

SUBCHAPTER B : HEARING REQUESTS, PUBLIC COMMENT

§55.21

Effective October 20, 1999

§55.21. Requests for Contested Case Hearings, Public Comment.

(a) Applicability. This subchapter applies to hearing requests and public comments on applications that are declared administratively complete before September 1, 1999.

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

- (1) the commission;
- (2) the executive director;
- (3) the applicant;
- (4) affected persons, when authorized by law; and

(5) for applications for air quality permits, or standard exemptions required to provide public notice, a legislator from the general area of the proposed facility.

(c) Form of Request. A request for a contested case hearing by an affected person 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 (d) of this section.

(d) Requirements for Request. A hearing request must substantially comply with the following:

(1) give the name, address, and daytime telephone 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 activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public;

(3) request a contested case hearing; and

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

(e) Deadline for hearing requests; public comment period. A hearing request must be filed with the chief clerk within the time period specified in the notice. The public comment period shall also end at the end of this time period. The time period shall end 30 days after the last publication of the notice of application, except that the time period shall end:

(1) 60 days after the last publication of the notice of a Class 3 modification of a solid waste permit under the TSWDA;

(2) 30 days after last publication for a new permit or permit amendment under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(3) 15 days after the last publication for a permit renewal or standard exemption for a concrete plant under Chapter 116 of this title;

(4) ten days after the mailing of notice of the application for the transfer of a permit;

(5) no less than 30 days after the last publication of the notice of draft permit for an application for a municipal solid waste permit or to amend, extend, or renew such a permit;

(6) no less than 30 days after the last publication of the notice of draft permit for an application for an industrial waste facility permit or to amend, extend, or renew such a permit;

(7) no less than 45 days after the last publication of the notice of draft permit for an application for a hazardous waste facility permit or to amend, extend, or renew such a permit;

(8) no less than 30 days after the last publication of the notice of draft permit for an application for a wastewater discharge permit except as provided in paragraph (9) of this subsection;

(9) no less than ten days after the mailing of the notice of draft permit for an application to amend a wastewater discharge permit where the application is to improve the quality of waste authorized to be discharged and does not seek to increase significantly the quantity of waste authorized to be discharged or change materially the pattern or place of discharge;

(10) no less than 30 days after the last publication of the notice of draft permit for an application for an injection well permit or to amend, extend, or renew such a permit;

(11) no less than 30 days after the mailing of the notice of draft production area authorization under Chapter 331 of this title (relating to Underground Injection Control); or

(12) the time specified in commission rules for other specific types of application.

(f) Public Comment. Documents that are filed with the chief clerk that comment on an application but that do not request a hearing will be treated as public comment.

(g) Late Filed Hearing Requests and Public Comment, Extensions.

(1) A hearing request or public comment shall be processed under §55.26 of this title (relating to Hearing Request Processing) or under §55.25 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline for hearing requests and public comment. The chief clerk shall accept a hearing request 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 file for the application.

(2) The commission may extend the time allowed for filing a hearing request.

(h) No Right to Hearing.

(1) There is no right to a hearing on an application for a minor amendment of a permit or a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits).

(2) There is no right to a contested case hearing on applications for weather modification licenses or permits under Texas Water Code, Chapter 18.

Adopted September 29, 1999

Effective October 20, 1999

§55.23. 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) 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) of this section. The request and response shall be filed according to the procedure in §55.25(e) and (f) of this title (relating to Hearing Request Processing).

Adopted May 8, 1996
Derived from §263.27

Effective June 6, 1996

§55.25. Public Comment Processing.

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

(b) This subsection applies to applications concerning hazardous waste facilities, underground injection wells, or Texas Pollutant Discharge Elimination System (TPDES) permits. It applies to an application only when the commission has federal authorization to manage the permitting program under which the application is evaluated.

(1) Before an application is approved, the executive director shall prepare a response to all significant public comment on the draft permit raised during the public comment period. 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. The executive director shall make the response available to the public.

