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

Sections 55.156, 55.201, 55.203, and 55.211 are adopted *with changes* to the proposed text as published in the August 21, 2015, issue of the *Texas Register* (40 TexReg 5240) and will be republished in this issue of the *Texas Register*. Section 55.205 and §55.210 are adopted *without changes* to the proposed text and will not be republished.

Section §55.156(e) adopted to be withdrawn as part of the State Implementation Plan (SIP) and the withdrawal will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the SIP.

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 50, Action on Applications and Other Authorizations; 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), they 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 the SOAH for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

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

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

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

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

Section by Section Discussion

In addition to the adopted amendments associated with this rulemaking, various stylistic, non-substantive changes to update rule language to current *Texas Register*

style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§55.156, Public Comment Processing

Adopted subsections (d)(3) and (e)(3) implements SB 709, Section 1, Texas Government Code, §2003.047(e-1) and SB 709, Section 5(a)(1). These subsections are amended by adding a date to provide that these subsections apply to applications filed before September 1, 2015. Adopted subsections (d)(4) and (e)(4) also implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1. Adopted subsections (d)(4) and (e)(4) provide that only relevant and material disputed issues of fact raised during the comment period by a hearing requestor who is an affected person and whose request is granted for an application filed with the commission on or after September 1, 2015.

Existing subsections (d)(4) and (e)(4) are re-designated as subsections (d)(5) and (e)(5), respectively. At adoption, the commission adds to subsections (d)(4) and (e)(4) that mixed questions of fact and law can be considered in a CCH for an application filed on or after September 1, 2015. Non-substantive changes are also adopted in subsections (d) and (e) to improve readability and to conform to agency style and usage guidelines. In addition, the applicability text that referenced the effective date of the section in subsection (f) is updated to provide the precise date of June 24, 2010.

Section §55.156(e) is withdrawn as part of the SIP and is adopted to be submitted to EPA as a revision to the SIP.

§55.201, Requests for Reconsideration or Contested Case Hearing

The amendment to §55.201 is adopted to implement SB 709, Section 1, Texas Government Code, §2003.047(e-1) and SB 709, Section 5(a)(1). Subsection (c) is amended to provide that for applications filed on or after September 1, 2015, a request for a CCH must be based on timely comments. At adoption, the commission revises the subsection to provide that the request must be based on the requestor's comments, rather than the comments of an affected person.

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

responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law.

§55.203, Determination of Affected Person

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

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

Subsection (e) is adopted in response to comments and provides that the commission, in determining whether a person is an affected person for the purpose of granting a hearing request for an application filed before September 1, 2015, may also consider the factors in §55.203(d) to the extent consistent with case law.

§55.205, Request by Group or Association

The amendment to §55.205 is adopted to implement the amendments to SB 709, Section 2, TWC, §5.115(a-1) and (2) and SB 709, Section 5(a)(1). Adopted subsection (b)(3) and (4) carries forward two existing requirements in subsection (a)(2) and (3). Subsection (b) also specifically implements TWC, §5.115(a-1)(2)(A) in adopted subsection (b)(1) and (2). Adopted subsection (b)(1) and (2) provides that a request for a CCH from a group or association on an application filed on or after September 1, 2015, may not be granted unless the group or association timely submits comments on the application and identifies one or more members of the group or association by name and physical address. Existing subsection (b) is adopted to be re-designated as subsection (c).

§55.210, Direct Referrals

The amendment to §55.210 is adopted to implement SB 709, Section 1, Texas Government Code, §2003.047(e-5) and SB 709, Section 5(a)(1). Subsection (e) is amended to clarify the applicability of the procedures for when Notice of Application

and Preliminary Decision is provided at or after direct referral under this section. Specifically, those procedures only apply to applications received by the commission before September 1, 2015

Adopted subsection (f) prohibits an ALJ from holding a preliminary hearing on applications filed on or after September 1, 2015, until after the issuance of the executive director's response to comment.

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

The amendment to §55.211(c)(2)(A) is adopted to implement SB 709, Section 1, Texas Government Code, §2003.047(e-1) and SB 709, Section 5(a)(1). Subsection (c)(2)(A) is restructured into clauses (i) and (ii). Clause (i) is amended by adding an applicability clause to the existing rule that provides that this paragraph is applicable to applications filed before September 1, 2015.

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

from an affected person whose request for CCH was granted by the commission and that those issues may be mixed issues of law and fact.

