on September 15, 2015, at 2:00 p.m. in Austin, Texas, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on September 21, 2015. For the rulemaking project described earlier that

amends six chapters of the commission's rules, the commission received comments from the United States Environmental Protection Agency (EPA); Harris County Pollution Control Services Department (HCPCSD); TCEQ Office of Public Interest Counsel (OPIC); Public Citizen; Sierra Club (individually); Sierra Club, Texas Campaign for the Environment, and Environmental Integrity Project (SC/TCE/EIP); Texas Association of Manufacturers (TAM); Texas Chemical Council (TCC); Texas Oil and Gas Association (TXOGA); Lone Star Chapter of the Solid Waste Association of North America (TXSWANA); and Water Environment Association of Texas (WEAT) and Texas Association of Clean Water Agencies (TACWA).

Response to Comments

General Comments

Comment

All commenters acknowledged that the rulemaking project was only to implement SB 709 and SB 1267 passed by the 84th Texas Legislature (2015). SC/TCE/EIP and Public Citizen stated that, in general, the proposed rules accurately reflect the legislation being implemented. TCC commends TCEQ's work on the proposed rules. TXOGA supports the implementation of SB 709 and SB 1267. Generally speaking, TAM commented the proposed rule tracks the legislation very closely and supports the rulemaking as proposed, with specific comments for review and consideration.

Response

The commission acknowledges these comments.

Comment

TCC requests TCEQ clarify that any delays in implementation of SB 709, including the rules, do not adversely impact permit applicants. For example, if online notice is not yet available on the commission website prior to finalization of the rules, this should not create any deficiencies to the applicant, as this is out of the applicant's control.

Response

SB 709 implementation was planned and largely achieved by September 1, 2015, to ensure timely compliance. For example, additional text for both Notice of Receipt of Application and Intent to Obtain Permit (commonly referred to as NORI) and Notice of Application and Preliminary Decision (commonly referred to as NAPD) were drafted and ready for use. The additional legislator notification text was developed, and the accompanying procedures were implemented. Internal procedures were established to track applications subject to SB 709 and to ensure that administratively complete applications are available on the commission's website. In addition, the TCEQ's *Public Participation in Environmental Permitting* webpage for applications filed prior to September 1, 2015, was updated, and

a new version was created for applications filed on or after September 1, 2015. SB 709 requires the commission to adopt rules by January 1, 2016; these rules were adopted on December 9, 2015, and will become effective on December 31, 2015. Therefore, the implementation is complete, and no adverse impacts have been identified nor are any expected.

Comment

HCPCSD is concerned the rulemaking will lessen the public's ability to oppose permitting actions that may negatively impact public health and safety, and the environment. In contrast to the notice and comment process which provides few protections, HCPCSD's experience has shown that the CCH process can be an important and valuable tool in the environmental permitting process. In many instances, more protective permit provisions, in the form of operational improvements, are negotiated during a CCH, and these added provisions minimize the nuisance potential from operations that are either located in an unsuitable location or have a high potential to create particulate or odor nuisances. The result is fewer citizen complaints, notices of violation, and enforcement actions.

Response

No changes were made to the rules in response to this comment. The commission understands that there are benefits to the CCH process but

does not agree that the rules compromise the public's ability to oppose permitting actions. The rules do not reduce the amount of public notice provided, nor the opportunity to comment on applications and draft permits for the permitting programs that are subject to the requirements of SB 709. Public comments are considered in each permitting action.

Comment

HCPCSD requests TCEQ, after evaluating the consequences of this rulemaking, reconsider these rules with the goal of determining and incorporating rules that allow for more public inclusion in the permitting process and actual guaranteed consideration of the public's concerns by the regulated community and TCEQ.

Response

No changes were made to the rules in response to this comment. The adopted rules implement SB 709 and SB 1267, neither of which amends the requirements for the commission to provide notice to the public. Further, the rules do not reduce the amount of public notice provided, nor the opportunity to comment on applications and draft permits for the permitting programs that are subject to the requirements of SB 709. Submitted comments are considered in each permitting action.

