

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** July 17, 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 Proposed Rulemaking
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 reason(s) 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 must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a hearing. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address, in its timely CCH 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) 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 TCEQ adopts the rules implementing SB 709.

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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 the State Office of Administrative Hearings (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 above.

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 notice 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.

First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, the bill creates a process through which a party that alleges that notice of

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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 Chapters 39, 50, 55, and 80 will primarily apply to applications filed on or after September 1, 2015, include:

1. Specifying that requests for CCH by individual entities and groups or associations cannot rely on comments submitted by others, and 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.
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 the ED's response to comments be filed before a preliminary hearing is held.
5. Amending other hearing procedures in Chapter 80, including:
 - a. Requiring copies 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 date of preliminary hearing, with extensions only to address constitutional concerns of the parties, or by agreement of the parties with approval by the ALJ;
 - d. Providing for the prima facie case; and
 - e. Amending the role of the executive director in the hearing.
6. Requiring the TCEQ to provide written notification of draft permits to state senators and representatives and to also provide web-based notice of administratively complete applications for permits and licenses.
7. Establishing criteria for ED consideration for determination of "substantially similar" re-filed applications.

For SB 1267: New §80.276 and amended rules in Chapters 1, 55, 70, and 80 update procedures for providing notice of the commission's decisions or orders and the

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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 proposed as revisions to the State Implementation Plan (SIP). The amendment to Section 55.156(e) is proposed as a revision to the SIP, or, in the alternative, existing Section 55.156 is proposed 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, §§5.013, 5.102, 5.103, 5.105, 5.115, 5.5553, and 7.001, *et seq.*; Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017; Texas Government Code, §§2001.004, 2001.006, 2001.142, 2001.146, and 2003.047; Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*

Effect on the:

The proposed rules do not affect persons not previously affected, and there will be no 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: 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

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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:

No stakeholder meetings were held.

Potential controversial concerns and legislative interest:

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

Will 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.

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 proposal rulemaking schedule:

Anticipated proposal date:	August 5, 2015
Anticipated <i>Texas Register</i> publication date:	August 21, 2015
Anticipated public hearing date (if any):	September 15, 2015
Anticipated public comment period:	August 7, 2015 – September 21, 2015
Anticipated adoption date:	December 9, 2015

Agency contacts:

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Attachments

SB 709
SB 1267

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Stephen Tatum

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