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

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 55 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Rather, they are procedural in nature and implement changes made to the TWC in SB 709, and to the APA in SB 1267, by revising rules regarding requests for CCH by individual entities and groups or associations, determination of affected persons and disputed issues for CCH on certain applications, and commission action on requests for CCH.

The rulemaking is procedural in nature and does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general 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 55 are procedural in nature and

implement changes made to the Texas Government Code, §2003.047, and TWC in SB 709, and to the APA in Texas Government Code, Chapter 2001 in SB 1267 by amending rules regarding requests for a CCH by individual entities and groups or associations, determination of affected persons and disputed issues for a CCH on certain applications, and commission action on requests for a CCH. This adopted rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the law described in the Statutory Authority section of this rulemaking.

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 assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendments to Chapter 55 revise rules regarding requests for a CCH by individual entities and groups or associations, determination of affected persons and disputed issues for a CCH on certain applications, and commission action on requests for a CCH and are procedural in nature. The primary purpose of the adopted rulemaking is to

implement changes made to the Texas Government Code, §2003.047 and the TWC in SB 709, and to the APA, Texas Government Code, Chapter 2001 in SB 1267. Promulgation and enforcement of the adopted rulemaking will not burden private real property. The adopted rules do not affect private property in a manner that restricts or limits an owner's right to the property that otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). Although the adopted rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do partially fulfill a federal mandate under 42 United States Code, §7410. Consequently, the exemption that applies to these adopted rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the 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 rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. 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 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

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 Texas Attorney General's 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* §55.201(h) and §55.25(b)(3), adopted November 5, 1997, and effective December 1, 1997, which were derived from predecessor rules in 30 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 CCH opportunity, which is 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, this §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)).

Comment

EPA commented that it has no specific comments regarding the proposed amendments to §55.156(e), since these revisions, and subsection (e) as a whole, pertain only to the instructions for requesting a CCH. However, EPA disagreed with the alternative proposal to withdraw the entirety of §55.156 from the Texas SIP, stating that §55.156 is a necessary and required element for the Texas Title I permit program, stating that this section provides the executive director must respond to all comments received regarding air quality NSR applications, and requires that the final permit and the response to comments be available on the TCEQ website. If TCEQ withdraws §55.156 from the Texas SIP, TCEQ will need to submit an analysis of how the remaining provisions of the Texas SIP satisfy the Title I public notice

requirements for Prevention of Significant Deterioration, Nonattainment NSR, and minor NSR permit applications. EPA commented that without a demonstration that the Texas SIP, absent §55.156 continues to satisfy all required elements for Title I public notice, EPA would revisit, and potentially reconsider, its past approvals of the Texas programs.

TAM commented that the changes to §55.156(e) are not necessary to meet requirements for SIPs under the FCAA and should be withdrawn from the SIP, rather than be submitted to EPA as a revision to the SIP. TAM recommended that alternatively, TCEQ could create a new section in the rules that provides instructions to the public on how to request a CCH for applications filed after September 1, 2015.

TXOGA commented that CCHs are purely a creature of state law, not federal law, and should not implicate the FCAA or Texas' SIP and that it is clear §55.156(e) is not necessary to meet SIP requirements since the CCH process is not a federal requirement. However, there is nothing problematic to be solved by submitting the amendment to subsection (e) or withdrawing subsection (e) from the SIP as part of this rulemaking action. Further, since the CCH process is entirely outside of EPA's legal purview, instructions to a hearing requestor regarding a CCH as proposed in §55.156(e) for applications filed after September 1, 2015, should be implemented completely independent of SIP-approved TCEQ rules. TXOGA recommends that the commission

should not change §55.156(e) but instead should include instructions for requesting a CCH for applications filed after September 1, 2015, in a new subsection. As previously discussed, asking for a SIP revision for the CCH process would create unnecessary regulatory uncertainty.

Response

Although the commission is adopting changes to §55.156(e), it agrees with EPA that §55.156(a), (b), (c)(1), and (g) should remain in the SIP and is withdrawing the prior version of subsection (e) from the approved SIP. Subsection (e) pertains only to the instructions for requesting a CCH, which the commission agrees is not a requirement under the FCAA.