Federal Program Approvability

Comment

EPA commented that it based its 1998 authorization of the Texas Pollution Discharge Elimination System (TPDES) program upon a finding that participation in a CCH was not a prerequisite to judicial review. Recent state court decisions, as well as statements made by the Texas Attorney General, indicate this may no longer be true. In a case currently pending at the Texas Court of Appeals, *Sierra Club and Public Citizen v. TCEQ*, No. 03-14-00130-CV, the Texas Attorney General filed a brief stating that participation in a CCH regarding a water quality permit is an essential component of the exhaustion of administrative remedies, and thus a prerequisite to judicial review. In light of this statement and recent State court holdings on the role of the CCH in determining a person's access to judicial review, EPA requests TCEQ explain how the TPDES program continues to meet the requirements of 40 Code of Federal Regulations (CFR) §123.30 and how the authorized air permitting programs continue to meet Federal Clean Air Act (FCAA) requirements, including FCAA, §502(b)(6).

Response

***TPDES:* Requesting or participating in a CCH is not a prerequisite to judicial review in Texas, provided the person exhausted their administrative remedies prior to requesting judicial review. In the 1998 "Statement of Legal Authority for the Texas National Pollutant Discharge Elimination System Program" (Statement of Legal Authority), the Texas**

Attorney General clearly explained that judicial review of TPDES permits is readily available. The APA provides that if a CCH was held a person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review (Texas Government Code, §2001.171). If a CCH was not held, judicial review is available under the provisions in TWC, §5.351. Neither statute has been amended since Texas received delegation of the TPDES program in 1998.

To place the Texas Attorney General's argument in *Sierra Club and Public Citizen v. TCEQ* within its proper context, one must be familiar with the facts of the case. In that case, Sierra Club and Public Citizen requested a CCH and a hearing was held; they then obtained judicial review but abandoned their claims on appeal. The hearing was to be conducted in two phases, one of which was to determine whether Sierra Club and Public Citizen were affected persons. If, and only if, SOAH found either entity to be an affected person, then SOAH was to hold a CCH on the issues referred. At the hearing, SOAH found that neither entity was an affected person; therefore, SOAH did not address the referred issues. The commission subsequently issued the permit, and both Sierra Club and Public Citizen appealed raising nine points of error. Seven of the nine points of error

challenged the commission's determination that they were not affected persons; the remaining two points of error challenged the commission's decision to issue the permit. Sierra Club and Public Citizen waived their challenge to the points of error regarding their affected person status and, instead, attempted to challenge the two points of error regarding the application.

In response to Sierra Club and Public Citizen's appeal, the Texas Attorney General argued that the court did not have jurisdiction to consider a direct challenge to the issuance of the permit when Sierra Club waived its originally pleaded points of error challenging the commission's denial of its hearing request. This position is not in conflict with the language in the Statement of Legal Authority because Sierra Club and Public Citizen had requested a CCH, which was denied. They sought and obtained judicial review of the commission's decision but abandoned their claims on appeal. If the court agreed with Sierra Club and Public Citizen that they were affected persons, it would have reversed the commission's decision and remanded the application back to the commission.

The State of Texas, acting through TCEQ, is required by 40 CFR §123.30 to provide an opportunity for judicial review of the commission's final

approval or denial of a TPDES permit. The opportunity for judicial review must be sufficient to "provide for, encourage, and assist public participation in the permitting process." In addition, 40 CFR §123.30 also provides that the opportunity for judicial review is sufficient if it allows the same opportunity for judicial review of a TPDES permit that would be available to obtain judicial review in federal court for a National Pollutant Discharge Elimination System (NPDES) permit. As discussed earlier, the opportunity for judicial review has not changed since Texas received delegation of the NPDES program, thus the TPDES program continues to meet the requirements of 40 CFR §123.30.

Finally, TCEQ rules have long provided that a person may seek judicial review even if they failed to file a timely public comment, failed to file a timely hearing request, failed to participate in the public meeting, and failed to participate in the CCH. To do so, such a person must first file a motion for rehearing or a motion to overturn the executive director's decision, to the extent of the changes from the draft permit to the final permit decision (*See* 30 TAC §55.201(h); and §55.25(b)(3), adopted November 5, 1997, and effective December 1, 1997, which were derived from predecessor rules 31 TAC §263.22 and §263.23).