(A) If the application is acted on by the commission under §50.13 of this title (relating to Action on Application) or §55.27(a)(1) of this title (relating to Commission Action on Hearing Request), the executive director's response to public comment shall be made available to the public and filed with the chief clerk at least ten days before the commission acts on the application. The commission shall consider all public comment in making its decision and shall either adopt the executive director's response to public comment or prepare its own response.

(B) If the application is approved by the executive director under Chapter 50, Subchapter C of this title (relating to Action by the Executive Director), the response to public comment should be made no later than the time of the executive director's action on the application.

(2) The executive director may 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 APA. 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. If a contested case hearing is held on the application, the public meeting shall be conducted as part of the preliminary hearing under §80.105 of this title (relating to Preliminary Hearings), unless the executive director specifies a different time and place for the public meeting. If the executive director specifies a different time and place for the public meeting, then public comment shall not be taken at the preliminary hearing. This paragraph supersedes and controls any conflict between this paragraph and §80.105 of this title (relating to Preliminary Hearings). The public comment period shall automatically be extended to the close of any public meeting. Public notice of the meeting shall be given as required by commission rule. The applicant shall attend any public meeting held by the executive director. A tape recording or written transcript of the public meeting shall be made available to the public.

(3) Any person who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under this subsection, and failed to participate in the public hearing held under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.19 of this title (relating to Notice of Commission Action, Motion for Rehearing) or §55.27 of this title (relating to Commission Action on Hearing Request) or §80.271 of this title (relating to Motion for Rehearing) or may file a motion for reconsideration under §50.39 of this title (relating to Motion for Reconsideration) only to the extent of the changes from the draft permit to the final permit decision.

(c) This subsection applies to applications other than those under subsection (b) of this section. The commission may designate an agency office to process public comment under this subsection.

(1) The designated office may evaluate and respond to public comment, other than timely hearing requests, when appropriate.

(A) If the application and timely hearing requests are considered by the commission, the designated office should prepare any response to public comment no later than ten days before the commission meeting at which the commission will evaluate the hearing requests. The response shall be made available to the public and filed with the chief clerk

(B) If the application is approved by the executive director under Chapter 50, Subchapter C of this title, any response to public comment should be made no later than the time of the executive director's action on the application.

(2) The designated office shall hold a public meeting when there is a significant degree of public interest or when otherwise appropriate to assure adequate public participation. A public meeting is intended for the taking of public comment, and is not a contested case proceeding under the APA. The applicant shall attend any such public meeting held by the designated office. When the designated office holds a public meeting it shall respond to public comment either by giving an immediate oral response or by preparing a written response. The response shall be made available to the public.

Adopted November 5, 1997
Derived from §263.22 and §263.23

Effective December 1, 1997

§55.26. Hearing Request Processing.

(a) The requirements in this section and §55.27 of this title (relating to Commission Action on Hearing Request) apply only to hearing requests that are filed within the time period specified in §55.21(d) of this title (relating to Requests for Contested Case Hearings, Public Comment).

(b) The executive director shall file a statement with the chief clerk indicating that technical review of the application is complete. The executive director may file the statement with the chief clerk either before or after public notice of the application is issued.

(c) After a hearing request is filed and the executive director has filed a statement that technical review of the application is complete, the chief clerk shall process the hearing request by both:

(1) referring the application and hearing request to the alternative dispute resolution director. The alternative dispute resolution director shall try to resolve any dispute between the applicant and the person making the request for hearing; and

(2) scheduling the hearing request for a commission meeting. The chief clerk should try to schedule the request for a commission meeting that will be held approximately 40 days after the later of the following:

(A) the deadline to request a hearing specified in the public notice of the application; or

(B) the date the executive director filed the statement that technical review is complete.

(d) The chief clerk shall mail notice to the applicant, executive director, public interest counsel, and the persons making a timely hearing request at least 30 days before the first meeting at which the commission considers the request. The chief clerk shall explain how the person may submit public comment to the executive director, describe alternative dispute resolution under commission rules, explain that the agency may hold a public meeting, and explain the requirements of this chapter.