Comment

TXSWANA and WEAT/TACWA suggest changing "...and whose request is granted can be considered" to "...and whose request is granted and not withdrawn can be considered" in §55.156(e)(4) to clarify that, if a requestor settles with an applicant after issues are referred to SOAH, the requestor takes his or her issues with him or her. The commenter notes that this will encourage applicants to settle with individual requestors, reduce the number of issues and complexity of hearings, and better implement the intent of SB 709, particularly in light of the language in SB 709 that prohibits requestors from adopting issues of other requestors. If the TCEQ intends that a requestor's issues

will remain in the hearing even if the requestor settles after the issues are referred to SOAH, the commenter suggests implementing rules make that clear.

Response

No changes were made to the rule in response to this comment. The request goes beyond new Texas Government Code, §2003.047(e-1), which does not address the status of issues during the CCH. Further, such a rule could potentially make the issues at the hearing a moving target if parties withdraw after the hearing commences, which will complicate, at a minimum, the agency record and judicial review.

Comment

TXSWANA and WEAT/TACWA suggest changing "disputed issues of fact raised" to "disputed issues of fact and mixed questions of fact and law raised" to better track the language of SB 709 in §55.156(d)(3) and §55.159(e)(4).

Response

The commission agrees and has made the corresponding changes to the rules. In doing so, the commission assumes the commenters meant to reference §55.156(d)(4) and (e)(4), rather than §55.156(d)(3) and

§55.159(e)(4), since the former are the new rules implementing SB 709. The commission does not require a hearing requestor to specifically list or identify issues as mixed questions of fact and law, although the commission can refer both disputed issues of fact and mixed questions of fact and law for a CCH.

§55.201, Requests for Reconsideration or CCH

Comment

TCC supports the position that a hearing requestor may not adopt the comments of others to be used as a basis of their hearing request, and that an individual, an organization, or association may not adopt the comments of others to form the basis of a hearing request. The commenter notes that as indicated in the preamble to the proposed rules, hearing requestors must base their hearing request on the specific and detailed issues raised in their own comments and cannot adopt the comments made by others to be used as their own issues for a CCH. The commenter also notes that this properly implements the intent of the Texas Legislature in SB 709, Section 1, in new Texas Government Code, §2003.047(e-1), which denotes that a commenter must have raised an issue with specificity in their own comments, as properly produced and submitted with full understanding of the claims made.

Response

SB 709, Section 1, Texas Government Code, §2003.047(e-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) New Texas Government Code, §2003.047(e-1) also provides that the commission, when referring issues for a CCH, must develop a list of issues that is detailed and complete that 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 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.

Comment

TAM recommends that in §55.201(c) the phrase "affected person's" be changed to "requestor's" to make the rule consistent with new Texas Government Code, §2003.047(e-1). TAM comments that the beginning of the subsection clarifies that the request must come from an affected person. SB 709 makes clear that the affected person requesting the CCH must have made timely comments. TAM recommends the clarifying change to make the new language in subsection (c) consistent with SB 709 and the new language in §55.201(d)(4)(B).

Response

The commission agrees for the reasons stated in the comment and has made the change accordingly.

Comment

TAM and TXOGA request the commission modify the rule language in §55.201(d)(4)(B) to clarify that the hearing request be "detailed and complete" consistent with new Texas Government Code, §2003.047(e-1) in SB 709.

Response

No changes were made to §55.201(d)(4)(B) in response to this comment.

The commission agrees that its rules should reflect the statutory directive that issues for CCH submitted to SOAH must be detailed and complete and has therefore added §50.115(g) to implement SB 709, Section 1, Texas Government Code, §2003.047(e-1). SB 709 requires that the list of issues submitted by the commission to SOAH for a CCH must be "detailed and complete." Section §55.201(d)(4)(B) concerns the requirements for hearing requests regarding applications filed on or after September 1, 2015, not the commission's submittal of the issues to SOAH, and thus, the commission declines to amend §55.201(d)(4)(B) as suggested.

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 §55.201(d)(4)(B) 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. SB 709 prescribes that the list of issues submitted by the commission to SOAH for a CCH must be "detailed and complete." Further, although it may be helpful in some cases to do so, 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.

§55.203, Determination of Affected Person

Comment

EPA commented that the TCEQ has proposed revisions to §55.203(d) that add criteria that SOAH can consider when making a determination of an "affected person." EPA requested an explanation of how these rule criteria comport with the standing requirements of Article III of the United States (U.S.) Constitution for judicial review under the federal statutes applicable to federal permit programs

being implemented by TCEQ, and also to explain whether hearing requestors, determined not to be "affected persons" on this basis, could still have access to judicial review, including standing consistent with Article III of the U.S. Constitution.