FCAA, including Title V: **FCAA, §502(b)(6), applies only to federal operating permits under Title V, which are not subject to the CCH opportunity, the primary subject of this rulemaking.**

The following information was stated in the most recent public participation rulemaking for new source review (NSR) permit applications (35 *TexReg* 5198, 5201 (June 18, 2010)) which was submitted to EPA on July 2, 2010, and approved on January 6, 2014 (79 FedReg 551).

Access to judicial review for all air quality permits, both NSR and Title V, is governed by Texas Health and Safety Code (THSC), §382.032. Generally, a person must comply with the requirement to exhaust the available administrative remedies prior to filing suit in district court. In addition, EPA has approved the Texas Title V Operating Permit Program, which required the submission of a Texas Attorney General opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution. The Attorney General Opinion specifically states that "(a)ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution." (Section XIX, Supplement to 1993, 1996, and 1998, Statements of Legal Authority for

Texas's FCAA Title V Operating Permit Program by the Attorney General of the State of Texas (October 29, 2001)). The state statutory authority cited in support of the Texas Title V Operating Program includes THSC, §382.032, which is the underlying authority for the appeal of Texas' air quality permit actions. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with Article III of the United States Constitution, is also applicable for every action of the commission subject to the Texas Clean Air Act. In addition, §55.201(h), also applies to NSR applications. As discussed earlier, §55.201(h) provides that a person who failed to file a timely public comment, failed to file a timely hearing request, failed to participate in the public meeting, and failed to participate in the CCH must first file a motion for rehearing or a motion to overturn the executive director's decision, to the extent of the changes from the draft permit to the final permit decision.

In addition, the commission notes that the requirement for a person to exhaust available administrative remedies is also present in federal law. Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed (*Reiter v. Cooper*, 507 U.S. 258, 269 (1993)).

§50.115, Scope of CCHs

Comment

TXOGA supports the proposed revisions to §50.115(c)(1) and interprets these and SB 709 to allow referral of both disputed questions of fact and mixed questions of law and fact, but not only one or the other. TXOGA requests clarification in the preamble that both disputed questions of fact and mixed questions of law and fact can be referred to the same CCH on an application, but questions of law are reserved for the commission.

Response

The commission may refer disputed questions of fact or mixed questions of law and fact, or both, for a CCH on an application, but questions of law are reserved for the commission.

Comment

TAM and TXOGA recommend §50.115(c)(1) specify that the list of issues submitted to SOAH be "detailed and complete" consistent with new Texas Government Code, §2003.047(e-1) in SB 709, Section 1.

Response

The commission agrees that the rule should reflect the statutory directive regarding issues for CCH submitted to SOAH must be detailed and complete

and has added §50.115(g) to implement this part of SB 709. Texas Government Code, §2003.047(e-1) in SB 709, Section 1, requires that the list of issues submitted by the commission to SOAH for a CCH must be "detailed and complete." Section 50.115(c)(1) concerns the commission's evaluation of the issues, and thus the commission declines to amend §50.115(c)(1) as suggested. When commenters can identify specific draft permit conditions or provide detailed information as part of their comments, the commission urges them to do so.

Comment

TXOGA commented that the Texas Legislature clearly intended that hearing requestors must state with specificity the factual issues that the hearing requestor would like to have referred to a CCH rather than allowing hearing requestors to raise broad generalizations and leave the commission and the applicant guessing about specific concerns. TXOGA commented that in order to implement the legislative intent, the commission should amend §50.115(c)(1) to require that issues raised in comments should identify a specific draft permit condition.

Response

No changes were made to the rule in response to this comment. Texas Government Code, §2003.047(e-1) in SB 709, Section 1, prescribes that the

list of issues submitted by the commission to SOAH for a CCH must be "detailed and complete." Further, identifying specific draft permit conditions is not necessary for a comment to raise a specific factual issue. Common examples of issues that are not necessarily related to one or more permit conditions could be comments related to an omission of a requirement in a permit, disagreement regarding the executive director's review of modeling results, or lack of monitoring data necessary to evaluate protectiveness of the draft permit. However, when commenters can identify specific draft permit conditions or provide detailed information as part of their comments, the commission urges them to do so.

