

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: December 3, 2015

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Caroline Sweeney, Deputy Director
Janis Hudson, Attorney
Office of Legal Services

Docket No.: 2015-0787-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 1, Purpose of Rules, General Provisions
Chapter 39, Public Notice
Chapter 50, Action on Applications and Other Authorizations
Chapter 55, Requests for Reconsideration and Contested Case Hearings;
Public Comment
Chapter 70, Enforcement
Chapter 80, Contested Case Hearings
SB 709 and SB 1267: Contested Case Hearings and Post Hearings
Rule Project No. 2015-018-080-LS

Background and reasons for the rulemaking:

Senate Bill (SB) 709

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

First, members of the public, or interested groups or associations, 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 the Texas Commission on Environmental Quality (TCEQ, agency, or commission) to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all

Re: Docket No. 2015-0787-RUL

applications filed on or after September 1, 2015; this is required until the rules implementing SB 709 become effective on December 31, 2015.

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

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

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

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ) 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. The bill allows for extensions beyond 180 days based upon agreement of the parties, with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

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

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

Re: Docket No. 2015-0787-RUL

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.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

For SB 709: The rule amendments in 30 TAC Chapters 39, 50, 55, and 80 will primarily apply to applications filed on or after September 1, 2015, and include:

1. Specifying that requests for a CCH by individual entities and groups or associations must timely and individually submit comments when requesting a CCH and specifying that groups or associations must timely provide the name and physical address of its member(s) who would be an affected person in their own right when requesting a CCH.
2. Adding discretionary information that the commission may consider in its determinations of affected persons.
3. Requiring the commission to determine that someone is an affected person only if the person timely submitted comments on the application.
4. Requiring that the executive director's response to comments be provided before a preliminary hearing is held.
5. Amending other hearing procedures in Chapter 80, including:
 - a. Requiring two duplicate originals of the application from the applicant for certification as part of the administrative record;
 - b. Specifying that the administrative record will be provided to SOAH when the notice of hearing is issued;
 - c. Limiting the deadline for submittal of the ALJ's Proposal for Decision to 180 days from the first date of the preliminary hearing or an earlier date specified by the commission, with extensions of the deadline only to either address constitutional concerns of the parties, or by agreement of the parties with approval by the ALJ;
 - d. Providing for the prima facie case, including that the ALJ shall admit the administrative record into evidence for all purposes, and limitations for rebuttal cases; and
 - e. Amending the role of the executive director in the hearing.
6. Requiring the executive director to provide written notification of draft permits to state senators and state representatives 30 days prior to issuance of the notice of

Re: Docket No. 2015-0787-RUL

draft permit, and to also provide web-based notice of administratively complete applications for permits and licenses.

7. Establishing criteria for executive director consideration for determination of "substantially similar" re-filed applications.

For SB 1267: New §80.276 and amended rules in 30 TAC Chapters 1, 55, 70, and 80 update procedures for providing notice of the commission's decisions or orders and the procedures and timelines concerning motions for rehearing to ensure consistency with the APA.

The rule amendments also provide that the effective date of an agreed order shall be the date the order is signed by the commission or the executive director, unless stated otherwise in the agreed order.

B.) Scope required by federal regulations or state statutes:

There is no federal law that will be implemented by this rulemaking, and the rules do not affect the United States Environmental Protection Agency approval or delegation of these permitting programs. Sections 39.405(g)(3) and 39.419(e)(1) are adopted as revisions to the State Implementation Plan (SIP). Section 55.156(e) is adopted to be withdrawn from the SIP.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

SB 709 and SB 1267, 84th Texas Legislature (2015); Texas Water Code, Chapter 5, Subchapter M, and §§5.013, 5.102, 5.103, 5.105, 5.115, 5.128, 5.1733, 5.228, 5.311, 5.5553, 7.001, *et seq.*, 26.020, 26.021, and 27.019; Texas Health and Safety Code, §§361.024, 382.002, 382.011, 382.012, 382.017, 382.029, 382.030, 382.056, 401.011, 401.051, 401.103, 401.104, and 401.412; Texas Government Code, §§2001.004, 2001.006, 2001.142, 2001.143, 2001.144, 2001.146, 2001.147, 2001.174, 2001.176, and 2003.047; and the Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*

Effect of the rules on the:

The adopted rules do not affect persons not previously affected, and there will be no significant fiscal impact on any of the following groups.

A.) Regulated community:

All applicants for air quality; water quality; municipal, industrial, and hazardous waste; and underground injection control permits whose applications receive requests for CCH will be subject to changes in procedures for CCH and motions for rehearing.

B.) Public:

Re: Docket No. 2015-0787-RUL

Those who submit comments and hearing requests regarding applications for air quality; water quality; municipal, industrial, and hazardous waste; and underground injection control permits will be subject to changes regarding submitting comments and hearing requests, as well as changes in procedures for CCH and motions for rehearing.