(e) The executive director, the public interest counsel, and the applicant may submit written responses to the hearing request no later than 20 days before the commission meeting at which the commission will evaluate the hearing request. Responses shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, the director of the Office of Public Assistance, the applicant, and any persons filing hearing requests.

(f) The person who filed the hearing request may submit a written reply to a response no later than six days before the scheduled commission meeting at which the commission will evaluate the hearing request. A reply may also contain additional information responding to the letter by the chief clerk required by subsection (d) of this section. A reply shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, and the applicant.

(g) The executive director or the applicant may file a request with the chief clerk that the application be sent directly to SOAH for a hearing on the application. If a request is filed under this subsection, the commission's scheduled consideration of the hearing request will be canceled.

Adopted April 16, 1997

Effective May 15, 1997

§55.27. Commission Action on Hearing Request.

(a) The determination of the validity of a hearing request is not, in itself, a contested case subject to the APA. The commission will evaluate the hearing request at the scheduled commission meeting, and may:

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

(2) determine that a hearing request does not meet the requirements of this subchapter, and refer the application to a public meeting to develop public comment before acting on the application;

(3) determine that a hearing request meets the requirements of this subchapter, and direct the chief clerk to refer the application to SOAH for a hearing; 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 request meets the requirements of this subchapter. The referral may also direct SOAH to proceed with a hearing on the application if the judge finds that a hearing request meets the requirements of this chapter. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the APA.

(b) 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 reasonable;

(B) is supported by competent evidence;

(C) complies with the requirements of §55.21 of this title (relating to Requests for Contested Case Hearings);

(D) is timely filed with the chief clerk; and

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

(3) for an air quality permit, made by a legislator in the general area of the facility if the request:

(A) is reasonable;

(B) complies with the requirements of §55.21 of this title, except for subsection

(c)(2)-(4);

(C) is timely filed with the chief clerk; and

(D) is pursuant to a right to hearing authorized by law.

(c) The commission may refer an application to SOAH if there is no hearing request complying with this subchapter, if the commission determines that a hearing would be in the public interest.

(d) The executive director shall determine the sufficiency of hearing requests on utility matters listed in this subsection. If a hearing request meets the requirements in this subsection, the executive director shall refer the hearing request to the chief clerk. The executive director shall review hearing requests concerning the following matters and shall use the specified standards for reviewing the requests.

(1) If a utility files a statement of intent to change rates under Texas Water Code, §13.187, the executive director shall evaluate any complaints or hearing requests received and determine if a hearing is required.

(2) If a person files an application or petition concerning a certificate of convenience and necessity under Texas Water Code, Chapter 13, Subchapter G, the executive director shall evaluate any complaints or hearing requests and determine if a hearing is required.

(3) If a person files an appeal under Texas Water Code, §13.043, invoking the commission's appellate jurisdiction over water, sewer, or drainage rates, the executive director shall evaluate the appeal and determine if a hearing is required.

(e) During a commission meeting, the commission may determine whether the application should be processed under the requirements of Chapter 80, Subchapter E of this title (relating to Freezing the Process). The commission may consider the number and sophistication of the parties or potential parties, the expected length of the hearing, and the complexity of the issues.

(f) A decision on a hearing request is an interlocutory decision on the validity of the request and is not binding on the issue of designation of parties under §80.109 of this title (relating to Designation of Parties). A person whose hearing request 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 hearing request.

(g) If a hearing request is denied, the procedures contained in §80.271 of this title (relating to Motion for Rehearing) apply. A motion for rehearing in such a case must be filed no earlier than, and no more than 20 days after, the date the person or his attorney of record is notified of the commission's final decision or order on the application. If the motion is denied under §80.271 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable), the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

Adopted April 16, 1997
Derived from §§263.21, 263.23, 263.24, 305.105, and New

Effective May 15, 1997

§55.29. 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) Governmental entities, including local governments and public agencies, with authority under state law over issues contemplated by the application may be considered affected persons.