Comment

TXSWANA and WEAT/TACWA suggest changing proposed text of §50.115(c)(2) from "by the affected person" to "by an affected person whose request is granted." This language is clearer and mirrors the language used in other parts of the proposed rule.

Response

The commission agrees that the suggested text more precisely implements SB 709 and has changed the rule accordingly.

Comment

EPA commented that the proposed revisions to §50.115(c)(2) remove the right of the hearing requestors to adopt comments made by others as their own issues for a CCH. Commenters frequently adopt the comments of others instead of repeating those comments in their entirety during the public comment process. EPA would like clarification that if a commenter adopts someone else's comments during the public comment period through written comments or verbally at a public meeting that the hearing requestor could still contest those issues at the hearing. If not, please explain whether hearing requestors determined not to be "affected persons" on this basis could still have access to judicial review, including standing.

Response

Texas Government Code, §2003.047(e-1) in SB 709, Section 1, provides that "(e)ach issue referred by the commission must have been raised by an affected person *in a comment submitted by that affected person* in response to a permit application." (emphasis added) This new section also provides that the commission, when referring issues for a CCH, must develop a list of issues that is detailed and complete and contains either only factual questions or mixed questions of fact and law. Prior to the adoption of Texas Government Code, §2003.047(e-1), the controlling applicable law in TWC, §5.556 provides, in part, that the commission may not refer an issue to SOAH unless it determines that the issue "was raised

during the public comment period" and is relevant and material to the decision on the application. The commission interprets SB 709 to mean that with the passage of SB 709 the legislature intends that the person who comments and submits a hearing request must individually and timely submit comments. New comments cannot be made in a hearing request submitted in response to the Executive Director's Response to Comments (as required by §55.156); this is because the new comments would be untimely since they were submitted after the end of the public comment period.

EPA specifically asks whether persons who comment and request a hearing, but who are determined not to be affected persons, will still have access to judicial review. The following is provided to explain judicial review for all possible scenarios with regard to degree of participation in the administrative process.

Standing is a question of law decided by a court (*Cleaver v. George Staton Co. Inc.*, 908 S.W.2d 468 (Tex. App - Tyler 1995, writ denied)). In 1993, the Texas Supreme Court held that standing is a component of subject matter jurisdiction and can be raised for the first time on appeal (*Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (1993)). The Supreme

Court has restated its holding many times, most recently in June 2015 (*State v. Naylor*, 466 S.W.3d 783 (Tex. 2015)).

If a CCH was held, a party to the hearing is entitled to judicial review under the authority and procedures of the APA. If a CCH is not available, a person affected by a final ruling, order, or decision of the commission may file a petition for judicial review under TWC, §5.351 or THSC, §382.032 within 30 days after the decision is final and appealable. A person seeking judicial review under any authority must have exhausted the available administrative remedies, including complying with applicable commission rules regarding motions for rehearing or reconsideration, e.g., §§50.119, 55.211, and 80.272. Requesting or participating in a CCH is not among the exhaustion requirements for judicial review of permit actions under TWC, §5.351 or THSC, §382.032.

Even a person who failed to file timely public comment, failed to file a timely hearing request, failed to participate in a public meeting held under the rules, and failed to participate in any CCH held under Chapter 80 may file a motion for rehearing as provided for in §§50.119, 55.211, or 80.272, or a motion to overturn the executive director's decision under §50.139, as long as the motion addresses only the changes from the draft permit to the

final permit decision, and thus, may exhaust administrative remedies for purposes of seeking judicial review regarding those changes (*See* §55.201(h)).

A finding by an ALJ or the commission concerning a person's status as an affected person would not bind a Texas district court judge in considering that person's standing to seek judicial review, under TWC, §5.351 or THSC, §382.032, of the commission's action on a permit application. The "affected person" standard set out in §55.203 and TWC, §5.115(a) comes into play only in a decision on entitlement to a CCH, whereas the statutory availability of judicial review does not depend on requesting or participating in a CCH.