C.) Agency programs:

Technical and legal staff who work on air quality; water quality; municipal, industrial, and hazardous waste; and underground injection control permit applications that are subject to comments and hearing requests will be subject to new procedures for notification and in CCH. The Office of the Chief Clerk will have somewhat different procedures for applications received on or after September 1, 2015; for procedures for providing notice of the commission's decisions or orders; and the procedures and timelines concerning motions for rehearing.

Stakeholder meetings:

The commission did not hold any stakeholder meetings related to this rulemaking project.

Public comment:

A rulemaking public hearing was held in Austin on September 15, 2015. The comment period closed on September 21, 2015. The commission received comments from the United States Environmental Protection Agency (EPA); Harris County Pollution Control Services Department; TCEQ Office of Public Interest Counsel; Public Citizen; Sierra Club (individually); Sierra Club, Texas Campaign for the Environment, and Environmental Integrity Project; Texas Association of Manufacturers; Texas Chemical Council; Texas Oil and Gas Association; Texas Pipeline Association; Lone Star Chapter of the Solid Waste Association of North America; and Water Environment Association of Texas and Texas Association of Clean Water Agencies.

The major concerns included in the comments are:

1. The possibility of delay due to legislator notification, scheduling of hearings for directly referred applications and discovery requests.
2. How the statutory text "[referred issues] must have been raised by an affected person in a comment submitted by that affected person . . ." is interpreted, and that comments should list the specific permit conditions at issue.
3. Persons who request a CCH should be precluded from appearing at a preliminary hearing and being admitted as a party unless they timely submitted comments.
4. Calculation of the 180 day limit for CCH.
5. The rules do not specifically allow for formal discovery to begin prior to SOAH taking jurisdiction of the case, thus there is inadequate time for discovery. In addition, concerns were expressed about:
 - a. a protestant's right to cross examination under the APA; and
 - b. discovery regarding and challenging at hearing the applicant's direct case, which is the filed and admitted administrative record.
6. EPA expressed concerns regarding:

Re: Docket No. 2015-0787-RUL

- a. judicial review of commission decisions on applications that are subject to a CCH for Texas Pollution Discharge Elimination System, New Source Review and Title V permits (although Title V applications are not subject to CCH); and
 - b. limitations on adoption of comments made by others.
7. No date limit is imposed by SB 709 for withdrawing applications.
 8. Rule text does not exactly match the new statutes.

No substantive comments were received regarding the rules that implement SB 1267.

Significant changes from proposal:

1. Various changes were made to the rules in Chapters 39, 50, 55, and 80 to use the precise text of SB 709. Those include:
 - a. executive director notification to state senators and state representatives;
 - b. that the prima facie case meets all state and federal legal and technical requirements;
 - c. a rebuttal case must demonstrate that the draft permit violates a specifically applicable requirement; and
 - d. that the list of issues submitted by the commission must be detailed and complete and may include mixed questions of fact and law.
2. Section 50.115(d)(2) expressly provides that the ALJ must complete the proceeding and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or the date specified by the commission, whichever is earlier.
3. For consistency with §50.115, text was added to §80.4 and §80.252 that the 180-day period for CCH is calculated from the first day of the preliminary hearing.
4. New §80.6(e) that provides if all group members are no longer parties in a CCH, the group or association may not continue as a party was added.
5. The preamble explains that the prima facie demonstration is, by statute, an applicant meeting its burden of proof for its direct case, and states expressly in new §80.127(h) that the ALJ shall admit the administrative record into evidence for all purposes.
6. Text was added to §§80.4, 80.6, 80.118, and 80.252 to ensure that radioactive licenses are not subject to the requirements of SB 709.
7. Text was added to §50.143 and §80.25 to clarify that the "substantially similar" application determination is a comparison of a new application to the withdrawn application.
8. An additional criterion (regarding changes in methods of treatment or disposal of waste) was added to the substantially similar determination in §50.143 and §80.25.

Potential controversial concerns and legislative interest:

Nature and timing of notification of draft permit to state senators and elected officials.

Re: Docket No. 2015-0787-RUL

Does this rulemaking affect any current policies or require development of new policies?

The notification to state senators and representatives is a new task in the application review process that began in September 2015.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

The consequences of not going forward with this rulemaking would be that the TCEQ's rules would conflict with the changes to the statutes made in SB 709 and SB 1267, and this would cause confusion for the public and the regulated community. For this reason, and because SB 709 requires rules be adopted no later than January 1, 2016, there are no alternatives to rulemaking. The rulemaking to implement SB 1267 is to ensure that TCEQ rules are consistent with the APA.

Key points in the adoption rulemaking schedule:

<i>Texas Register</i> proposal publication date:	August 21, 2015
Anticipated <i>Texas Register</i> adoption publication date:	December 25, 2015
Anticipated effective date:	December 31, 2015
Six-month <i>Texas Register</i> filing deadline:	February 21, 2016

Agency contacts:

Janis Hudson, Rule Project Manager, Environmental Law Division, (512) 239-0466
Sherry Davis, Texas Register Coordinator, (512) 239-2141

Attachments

SB 709
SB 1267

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Stephen Tatum
Jim Rizk
Office of General Counsel
Janis Hudson
Sherry Davis