Response

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 of the commission's action on a permit application under TWC, §5.351 or THSC, §382.032. The "affected person" standard set out in TWC, §5.115(a) and §55.203 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

HCPCSD commented that the amendments to §55.203 effectively remove the ability to request affected person status during a preliminary hearing and is a cause for concern. The commenter notes that in the current process, an individual is allowed to seek party status at the preliminary hearing or if the ALJ extends the time after such discrepancies are raised. The commenter also notes that if there are any discrepancies in the underlying permit application, affected persons are potentially left in a regulatory quagmire under these proposed rules.

HCPCSD also commented that if a permit application has any typographical errors,

substantive errors or omissions, such as an incorrect address, vague facility location or incorrect distance requirement, an affected party might not timely submit comments because they were not aware that they may be an affected person. The commenter recommends that the commission include a provision allowing additional time for affected persons to seek party status and file comments if permit applications are amended during or after the public comment period.

Response

No changes were made to the rules in response to this comment. Unless an applicant withdraws its application after the close of the comment period, there is no opportunity for an applicant to amend its application after the comment period closes without the comment period being extended so that the applicant can comply with the public participation requirements, including making a copy of the application available for review in a public place. Depending upon the nature of any such amendments, the application could be subject to re-publication of the Notice of Receipt of Application and/or the Notice of Preliminary Decision, thus providing another opportunity for submitting comments.

Air quality applications subject to CCH cannot be amended within the 30 days before hearing, which is calculated from the first day of the

preliminary hearing (THSC, §382.0291(d)).

Comment

TCC supports the changes proposed to §55.203(d), which authorizes the commission to take into consideration the merits of the underlying permit application in considering whether a hearing requestor is an affected person, as this is consistent with current case law in *Sierra Club v. Tex. Comm'n on Envtl. Quality & Waste Control Specialists,* 455 S.W.3d 214 (Tex. Civ. App. -Austin 2014, pet. denied) and SB 709. The commenter stated that the court held that the commission has the ability to inquire into the likely effects of the proposed permit on the hearing requestor because those merits issues are properly the subject of a CCH, and that the Texas Legislature codified this ruling in SB 709, providing clear legislative intent that the commission has the ability to weigh the merits of the underlying application relative to the validity of the hearing requestor's claims. TCC supports proposed §55.203(d) as properly implementing this legislative intent.

Response

The commission acknowledges this comment. The changes to §55.203(d) implement new TWC, §5.115(a-1)(1).

Comment

TAM and TXOGA commented that one of the statutory factors the commission may consider when evaluating hearing requests, regarding the likely impact of regulated activity on the health, safety, and use of a hearing requestor's property, was not included in the list of factors in proposed §55.203(d). TAM assumes this was an oversight and requests that the commission include this statutory factor in the final rule. TAM commented that this is consistent with the statutory change made in SB 709 to TWC, §5.115(a-1)(1)(B), and is consistent with the discretion afforded to the commission by the Third Court of Appeals in *Sierra Club v. Tex. Comm'n on Envtl. Quality & Waste Control Specialists*, 455 S.W.3d 214 (Tex. Civ. App. -Austin 2014, pet. denied).

Response

No changes were made to the rule in response to this comment. TAM is correct that the criterion in TWC, §5.115(a-1)(1)(B) is not included in the rule that implements the discretionary criteria for the commission to consider when referring applications to SOAH. This particular criterion has been a mandatory criterion for the commission to consider in §55.203(c)(4) for applications filed on or after September 1, 1999, and, for applications filed before that date, in §55.29 and its predecessor rules which implement TWC, §5.115(a), which was adopted by the Texas Legislature in 1985.

Comment

TXOGA commented that the commission should establish a deadline for submittal of the information in proposed §55.203(d)(3). This would prevent an argument that late filed information is fair game.

Response

No changes were made to the rule in response to this comment. Deadlines for submittal of comments, hearing requests, and response to hearing requests are established in other rules. Section 55.203 concerns action by the commission regarding affected person determinations.

Comment

TXSWANA and WEAT/TACWA suggest deleting "filed on or after September 1, 2015" from §55.203(d), stating that under existing case law, the commission may consider the same factors. The commenters' position is that by stating that these factors may be considered for applications filed on or after September 1, 2015, a court might apply the negative inference, i.e., that the commission no longer intends to consider these factors in applications filed before September 1, 2015, even though it would otherwise have the discretion to do so under current law.