For TPDES discharge and Underground Injection Control permits, the Office of the Attorney General (OAG) agreed, in its "Statement of Legal Authority for the Texas National Pollutant Discharge Elimination System (TPDES) Program" in 1998 and "State of Texas Office of the Attorney General Statement for Class I, III, IV and V Underground Injection Wells" in 2003, that it will not rely on or refer to the conclusion of an ALJ or the commission that a person is not an affected person as a basis to oppose participation by that person in subsequent judicial proceedings brought

under TWC, §5.351. Although the OAG has not issued an opinion regarding what its position would be in judicial proceedings for the Resource Conservation and Recovery Act permitting program, TWC, §5.351 also applies and presumably the position of the OAG would be no different for that program. Similarly, although the OAG has not issued an opinion regarding what its position would be in judicial proceedings for the air quality NSR program, the requirements of THSC, §382.032 are similar to those of TWC, §5.351, and presumably the position of the OAG would be no different for NSR cases. The OAG may, however, rely on the facts underlying the conclusion in opposing a person's standing in court. Also, when an ALJ or commission conclusion about affected person status is challenged in the judicial proceeding, the Attorney General may defend that conclusion.

Comment

TXSWANA and WEAT/TACWA support the TCEQ's inclusion in §50.115(d)(2), in accordance with new Texas Government Code, §2003.047(e-3), that the ALJ has the discretion to extend a hearing beyond 180 days from the date of the preliminary hearing when agreed to by the parties, or when necessary, to not unduly deprive a party of due process or other constitutional right. Landfill applications, in particular, are extremely complex applications, and TXSWANA believes that additional time will routinely be

required for these applications.

Response

The commission acknowledges this comment.

Comment

TAM supports the manner in which §50.115(d)(2) allows the ALJ to extend the hearing under only very limited circumstances. TAM notes that there may be other laws that allow an ALJ to extend a CCH for reasons other than those specifically outlined in SB 709. However, for the purpose of CCH for the environmental permits to which SB 709 is applicable, the legislative intent was to allow an extension of time under only very limited circumstances. In order for the rule to be consistent with the legislation and new Texas Government Code, §2003.047(e-2), TAM requests that TCEQ clarify in §50.115(d)(2) that no hearing shall be longer than the earlier of 180 days after the date of the preliminary hearing or the date specified by the commission. TAM comments that the manner in which the provision is currently drafted implies that the commission can specify a date beyond 180 days, which is not consistent with the express language of the bill, in new Texas Government Code, §2003.047(e-2), and suggests that the language be consistent with the amendment proposed to §80.4(c)(18) because it is consistent with the legislation. TXOGA commented that the rule should clarify that the commission may specify a CCH may be shorter than 180 days, but may not be longer, subject to extension

as specified in SB 709.

Response

The statute specifically provides that the term of the hearing will be no longer than 180 days from the date of the preliminary hearing, or an earlier date specified by the commission and has amended the rule accordingly. The commission has revised §50.115(d)(2) from proposal to ensure that the rule is compliant with new Texas Government Code, §2003.047(e-2).

Comment

OPIC commented that the 180-day limitation on the duration of a CCH appears in §§50.115(d)(2), 80.4(c)(18), and 80.252(c). OPIC's recommendation addresses the scenario where a preliminary hearing does not start and end on a single date. This occurs when a preliminary hearing must be continued and therefore the preliminary hearing occurs on multiple dates. In OPIC's experience, this continued/second preliminary hearing scenario can happen for a variety of reasons including notice defect, severe weather, problems with the size or location of the hearing venue, or jurisdiction issues. When a preliminary hearing must be continued, the delay between the dates can be weeks or even months. To account for this possibility, OPIC believes the 180 days should be calculated from the last day of the preliminary hearing, not the first.

OPIC comments that if a party is not admitted until a continued/second preliminary hearing is held, but the calculation of the 180 days begins at the first day of the preliminary hearing, that new party is subject to a shorter procedural schedule than other parties. OPIC notes that the consequences of calculating the 180-day period from the first day of the preliminary hearing may include less time for parties to conduct and respond to discovery and less time to prepare pre-filed evidence. Also, all parties to a CCH should be treated consistently and equally, and no party should be prejudiced by receiving less time to participate. OPIC recommends counting the 180 days from the last day of the preliminary hearing to ensure that the procedural schedule grants all parties equal amounts of time to participate in the important steps of a CCH. Therefore, OPIC recommends that the word "first" should be replaced with "last" in §50.115(d)(2).