(c) All relevant 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, 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.

Adopted May 8, 1996
Derived from §263.25 and §305.105

Effective June 6, 1996

§55.31. Determination of Reasonableness of Hearing Request.

(a) The reasonableness of a hearing request shall be based on all relevant factors including the following:

(1) whether the request is based solely on concerns outside of the jurisdiction of the commission; and

(2) whether the request is based on concerns related to other media that cannot be addressed by the pending application, even though within the jurisdiction of the commission;

(3) whether the project is an emissions, pollutant, or source reduction project or a project to improve the quality of waste to be discharged, including:

(A) whether there are no increases in emissions of any contaminants or no increases in discharges of any pollutants;

(B) whether the project is not driven by a noncompliance situation; and

(C) whether the project will have both emission, source, or pollutant discharge reductions and incidental increases, where the net effect is an emission, source, or pollutant discharge reduction;

(4) whether the project is mandated by commission rule;

(5) the location of the proposed project;

(6) whether the applicant requests authority to substitute an equivalent or more efficient control device;

(7) whether the hearing request is based solely on something other than concerns about pollution;

(8) the extent to which the person requesting a hearing is likely to be impacted by the emissions, discharge, or waste; and

(9) the applicant's compliance history.

(b) The commission shall consider the following additional factors for hearing requests on air quality applications.

(1) A request concerning an amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted is unreasonable.

(2) Notwithstanding paragraph (1) of this subsection, a request may be determined reasonable 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.

Adopted April 16, 1997
Derived from §263.26

Effective May 15, 1997

Derivation Table
Rule Log No. 95123-263-AD
Procedural Rules
Adopted May 8, 1996
Effective June 6, 1996
Chapter 55 - Request for Contested Case Hearings
Subchapter B : Hearing Requests

This table is to track sections after rule revisions. The column on the left lists the sections after the revision. The column on the right lists where the section was prior to the revision.

New Section	Old Section
55.21 (a)	263.21 (a), 263.22 (a), 305.92, 305.105 (a)
55.21 (b)	new, 305.105 (a)
55.21 (c)	263.22 (b), 305.105 (b)
55.21 (d)	305.94-305.96, 305.105 (a)
55.21 (e)	305.105 (a)
55.23	263.27
55.25	263.22 (d)
55.25 (c)	263.23 (c)
55.25 (d)	263.23 (d)
55.25 (e)	263.23 (d)
55.25 (f)	263.23 (e)
55.25 (g)	263.23 (f)
55.25 (h)	263.23 (g)
55.27 (a)	263.23 (h)
55.27 (b)	263.24, 305.105 (d)
55.27 (c)	new
55.27 (d)	263.21 (b)
55.27 (e)	263.23 (i)
55.29	263.25, 305.105 (c)
55.31	263.26

Derivation Table
Rule Log No. 96170-050-AD
Hearings Requests/Procedural Rules
Adopted April 16, 1997
Effective May 15, 1997

Chapter 55 - Request for Contested Case Hearings; Public Comment
Subchapter B : Hearing Requests, Public Comment

This table is to track sections after rule revisions. The column on the left lists the sections after the revision. The column on the right lists where the section was prior to the revision.

New Section	Old Section
55.21 (a)	New
55.21 (b)	New
55.21 (c)	New
55.21 (d)	New
55.21 (e)	New
55.21 (f)	New, 55.21(e)
55.21(g)	New
55.25	New
55.26 (a)	New
55.26 (b)	55.25 (c)
55.26 (c)	55.25 (d)
55.26 (d)	55.25(b)
55.26 (e)	55.25 (e)
55.26 (f)	55.25 (f)
55.26 (g)	55.25 (g)
55.27 (a)	New
55.27 (b)	New
55.27 (g)	New
55.31	New