

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** September 26, 2023

Thru: Laurie Gharis, Chief Clerk
Kelly Keel, Interim Executive Director

From: Erin E. Chancellor, Director
Office of Legal Services

Subject: Docket No. 2023-0583-RUL / Rule Project No. 2023-130-050-LS
Revised Back-up for Commission Approval for Rulemaking Adoption
Chapter 50, Actions on Applications and Other Authorizations
Update to 30 TAC §50.131
Highlighted and Strikethrough Version of the Adoption Preamble

The attached preamble document for the rulemaking adoption for an amendment to Chapter 50, Actions on Applications and Other Authorizations, Rule Project Number 2023-130-050-LS, has been revised to edit the Response to Comment (RTC) section for clarity. Changes were made to be specific that authorizations to use standard permits that require the exercise of discretion by the executive director involve a decision by the executive director that should be reviewable and to acknowledge that some types of standard permit authorizations do not involve such discretion and decision-making. Changes are made with highlighted language to indicate new language and strikethrough to indicate deleted language in the RTC. Original back-up materials for this rulemaking project were filed on September 14, 2023.

Attachments:
Adoption Preamble

cc: Chief Clerk, 7 copies

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §50.131.

Background and Summary of the Factual Basis for the Adopted Rules

The adopted amendments will conform an agency rule with statutory requirements. The agency will amend 30 Texas Administrative Code (TAC) §50.131(c)(1) to state that the exemption applies except when a registration to use an air quality standard permit requires a decision by the executive director. This will remove the exemption from the agency’s motion to overturn process for the executive director’s decision on registrations for authorization under an air quality standard permit, when such an authorization requires an executive director decision to be issued. When the adopted rule becomes effective, it will be clear that applicants and affected persons who wish to challenge an executive director decision to issue a registration for an air quality standard permit may request that the commission overturn that decision through the agency’s motion to overturn process. This administrative action will be required before such a decision can be challenged in district court. Thus, the administrative remedy will have to be exhausted prior to a judicial challenge. This change is being adopted to align the agency’s rules with Texas Health and Safety Code (THSC), §382.061(b), which requires executive director decisions on permits to be reviewable by the commission. The commission changed the deletion of the exemption that was proposed to the adopted language that mirrors the statutory language in THSC, §382.061(b) in response to comments that not all air quality standard permit registrations require a decision by the executive director before being issued.

Section by Section Discussion

An amendment to §50.131(c)(1) to state that the exemption applies except when a registration to use an air quality standard permit requires a decision by the executive director is adopted.

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 of §50.131 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they 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. Rather, this rulemaking amends rule language to align the rule with statutory requirements relating to the review by the commission of executive director decisions on air quality standard permit registrations through a motion-to-overturn opportunity in the commission's rules.

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. The adopted amendment of §50.131 do not exceed a standard set by federal law, exceed an express

requirement of state law, exceed a requirement of a delegation agreement or contract, and were not developed solely under the general powers of the agency but are authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments on the Draft Regulatory Impact Analysis were received.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would 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). 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 rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is 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. No comments were received during the public comment period.

Effect on Sites Subject to the Federal Operating Permits Program

Section 50.131 is not an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; and therefore, no effect on sites subject to the Federal Operating Permits program is expected when the commission adopts this rule.

Public Comment

The commission offered two public hearings, on August 1, and August 15, 2023. The comment period closed at 11:59 p.m. on August 18, 2023. The commission received comments from State Senator Carol Alvarado; Energy Transfer LP (ET); Texas Chemical Council (TCC) and the Texas Oil and Gas Association (TXOGA), jointly; Texas Industry Project (TIP); Texas Pipeline Association (TPA); and State Representative Armando Walle. Senator Alvarado and Representative Walle were supportive of the proposed amendment. The remaining comments expressed support for a more limited change than what the commission proposed and suggested changes to the proposed amendment. TCC, TXOGA, and TPA jointly requested that the commission extend the comment period for the proposed rulemaking from August 15, 2023, until August 29, 2023. The commission granted a limited extension of the comment period to August 18, 2023. The commission made changes to the proposed rule amendment in response to the comments that were received. In response to comments, the rule language has been amended to explicitly mirror the statutory language of THSC, §382.061(b).

Response to Comments

Comment

State Senator Carol Alvarado supports the proposed amendments to align TCEQ rules with statutory requirements.

Response

The commission appreciates the support for the proposed rulemaking. No changes were made in response to this comment.