TCC commented that it recognizes that in some instances, an ALJ will hold multiple preliminary hearings, and urges TCEQ to interpret the rules to trigger the 180-day timeline from the date of the first preliminary hearing, unless agreed to by the parties, which falls under a proper extension. TCC notes that this is consistent with the legislative intent that there is certainty in the process for all parties by maintaining a consistent timeline trigger, and ensuring the expeditious resolution of the hearing.

Response

No changes were made to the rule in response to this comment. Most preliminary hearings are conducted on one day. The types of events included in the comments occur infrequently. In addition, it is very rare for the period between the first and last days of a preliminary hearing to be months in length. The ALJ has the authority to extend the length of the hearing if necessary to ensure due process and thus there is no need for the rule to specify any beginning date for calculating the length of the hearing other than the first day, which is also consistent for hearings regarding applications filed before September 1, 2015.

Comment

TXOGA commented that prior to the enactment of SB 709, any person who appeared at a preliminary hearing might be admitted as a party if the person could demonstrate that the person qualifies as an affected person. TXOGA comments that SB 709, Section 1, adds Texas Government Code, §2003.047(e-1) which expressly requires that each issue referred by the commission must have been raised by an affected person in a comment submitted by that affected person. SB 709, Section 2, adds TWC, §5.115(a-1)(2)(B) which expressly precludes a hearing requestor from being an affected person unless the hearing requestor timely submitted comments. TXOGA comments that the legislative intent is clearly to only allow participation in a CCH by an affected party who participated in the permitting process by offering comments and requesting a CCH

based on that affected party's comments. Thus, a subsection in §50.115 should be added to clarify that, for applications not directly referred to a CCH, the only possible parties are those who triggered the CCH based on their comments and associated hearing requests.

Response

No changes were made to the rule in response to this comment. For applications submitted on or after September 1, 2015, the commission agrees that for a person to be considered an affected person, they must submit comments and a hearing request. Commission rule §55.211(e) and (f) address the commenter's concerns. A person whose hearing request is denied by the commission has two options for subsequent action. First, under subsection (e), they may seek to be a party if any other hearing request is granted, but they must have timely submitted comments regarding the application. Or, under subsection (f), they may file a motion for rehearing under §80.272 if no hearing requests are granted. Except for amendments to specifically implement portions of SB 1267, §55.211(f) was not proposed for amendment, and the commission declines to make this change without the opportunity for the public to comment on a proposed amendment to §55.211(e) and (f).

§50.143, Withdrawing the Application

Comment

Public Citizen commented that the proposed amendment to §50.143 does not reflect the plain language of the statute nor the legislative intent of SB 709, Section 5(1). SB 709, Section 5(1)(c) was added to prevent an applicant from circumventing SB 709, Section 5(1)(b) by withdrawing an application filed before September 1, 2015, which is withdrawn and for which a substantially similar application is filed after September 1, 2015. Public Citizen stated that Section 5(1)(b) and (c) of SB 709 is designed to minimize the potential for abuse by an applicant seeking to benefit from a more advantageous permitting process for the applicant. Public Citizen recommends that to reflect this intent, the text "on or after September 1, 2015," in connection to when an application is withdrawn should not be included.

Response

The commission agrees that there is no date restriction in SB 709, Section 5(1)(c)(1)(B)(ii) regarding the withdrawal date of an application that meets the other criteria of SB 709, and is not adopting this language.

Comment

TXSWANA and WEAT/TACWA suggest adding criteria which the executive director may consider in §50.143, specifically: 1) changes in methods of treatment or disposal; 2)

significant changes in design; and 3) whether the resubmitted application is more protective of human health and the environment than the withdrawn application. In addition, they suggest, for clarity, that the text "determines the resubmitted application is substantially similar" be revised to "determines the resubmitted application is substantially similar to the withdrawn application."

Response

The commission has amended the rule in response to part of these comments by adding the phrase "to the withdrawn application." In addition, the criterion "changes in methods of treatment or disposal of waste" is added as subsection (b)(7).