Response

The rule was changed from proposal in response to these comments. The date is necessary to implement SB 709, Section 2, TWC, §5.115(a-1)(1) for applications filed on or after September 1, 2015. To avoid the possible negative inference stated in the comment, subsection (e) is adopted that provides that the commission may consider the factors in §55.203(d) for applications filed before September 1, 2015, to the extent consistent with law. At the time the commission is adopting these rules, the Texas Supreme Court has denied the petition for review appealing the opinion of the Third Court of Appeals in *Sierra Club v. TCEQ and Waste Control Specialists*, 455 S.W.3d 214 (Tex. Civ. App. -Austin 2014, pet. denied).

§55.205, Request by Group or Association

Comment

HCPCSD expressed concern that §55.205 places individuals, who live near facilities and often rely on the resources provided by citizen groups and organizations to effectively contest a permitting action, will be at an unfair disadvantage in pursuing CCH.

Response

No changes were made to the rule in response to this comment. The commission understands individuals often rely on the resources provided by citizen groups and organizations to assist or represent them in the public

participation process. The amendment to §55.205 ensures that the requirements for requesting a CCH by groups or associations reflect the statutory changes in SB 709 and are clearly stated in this rule. Although adopted §55.210(b)(1) prescribes that comments must be timely submitted, that is not a new requirement, and most of paragraph (2) and all of paragraphs (3) and (4) are not new requirements. The only new express requirement is the portion of subsection (b)(2) which requires that the member(s), that would otherwise have standing to request a hearing, be identified by name and physical address. Such a requirement was previously implied via the group or association standing requirements, and this information has generally been included in CCH requests from groups or associations.

Comment

TAM recommends that §55.205(b)(2) be amended to clarify that a group or association must identify in a "timely request for a CCH" its member(s) who would be affected in their own right for purposes of establishing the affected person status of the group or association. TAM appreciates that proposed subsection (b)(1) specifies that comments on the application must be timely submitted by the group or association, but this is different than requiring the group or association to identify its affected member(s) in a timely request for a CCH. TAM requests the agency make this clarifying change in the

final rule.

Response

No changes were made to the rule in response to this request. A CCH request from a group or association must comply with all of the requirements of §55.205(b), and the text of subsection (b)(2) specifically addresses the commenter's concern.

§55.210, Direct Referrals

Comment

TAM wants to ensure that the commission is not extending any of the timeframes in the current process and the rules do not inadvertently create potential delays or add time to the current process. TAM requests §55.210(f) clarify that the scheduling of a preliminary hearing can run concurrently with the executive director's preparation and issuance of the response to comments.

Similarly, TXOGA commented that in order to avoid potential delays in cases in which a direct referral to a CCH is requested, the rules should provide the scheduling of a preliminary hearing will run concurrently with the executive director's 60-day timeframe in §55.156 to prepare his response to comments. TXOGA stated that by providing concurrent scheduling of a preliminary hearing with preparation of the

executive director's response to comment will provide more certainty in scheduling for permit applicants, hearing requestors, TCEQ staff, ALJs, and the public. TXOGA suggests the rule include a sentence that requires the chief clerk to coordinate with SOAH, the executive director, and "the parties" to schedule the preliminary hearing as soon as practicable, but no later than the response to comments deadline which is 60 days after the end of the comment period.

Response

No changes were made to the rule in response to these comments. At the time the Office of Chief Clerk (OCC) is working with SOAH to schedule a preliminary hearing for directly referred applications, the protesting parties have not yet been determined since SOAH does not yet have jurisdiction over the application and, therefore, complete coordination could not necessarily be achieved.

The current permitting timeframes and deadline for filing of the executive director's response to comments are not extended by SB 709 or the rule amendments implementing SB 709 prohibits holding a preliminary hearing for directly referred applications until after the executive director's response to comments has been issued. TCEQ can, and does, work with SOAH to schedule the preliminary hearing prior to the filing of the

response to comments or concurrently with the preparation and filing of the response to comments for these applications. The OCC works as expeditiously as possible, given the circumstances of each case, to schedule the preliminary hearing.