Comment

Energy Transfer LP (ET) opposes the proposed amendments to 30 TAC §50.131. ET disagrees that the proposed amendment is necessary to reconcile the rule with the statutory requirement of THSC, §382.061(b). ET states that standard permits are exempted from coverage under §50.131 because they are claimed registrations and not issued permits. ET states that action by the executive director occurs on standard permits when the specific standard permit is promulgated; and when a standard permit is registered for a process, there is no further executive director decision that occurs that would be addressed with a motion to overturn. ET states that if the proposed amendment is adopted, it will have an adverse impact on energy reliability in Texas and needlessly increase the costs and time spent by the commission and operators who use standard permits.

Response

The commission disagrees with the assertion that the proposed amendment is not necessary. The discrepancy between 30 TAC §50.131(c)(1) and THSC, §382.061(b) was identified and discussed at the April 26, 2023, hearing of the Senate Natural Resources and Economic

Development Committee during the 88th Regular Legislative Session. Although it is possible that the commission may receive an increased number of motions to overturn for air quality standard permit registrations, the commission does not anticipate any undue burden on either the commission or on the regulated community. The commission understands that air quality standard permits themselves are generally open for public comment when the standard permit itself is promulgated; however, for some authorizations to use the standard permit, the commission has delegated decision-making authority to the executive director. Accordingly, pursuant to statute, these authorizations should be reviewable by the commission. approval of a registration to use some types of air quality standard permits is still a decision of the executive director that, according to statute, must be reviewable by the commission. However, the The commission does agree agrees that the rule language should only encompass authorizations involving a decision by the executive director. be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits which that require a decision by the executive director do not have an exemption are not exempt from the motion to overturn process.

Comment

TCC, TXOGA, and TPA requested an extension of the comment period on the proposed rulemaking until August 29, 2023.

Response

The commission extended the comment period for this rulemaking to Friday, August 18, 2023.

Comment

TCC and TXOGA state that the proposed rule amendment will remove all standard permits issued under 30 TAC Chapter 116 from the scope of actions that are exempt from motion to overturn procedures.

Response

*TCC and TXOGA are correct that the proposed rule amendment would have meant that all registrations for authorization under an air quality standard permit issued under Chapter 116 are subject to a motion to overturn. **The commission acknowledges that some air quality standard permit use authorizations do not require a decision by the executive director.** In response to comment, the commission has clarified in the adopted rule language that it is the issuance of registrations to use an air quality standard permit that require a decision of the executive director to be issued that ~~do not have an exemption~~ **are not exempt** from the motion to overturn process.*

Comment

TCC and TXOGA state that the proposed rulemaking is three separate rulemakings in one.

Response

Commenters are incorrect. The amendments to the proposed rule are one rulemaking that has been undertaken to align TCEQ rules with statutory requirements as discussed in the rule preamble. No changes were made in response to this comment.

Comment

TCC and TXOGA state that the proposed rule amendment will impact an average of 850-1000 standard permits a year, allow for potential challenges through the motion to overturn process,

and has the potential to greatly impact the timeframe for claiming standard permits, the Texas economy as a whole, TCEQ ED staff resources, TCEQ commission staff resources, and potentially Alternative Dispute and State Office of Administrative Hearings staff resources.

Response

The commission evaluated the potential impact of the proposed rule and does not agree with the commenters that there will be adverse effects on the Texas economy, TCEQ resources, or SOAH resources. Although the number of actions that may be subject to a motion to overturn will increase, the commission does not anticipate that all such actions will receive challenges. Given that few motions to overturn have historically been filed on air quality standard permits, the commission does not believe that adoption of the proposed amendment would significantly impact the number of motions to overturn filed on air quality standard permit registrations. No changes were made in response to this comment.

Comment

TCC and TXOGA detail the process for promulgating a standard permit, and state that the appropriate place for the public to comment on a standard permit is when the standard permit is developed by the commission. The commenters state that a registration to use a standard permit is not a decision by the executive director that should be subject to a motion to overturn as contemplated by THSC, §382.061(b). TCC and TXOGA state that only standard permit registrations that require notice, specifically, the Concrete Batch Plant, Concrete Batch Plants with Enhanced Controls, Permanent Rock and Concrete Crushers, Animal Carcass Incinerators, and Hot Mix Asphalt Plant Standard Permits, should be subject to a motion to overturn. Commenters state that other standard permit registrations do not require a decision by the executive director, and therefore, the commission should change the proposed amendment to

limit the opportunity for a motion to overturn to those specific enumerated types of standard permits.

