

SUBCHAPTER C: GENERAL PROVISIONS

§§35.21 - 35.30

Effective March 24, 2016

§35.21. Action by Commission or Executive Director.

For the purposes of, and in the manner provided by this chapter, the commission may issue a temporary order; and the commission or the executive director may issue an emergency, mandatory, permissive, or prohibitory order; and the commission by temporary order, or the executive director or commission by emergency order, may:

- (1) issue a temporary permit; or
- (2) temporarily suspend or amend a permit condition.

Adopted November 18, 1998

Effective December 10, 1998

§35.22. Term and Renewal of Orders.

Unless otherwise provided by this chapter, an emergency order issued under this chapter is limited to a reasonable time specified by the order, which may not exceed 180 days and may be renewed once for an additional period not to exceed 180 days by submittal of a new application. A temporary order must be limited to a reasonable time specified by the order.

Adopted November 18, 1998

Effective December 10, 1998

§35.23. Effect of Orders.

An emergency or temporary order issued under this chapter does not vest any rights in the permit holder or recipient and expires in accordance with its terms.

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§35.24. Application for Emergency or Temporary Order.

(a) A person wanting an emergency or temporary order under this chapter shall submit a written application to the chief clerk. Unless the person submitting the application is the executive director or the executive director's representative, the application must be sworn.

(b) If a person seeks an emergency or temporary order for a bypass of untreated or partially treated wastewater, as that term is defined in §305.2 of this title (relating to Definitions), from a facility that is subject to a Texas pollutant discharge elimination system permit, the filing of the application for an emergency or temporary order constitutes prior notice of an anticipated bypass. Filing of the application for bypass shall be done, if possible, at least ten days before the date of the bypass. The person must comply with all bypass requirements under §305.535 of this title (relating to Bypasses from TPDES Permitted Facilities).

(c) The application must:

(1) state the name, address, and telephone number of the applicant, the person submitting the application on the applicant's behalf, and the person signing the application on the applicant's behalf;

(2) contain information sufficient to identify the facility and location to be affected by the order;

(3) describe the condition of emergency or other condition justifying the issuance of the order;

(4) allege facts to support any findings required under this chapter;

(5) estimate the dates on which the proposed order should begin and end and the dates on which the activity proposed to be allowed, mandated, or prohibited should begin and end;

(6) describe the action sought and the activity proposed to be allowed, mandated, or prohibited;

(7) include any other statement or information required by this chapter;
and

(8) be accompanied by payment of any application fees required by the commission.

(d) A copy of the application must be provided to the division director of the appropriate program on behalf of the executive director, and to the public interest counsel, at the same time it is filed with the chief clerk. The division director may designate another representative of the executive director for this service.

(e) All applications shall be signed as follows.

(1) For a corporation, the application shall be signed by a responsible corporate officer. For purposes of this paragraph, a responsible corporate officer means a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. Corporate procedures governing authority to sign permit applications may provide for assignment or delegation to applicable corporate positions rather than to specific individuals. Documentation of authority to sign must be provided with the application.

(2) For a partnership or sole proprietorship, the application shall be signed by a general partner or the proprietor, respectively.

(3) For a municipality, state, federal, or other public agency, the application shall be signed by either a principal executive officer or a ranking elected official. For purposes of this paragraph, a principal executive officer of a federal agency includes the chief executive officer of the agency, or a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., regional administrator of the United States Environmental Protection Agency).

(4) For the executive director, the application shall be signed by the executive director or any duly authorized representative;

(5) A person other than the executive director or the executive director's representative signing an application shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(6) For hazardous solid waste applications, the owner and operator of a facility must sign the application.

(7) For radioactive material license applications under Chapter 336 of this title (relating to Radioactive Substance Rules), the applicant or person duly authorized to act for and on the applicant's behalf must sign the application.

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§35.25. Notice and Opportunity for Hearing.

(a) An emergency order under this chapter may be issued with notice and an opportunity for hearing, or without notice and an opportunity for hearing, as provided by this chapter.