The commission declines to include the other suggested criteria. The evaluation of whether an application is "significantly similar" will also depend on its complexity. Rather than adopt a more subjective criteria of "significant changes in design," the determination will need to be based, as it is for every application, on how the application meets the permitting requirements. Each permit application is reviewed to ensure it complies with various rules that range from basic administrative requirements to complex technical requirements. The executive director will review each resubmitted application in light of the applicable regulatory requirements

to determine if the new application is "significantly similar."

SUBCHAPTER F: ACTION BY THE COMMISSION

§50.115, §50.119

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, Chapter 5, Subchapter M, concerning Environmental Permitting Procedures, which requires the commission to provide notice, opportunity for comment and to request a public meeting or contested case hearing (CCH), responses to comments, and applications to be directly referred for a CCH; TWC, §26.020, concerning Hearing Powers, which authorizes the commission to call and hold hearings, and make decisions to administer the provisions of TWC, Chapter 26 or the rules, orders, or other actions of the commission; TWC, §26.021, concerning Delegation of Hearing Powers, which authorizes the commission to authorize the chief administrative law judge of the State Office of Administrative Hearings (SOAH) to call and hold hearings and report to the commission; and TWC, §27.019, concerning Rules, Etc., which requires the commission to adopt rules reasonably required for the performance of duties and functions under

the Injection Well Act. The amendments are also adopted under Texas Health and Safety Code (THSC), §361.024, concerning Rules and Standards, which authorizes the commission to adopt rules consistent with THSC, Chapter 361 and establish minimum standards of operation for the management and control of solid waste under THSC, Chapter 361; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning the State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which authorizes the commission to provide notice of permit applications. Additional relevant sections are Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute or Rule which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation; Texas Government Code, §2001.142, concerning Notification of Decisions and Orders, which specifies the

requirements for agencies to provide notice of their decisions and orders; Texas Government Code, §2001.146, concerning Motions for Rehearing: Procedures, which authorizes the procedures for motions for rehearing filed with state agencies; and Texas Government Code, §2003.047,concerning the Natural Resource Conservation Division, which provides the authority for SOAH to conduct hearings on behalf of the commission.

The adopted amendments implement Texas Government Code, §2001.146 and §2003.047; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§50.115. Scope of Contested Case Hearings.

(a) Subsections (b) - (d) of this section apply to applications under Texas Water Code, Chapters 26 and 27 ~~of the Texas Water Code~~ and Texas Health and Safety Code, Chapters 361 and 382 ~~of the Texas Health and Safety Code~~. Subsection (e)(1) of this section applies to all applications under this subchapter. Subsections (e)(2) and (f) of this section apply as stated in the subsection.

(b) When the commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be referred to State Office of Administrative Hearings (SOAH) [SOAH] for a hearing.

(c) The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue:

(1) involves a disputed question of fact or a mixed question of law and fact;

(2) was raised during the public comment period, and, for applications filed on or after September 1, 2015, was raised in a comment made by an ~~the~~ affected person whose request is granted; and

(3) is relevant and material to the decision on the application.

(d) Consistent with the nature and number of the issues to be considered at the contested case hearing, the commission by order shall specify the maximum expected duration of the hearing by stating the date by which the judge is expected to issue a proposal for decision.

(1) For applications filed before September 1, 2015, no [No] hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. A judge may extend any hearing if the judge determines

that failure to grant an extension will deprive a party of due process or another constitutional right.

(2) For applications filed on or after September 1, 2015, no hearing shall be longer than 180 days~~, or a date specified by the commission,~~ from the first day of the preliminary hearing, or an earlier date specified by the commission, to the date the proposal for decision is issued, unless the hearing is extended by the judge. A judge may extend any hearing if the judge determines that failure to grant an extension will unduly deprive a party of due process or another constitutional right, or by agreement of the parties with approval of the judge.

(e) The commission may limit the scope of a contested case hearing:

(1) to only those portions of a permit for which the applicant requests action through an amendment or modification. All terms, conditions, and provisions of an existing permit remain in full force and effect during the proceedings, and the permittee shall comply with an existing permit until the commission acts on the application; and

(2) to only those requirements in Texas Health and Safety Code, §382.055 [of the Texas Health and Safety Code] for the review of a permit renewal.