Comment

SC/TCE/EIP and Public Citizen commented that the ability to conduct discovery is one of the most important benefits of the CCH process, in part because the executive director's staff is limited in its ability to explore the basis of the facts and opinions presented in the application. The commenters believe that due to their independent perspective, affected persons and the experts they employ can often identify factual areas needing inquiry that the executive director's staff may have missed. The commenters are concerned that it is difficult for meaningful discovery to occur within the 180-day time limit set forth in SB 709, Section 1, and now reflected in the proposed rules. The ability to conduct discovery could be particularly hindered in light of the current requirement that all discovery on a party be completed prior to the submission of that party's prefiled testimony. Specifically, commenters ask whether the other parties will be allowed to conduct any discovery upon the applicant if the administrative record is the applicant's direct case. The commenters stated that the rules are not clear on how the applicable discovery deadlines will be harmonized with this new means by

which an applicant may present its case, and, even if a case progresses through the submission of prefiled testimony, it is difficult to see how the applicant's prefiled testimony would be submitted in a timely fashion that will allow for genuine discovery, given the need to fit other procedural steps into the process.

Response

No change has been made to the rules in response to this comment. The commission did not propose any changes to the rules for discovery in CCH for permit applications. The prima facie case, which will be the administrative record, will be available for review at SOAH and the OCC at least 30 days prior to the first day of the preliminary hearing, the same length of time that notice of the CCH is provided to the public, as provided for in the commission's rules. The administrative record, which consists of certified copies of documents, serves as the applicant's entire direct case, unless the applicant chooses to offer more evidence. Therefore, the requirement in §80.151(b)(2) that discovery must be complete prior to the deadline for prefiled testimony would not apply to the applicant's direct case, except to the extent that the applicant wishes to submit prefiled testimony, in addition to the contents of the administrative record. Statutory parties (the applicant, OPIC, and the executive director) and persons who submitted comments and hearing requests regarding

applications that are direct referred to SOAH, and who expect to seek party status, can expedite their preparation for the hearing and by propounding discovery requests as soon as they are named parties by obtaining a copy of the administrative record. Decisions regarding how applicants will present their case in the CCH and applicable discovery deadlines will be governed by the ALJ's orders at the hearing based on the applicable rules.

Comment

SC/TCE/EIP and Public Citizen commented that limitations on conducting discovery during the hearing itself necessitate the allowance of discovery prior to the preliminary hearing. Such an allowance is already made in 16 TAC §22.104(c) with regard to applications filed with the Public Utility Commission, wherein motions to intervene may be filed soon after the submission of an application, and any party with a pending motion to intervene has all rights of a party. The commenters note that where the commission has referred a matter to SOAH pursuant to hearing requests, an identified class of potential parties already exists, particularly considering the new limitations on the ability of persons to join as parties at the preliminary hearing. The commenters recommend a new subsection be added to §55.210 that would prescribe, for direct referred applications filed on or after September 1, 2015, written discovery begins on the date the application is referred to SOAH for the applicant, executive director, OPIC, and any person who filed comments and a hearing request on the application.

Response

No change has been made to the rule in response to this comment. The commission did not propose any changes to the rules for discovery in CCH for permit applications. The prima facie case, which will be the administrative record, will be available for review at SOAH and the OCC at least 30 days prior to the first day of the preliminary hearing, the same length of time that notice of the CCH is provided to the public, as provided for in the commission's rules. Statutory parties (the applicant, OPIC, and the executive director) and persons who submitted comments and hearing requests regarding applications that are direct referred to SOAH and who expect to seek party status can expedite their preparation for the hearing and by propounding discovery requests as soon as they are named parties by obtaining a copy of the administrative record.

The administrative record, which consists of certified copies of documents, is provided to SOAH, but that action does not constitute an applicant's prefiled testimony. Decisions regarding how applicants will present their case in the CCH will be governed by the ALJ's orders at the hearing based on the applicable rules. Until specific issues arise regarding implementation of the new prima face case requirement and how it

practically works with regard to existing discovery rules, the commission declines to make changes to its discovery rules.

§55.211, Commission Action on Requests for Reconsideration and CCH Comment

EPA commented that the proposed revisions to §55.211(c)(2)(A)(ii) 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 requests 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

SB 709, Section 1, Texas Government Code, §2003.047(e-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 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 many 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 judge in considering that person's standing to seek judicial review of the commission's action on a permit application, under TWC, §5.351 or THSC, §382.032. 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 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. 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 suggest changing "by the affected person" to "by an affected person whose request is granted" in §55.211(c)(2)(A)(ii), stating that this

language is clearer and mirrors the language used in other parts of the proposed rule.

Response

The commission agrees with the commenters' reasons and has made this change to the rule.

Comment

TXSWANA and WEAT/TACWA suggest changing "disputed issues of fact raised" to "disputed issues of fact and mixed questions of fact and law raised" to better track the language of SB 709 in §55.211(c)(2)(A)(ii).