(b) If an emergency order is issued under this chapter without a hearing, the order shall set a time and place for a hearing to affirm, modify, or set aside the order to be held before the commission or its designee as soon as practicable after the order is issued.

(c) Except as otherwise provided by this chapter, notice of a hearing to affirm, modify, or set aside an emergency order under this chapter shall be given not later than the tenth day before the date set for the hearing. This notice shall provide that an affected person may request an evidentiary hearing on issuance of the emergency order.

(d) Temporary orders require a hearing before the issuance of the order. Notice of a hearing on a temporary order shall be given not later than the 20th day before the hearing on the order. This notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary order.

(e) In addition to the notice requirements provided elsewhere in these rules, notice shall be provided as follows.

(1) For water quality temporary orders, notice of a hearing that is held before issuance of the order shall be provided:

(A) by mail to persons requesting public notice of certain applications, in accordance with §39.7 of this title (relating to Mailing Lists) and to persons or agencies identified in §39.13 of this title (relating to Mailed Notice);

(B) by publication by the applicant in a newspaper of largest general circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county in which the facility is located or proposed to be located, the notice must be published in the newspaper of general circulation in the county in which the facility is located or proposed to be located. The

applicant must file an affidavit with the chief clerk certifying facts that constitute compliance with the publication requirements. The deadline to file the affidavit is 15 days after publication of the notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice; and

(C) at least 20 days before the hearing.

(2) For water quality emergency orders, notice of the issuance of the order and the hearing to affirm, set aside, or modify if a hearing is held shall be provided in accordance with paragraph (1)(A) and (C) of this subsection.

(3) For nonhazardous underground injection control (UIC) emergency orders, notice shall be mailed and published at least 30 days before the hearing to affirm, modify, or set aside the emergency order, as is required by Chapter 39 of this title (relating to Public Notice) for notice of a hearing on an application for a UIC permit.

(4) For nonhazardous solid waste emergency orders, notice shall be mailed and published not later than the tenth day before the hearing to affirm, modify, or set aside the emergency order, as is required by Chapter 39 of this title for notice of a hearing on an application for a nonhazardous waste permit.

(5) For hazardous solid waste emergency orders, including UIC emergency orders, notice shall be mailed and published at least 30 days before the hearing to affirm, modify, or set aside the emergency order, as required by Chapter 39 of this title for notice of a hearing on an application for a hazardous waste permit. The commission must also give at least 45 days for public comment before issuing the order.

(6) For suspension of beneficial inflows under Texas Water Code, §11.148, notice shall be published in a newspaper or newspapers of general circulation in the affected area not later than the 15th day before the hearing to all affected persons.

(7) For water utility emergency orders for operation of a utility, notice shall be mailed or hand delivered to the utility not later than the tenth day before the hearing to affirm modify or set aside.

(8) For water utility temporary rate increase orders, notice shall be mailed or delivered to the affected ratepayers not later than the tenth day before the hearing to affirm, modify, or set aside.

(9) For air catastrophe emergency orders, notice shall be published in a newspaper of general circulation in the nearest municipality not later than the tenth day before the hearing.

(10) For generalized condition of air pollution emergency orders, the timing, method, and recipients of notice shall be as practicable under the circumstances.

(11) For radioactive substances emergency orders, notice shall be provided by personal service or certified mail to those named in the order not later than the tenth day before the hearing to affirm, modify, or set aside.

(12) For radioactive material impoundment, notice shall be provided by personal service or certified mail to those named in the order not later than the tenth day before the hearing to affirm, modify, or set aside.

(13) For petroleum storage tank emergency orders, notice shall be provided by certified mail, hand delivery, or if that fails, one time in the *Texas Register* or published once in the county newspaper not later than the tenth day before the hearing to affirm, modify, or set aside.

(14) For imminent and substantial endangerment emergency orders, notice shall be given by certified mail for hand delivery to the person named in the order, and if that fails, published once in the *Texas Register* and once in the newspaper of general circulation not later than the tenth day before the hearing to affirm, modify, or set aside.