(f) When referring a case to SOAH, for applications other than those filed under Texas Water Code, Chapters 26 and 27 [of the Texas Water Code] and Texas Health and Safety Code, Chapters 361 and 382 [of the Texas Health and Safety Code], the commission or executive director shall provide a list of disputed issues. For hearings on these applications, the disputed issues are deemed to be those defined by law governing these applications, unless the commission orders otherwise under §80.6(d) of this title (relating to Referral to SOAH).

(g) When referring a case to SOAH under Texas Water Code, §5.556 for applications filed on or after September 1, 2015, the commission shall submit a list of detailed and complete issues.

§50.119. Notice of Commission Action, Motion for Rehearing.

(a) If the commission acts on an application, the chief clerk shall mail or otherwise transmit the order and notice of the action to the applicant, executive director, public interest counsel, and to other persons who timely filed public comment, or requests for reconsideration or contested case hearing. The notice shall explain the opportunity to file a motion under §80.272 of this title (relating to Motion for Rehearing). If the commission adopts a response to comments that is different from the

executive director's response to comments, the chief clerk shall also mail the final response to comments. The chief clerk need not mail notice of commission action to persons submitting public comment or requests for reconsideration or contested case hearing 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, §80.272 of this title applies. A motion for rehearing must be filed not later than 25 [within 20] days after the date [the person is notified in writing of] the commission's final decision or order on the application is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, §2001.142 and §80.276 of this title, by agreement under Texas Government Code, §2001.147, or by the commission's written order issued pursuant to Texas Government Code, §2001.146(e). [A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail.] If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

(c) Motions for rehearing may be filed on:

(1) an issue that was referred to State Office of Administrative Hearings (SOAH) [SOAH] for contested case hearing, or an issue that was added by the judge;

(2) issues that the commission declined to send to SOAH for hearing; and

(3) the commission's decision on an application.

(d) A motion for rehearing must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The motion must also state the legal and factual basis for the claimed error.

SUBCHAPTER G: ACTION BY THE EXECUTIVE DIRECTOR

§50.143

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §26.020, concerning Hearing Powers, which authorizes the commission to call and hold hearings, and make decisions to administer the provisions of TWC, Chapter 26 or the rules, orders, or other actions of the commission; TWC, §26.021, concerning Delegation of Hearing Powers, which authorizes the commission to authorize the chief administrative law judge of the State Office of Administrative Hearings to call and hold hearings and report to the commission; and TWC, §27.019, concerning Rules, Etc., which requires the commission to adopt rules reasonably required for the performance of duties and functions under the Injection Well Act. The amendment is also adopted under Texas Health and Safety Code (THSC), §361.024, concerning Rules and Standards, which authorizes the commission to adopt rules consistent with THSC, Chapter 361 and establish minimum standards of operation for the management and

control of solid waste under THSC, Chapter 361; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning the State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Additional relevant sections are Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute of Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The adopted amendment implements Senate Bill 709 (84th Texas Legislature, 2015).

§50.143. Withdrawing the Application.

(a) Upon a request by the applicant at any time before the application is referred to the State Office ~~Of~~ of Administrative Hearings (SOAH) [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. 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 §55.210 of this title (relating to Direct Referrals) [§55.209(h) of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing)].

(b) Applications filed before September 1, 2015, for which chief clerk mailed the executive director's preliminary decision and notice of a draft permit under §39.419 of this title (relating to Notice of Application and Preliminary Decision) that are subsequently withdrawn by the applicant ~~on or after September 1, 2015,~~ are governed by the commission's rules as they existed immediately before September 1, 2015, and those rules are continued in effect for that purpose if the application is refiled with the commission and the executive director determines the resubmitted application is substantially similar to the withdrawn application. For purposes of making this determination, the executive director may consider the following information contained in the withdrawn application and the refiled application:

(1) the name of the applicant;

(2) the location or proposed location of the construction, activity or discharge, to be authorized by the application;

(3) the air contaminants to be emitted;

(4) the area to be served by a wastewater treatment facility;

(5) the volume and nature of the wastewater to be treated by a wastewater treatment facility;

(6) the volume and type of waste to be disposed; ~~or~~

(7) changes in methods of treatment or disposal of waste; or

(8) ~~(7)~~ any other factor the executive director determines is relevant to this determination.