Response

The commission agrees that the suggested text better tracks the text of SB 709, Section 1, adopting new Texas Government Code, §2001.047(e-1)(2), and has revised §55.211(c)(2)(A)(ii) accordingly.

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 rule should specify that the requestor must identify the specific draft permit provision or provisions that the requestor disputes, and explain in a detailed and complete manner the disputed question or questions of fact or mixed question or questions of law and fact.

Response

No changes were made to the rule in response to this comment. SB 709, Section 1, Texas Government Code, §2003.047(e-1) prescribes that the list of issues submitted by the commission to SOAH for a CCH must be "detailed and complete." Further, although it may be helpful in some cases to do so, 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

SC/TCE/EIP and Public Citizen commented that the ability to conduct discovery is one of the most important benefits of the CCH process.

The limitations on the conduct of discovery during the hearing itself necessitate the allowance of discovery prior to the preliminary hearing. Such an allowance is already made in 16 TAC §22.104(c) with regard to applications filed with the Public Utility Commission, wherein motions to intervene may be filed soon after the submission of an application, and any party with a pending motion to intervene has all rights of a party. Where the commission has referred a matter to SOAH pursuant to hearing requests, an identified class of potential parties already exists, particularly considering the new limitations on the ability of persons to join as parties at the preliminary hearing. Thus, §55.211(f) should be added that would prescribe for applications filed on or after September 1, 2015, and are referred by the commission to SOAH for a CCH, written discovery begins on the date the application is referred for the applicant, executive director, OPIC, and any person whose hearing request has been granted.

Response

No change has been made to the rule in response to this comment. The commission expressly did not propose any changes to the rules for

discovery in CCH for permit applications. The prima facie case, which will be the administrative record, will be available for review at SOAH and the OCC at least 30 days prior to the first day of the preliminary hearing, the same length of time that notice of the CCH is provided to the public, as provided for in the commission's rules. Statutory parties (the applicant, OPIC, and the executive director) and persons who submitted comments and hearing requests regarding applications that are direct referred to SOAH and who expect to seek party status can expedite their preparation for the hearing and by propounding discovery requests as soon as they are named parties by obtaining a copy of the administrative record.

The administrative record, which consists of certified copies of documents, is provided to SOAH, but that action does not constitute an applicant's prefiled testimony. Decisions regarding how applicants will present their case in the CCH will be governed by the ALJ's orders at the hearing based on the applicable rules. Until SOAH and the commission have some experience with the new prima face case requirement and how it practically works with regard to existing discovery rules, the commission declines to make changes to its discovery rules.

Comment

SC/TCE/EIP and Public Citizen commented that the commission should add and adopt a subsection in §55.211 that would delegate authority to the Office of General Counsel (OGC) to resolve disputes related to discovery conducted by unnamed parties prior to the hearing under rule amendments included in their comments.

Response

No change has been made to the rule in response to this comment. The commission maintains concurrent jurisdiction over a case even after it has been referred; however, the commission has contracted with SOAH to conduct CCHs and manage numerous matters that are ancillary to the CCH. Many of these matters regarding cases are explicitly stated in §80.4. In an effort to avoid confusion and to prevent the erosion of SOAH's authority, the commission makes every effort to avoid interference with ALJs while they perform their duties. This policy is the basis of §80.131(a), which largely prohibits interlocutory appeals to the commission by a party to a proceeding before an ALJ. For this reason, the commission declines to adopt a rule that delegates authority to the OGC to resolve discovery disputes.

Comment

TXOGA commented that the legislative intent of SB 709 is to allow participation in a CCH only by an affected person who participated in the permitting process by offering comments and requesting a CCH based on that affected person's comments and therefore, requests adoption of a new subsection in §55.211 that would establish that limit on parties.

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 as an affected person, they must submit comments and a hearing request. Commission rule §55.211(e) and (f) address the commenter's concerns raised. 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. Or, under subsection (f), they may file a motion for rehearing under §80.272 if all hearing requests are denied. 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 comment on proposed amended §55.211(e) and (f).

SUBCHAPTER E: PUBLIC COMMENT AND PUBLIC MEETINGS

§55.156

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, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; and TWC, 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 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, 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 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 the Requirement to Adopt Rules of Practice and Index Rules, Order, and Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to

Implementation of State Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

In addition, the withdrawal of §55.156(e) as part of the State Implementation Plan (SIP) is also adopted under Federal Clean Air Act, 42 United States Code, §§7401, *et seq*., which requires states to submit SIP revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

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

§55.156. Public Comment Processing.