(15) For on-site sewage and disposal system emergency orders, notice shall be mailed to those in the order not later than ten days before the hearing to affirm, modify, or set aside.

(f) Statutes or rules requiring notice of hearing or setting procedures for the issuance of permits do not apply to a hearing on an emergency order issued under this chapter unless they specifically require notice for an emergency order.

(g) If the commission acts on an application for a temporary order, or the commission or executive director acts on an application for an emergency order, the chief clerk or the office designated by the executive director shall mail notice of the action to the applicant, the executive director, public interest counsel, and other persons who have filed hearing requests or public comment.

§35.26. Contents of Emergency or Temporary Order.

An emergency or temporary order issued under this chapter shall contain at least the following:

(1) the name and address of the applicant and information sufficient to identify the facility or location affected by the order;

(2) a description of the condition of emergency or other condition justifying the issuance of the order;

(3) any findings of facts required under this chapter;

(4) a statement of the term of the order, including the dates on which it shall begin and end and the dates on which the activity proposed to be allowed, mandated, or prohibited shall begin and end;

(5) a description of the action sought and the activity proposed to be allowed, mandated, or prohibited;

(6) if the order was issued without a hearing, a statement to that effect and a provision setting a time and place for a hearing before the commission or its designee; and

(7) any other statement or information required by this chapter.

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§35.27. Hearing Required.

A hearing shall be held before the issuance of each temporary order and either before or after the issuance of each emergency order. If no hearing is held before the issuance of an emergency order, a hearing to affirm, modify, or set aside the order shall be held before the commission or its designee as soon as practicable after the order is issued.

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§35.28. Hearing Requests.

(a) The executive director, the applicant, or an affected person as defined by Texas Water Code, §5.115(a) may request a contested case hearing.

(b) The commission is not required to hold a hearing if it determines that the basis of a person's request for a hearing as an affected person is not reasonable or is not supported by competent evidence.

(c) All relevant factors shall be considered in the evaluation of a person's request for a hearing as an affected person, 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, safety, and 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 governmental entities, their statutory authority over or interest in the issues relevant to the application.

(d) 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.

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Effective December 10, 1998

§35.29. Procedures for a Hearing.

(a) Hearings before the commission under this chapter shall be conducted in accordance with Chapter 10 of this title (relating to Commission Meetings). Contested case hearings shall be conducted under the Texas Administrative Procedure Act (APA) and Chapter 80 of this title (relating to Contested Case Hearings).

(b) If a contested case hearing is requested on the application, and the commission grants the request, the commission shall either conduct the contested case hearing or remand the matter to the State Office of Administrative Hearings (SOAH).

(c) The commission or judge may, consistent with the requirements of the APA, reduce the time periods specified in the commission's rules governing contested case hearings.

(d) For any hearing on a temporary or emergency order, the following procedures will apply:

(1) parties will be designated by the commission or judge. To be designated as a party, the person seeking party status must show a justiciable interest. For each hearing under this section, the applicant, the public interest counsel, and the executive director are parties by rule;

(2) the testimony of all witnesses will be under oath, with an opportunity for questioning by the commission or judge and cross-examination by the other parties;

(3) other parties to the hearing will be given an opportunity to present rebuttal evidence and testimony;

(4) the applicant will have the burden of proving its need for an emergency or temporary order, and will have the right to open and close the evidentiary parts of the hearing. The fact that an emergency order was issued without a hearing, standing alone, will not constitute evidence of the need for such authorization; and

(5) the commission or judge will have the right to limit the number of witnesses; to limit the time for direct questioning or cross-examination of a witness; to refuse illustrative and documentary evidence; and to limit argument.

(e) If a hearing request is denied, the procedures contained in §80.272 and §80.273 of this title (relating to Motion for Rehearing; and Decision Final and Appealable) apply.

§35.30. Application Fees.

The application fee for an emergency or temporary order under this chapter is \$500 plus the cost of the required notice. The fee is payable at the time the application is filed, and is not refundable.

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