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

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

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

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

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

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

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

(2) §39.420(f) and (g) of this title.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR CONTESTED CASE HEARING

§§55.201, 55.203, 55.205, 55.210, 55.211

Statutory Authority

The amendments are 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, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; and TWC, 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 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, 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 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 the 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 State Rules, 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 prescribes requirements for the notification of decisions and orders of a state agency; Texas Government Code, §2001.146, concerning Motions for Rehearing: Procedures, which authorizes the procedures for motions for rehearing filed with state agencies; Texas Government Code, §2001.147, concerning Agreement to Modify Time Limits, which provides that parties to a contested case, with state agency approval, may agree to modify the times prescribed by statute; and Texas Government Code, §2003.047, concerning Natural Resource Conservation Division, which provides the authority for State Office of Administrative Hearings to conduct hearings on behalf of the commission.

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

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's

decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

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

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

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

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

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

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

(3) request a contested case hearing;

(4) <u>for applications filed:</u>

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

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

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

(e) Any person, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title (relating

to Definitions), may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

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

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

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment

that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

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

(h) Any person, except the applicant, the executive director, the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title, who was provided notice as required under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

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

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

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

(3) any air permit application for the following:

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

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

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

(D) amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

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

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

(A) the applicant is not applying to:

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

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

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

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

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

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

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

(7) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.025 ~~§27.023~~, concerning General

Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

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

(9) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

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

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

§55.203. Determination of Affected Person.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed before September 1, 2015, the commission may also consider the factors in subsection (d) of this section to the extent consistent with case law.

§55.205. Request by Group or Association.

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

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

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

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

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

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

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

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

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

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

§55.210. Direct Referrals.

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

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

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

not a contested case proceeding under the Administrative Procedure Act. Public meetings held under this section shall be subject to following procedures.

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

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

(3) Public notice of a public meeting may be abbreviated to facilitate the convening of the public meeting prior to or on the same date as the preliminary hearing, unless the timing of notice is set by statute or a federal regulation governing a permit under a federally authorized program. In any case, public notice must be provided at least ten days before the meeting.

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

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

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

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

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

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

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

(3) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted, the deadline to file public comments or request

a public meeting, and a statement that a public meeting will be held by the executive director if there is significant public interest in the proposed activity. These public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice.

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

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

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

(1) public comment;

(2) executive director's response to comment;

(3) request for reconsideration; or

(4) request for contested case hearing.

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

(1) grant or deny the request for reconsideration;

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

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

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

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

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

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

(B) if the request raises only disputed issues of law or policy, make a decision on the issues and act on the application; or

(4) direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the requestor is an affected person. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the APA. If the commission determines that a requestor is an affected person, SOAH may proceed with a contested case hearing on the application if either the commission has specified, or the parties have agreed to, the number and scope of the issues and maximum expected duration of the hearing.

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

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

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

(A) is on an application filed:

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

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

(B) is timely filed with the chief clerk;

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

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

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

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

(2) the application is for an amendment, modification, or renewal of an air permit under Texas Health and Safety Code, §382.0518 or §382.055 that involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(3) the application is for renewal of a hazardous waste permit, subject to §305.65(8) [§305.65(a)(8)] of this title (relating to Renewal) and the applicant's

compliance history as determined under Chapter 60 of this title (relating to Compliance History) raises an issue regarding the applicant's ability to comply with a material term of its permit.

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

(e) If a request for a contested case hearing is granted, a decision on a request for reconsideration or contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under §80.109 of this title (relating to Designation of Parties) or the issues referred to SOAH under this section. A judge may consider additional issues beyond the list referred by the commission as provided by §80.4(c)(16) of this title (relating to Judges). A person whose request for reconsideration or contested case hearing is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's request for reconsideration or hearing request.

(f) If all requests for reconsideration or contested case hearing are denied, §80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed not later than 25 [no more than 20] days after the date that [the person or attorney of record is notified of] the commission's final decision or order is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, §2001.142 and §80.276 of this title, (relating to Request for Extension to File Motion for Rehearing), by agreement under Texas Government Code, §2001.147, or by the commission's written order issued pursuant to Texas Government Code, §2001.146(e). [A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail.] If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §361.321 or §382.032, or under the APA.

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