Response

*The commission disagrees with commenters' assessment that only air quality standard permits that require notice **and,** or the hot mix asphalt standard permit (which does not require notice), are subject to a "decision by the executive director." ~~Several types of air quality standard permit registrations require either an affirmative action~~ **The commission has delegated the decision to authorize use of a standard permit for more types of registrations than those that require notice and comment and the hot mix asphalt standard permit. The commission believes that authorizations to use a standard permit that require the exercise of discretion by the executive director involve a decision that, pursuant to statute, should be reviewable by the commission. However, the** ~~on that the executive director approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no comments before construction or, for some types of permits, operation can begin. All of these scenarios require a decision by the executive director – either to approve a permit registration or let an applicant know that the executive director has no comments on or objections to the registration to use the air quality standard permit. Therefore, as some types of air quality standard permits require some executive director decision, they fall within the statutory directive of THSC, §382.061(b). The commission disagrees with the assertion that only air quality standard permits that require notice or a more extensive review should be subject to the opportunity for commission review. However, the commission~~ **acknowledges that some types of authorizations to use standard permits do not involve such discretion and decision-making.** ~~does agree that the rule language should be explicit that it is the issuance of air quality standard permit~~*

~~registrations requiring a decision by the executive director which are subject to a motion to overturn.~~ Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permit registrations **that** ~~which~~ require a decision by the executive director ~~to be issued do not have an exemption~~ **are not exempt** from the motion to overturn process.

Comment

TCC and TXOGA state that the proposed amendment should be narrowed to only apply to standard permits that require a more in-depth review by the executive director and that have the opportunity for public comment and a response to those comments from TCEQ.

Response

The commission disagrees with commenters' assessment that only air quality standard permits that require notice and the hot mix asphalt standard permit (which does not require notice), are subject to an in-depth review or decision by the executive director. The commission has delegated the decision to authorize use of a standard permit for more types of registrations than those that require notice and comment and the hot mix asphalt standard permit. The commission believes that authorizations to use a standard permit that require the exercise of discretion by the executive director involve a decision that, pursuant to statute, should be reviewable by the commission. However, the commission acknowledges that some types of authorizations to use standard permits do not involve such discretion and decision-making. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permit registrations that require a decision by the executive director are not exempt from the motion to overturn process.

~~The commission disagrees that only air quality standard permits that require a more extensive review by the executive director or that have an opportunity for public comment, or the hot mix asphalt standard permit (which does not require notice), should be subject to a motion to overturn under the statutory requirement. As previously discussed, several types of air quality standard permit registrations require either an affirmative action that the executive director approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no executive director comments before construction or, for some types of permits, operation can begin. All of these scenarios require a decision by the executive director—either to approve a permit registration, inform an applicant that the executive director has no comments, or simply choose not to object to the registration to use the air quality standard permit. Therefore, as some types of air quality standard permits require some executive director decision, they fall within the statutory directive of THSC, §382.061(b). The commission disagrees with the assertion that only air quality standard permits that require notice or a more extensive review should be subject to commission review through a motion to overturn. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.~~

Comment

TIP believes that the proposed amendment would have unintended consequences. TIP states that the proposed amendment would make any response by the executive director to a standard permit registration under Chapter 116 a "decision of the executive director" that would be subject

to the motion to overturn. TIP states that this reading is inconsistent with the standard permit rules and with conditions of standard permits that require only registration, such as the Oil and Gas Standard Permit and Pollution Control Standard Permits. TIP contrasts these types of standard permits with those that require notice, including the Concrete Batch Plant, Permanent Rock and Concrete Crushers, Animal Carcass Incinerators, and Hot Mix Asphalt Plant Standard Permits. TIP asks the commission to amend the rule proposal to leave the exemption for standard permits in place except for these specific types of standard permits.

Response

The commission disagrees with TIP's assessment that only air quality standard permits that require notice and the hot mix asphalt standard permit (which does not require notice), are subject to a decision by the executive director. The commission has delegated the decision to authorize use of a standard permit for more types of registrations than those that require notice and comment and the hot mix asphalt standard permit. The commission believes that authorizations to use a standard permit that require the exercise of discretion by the executive director involve a decision that, pursuant to statute, should be reviewable by the commission. However, the commission acknowledges that some types of authorizations to use standard permits do not involve such discretion and decision-making. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permit registrations that require a decision by the executive director are not exempt from the motion to overturn process.

~~The commission disagrees with TIP's assessment that only air quality standard permits that require notice, or the hot mix asphalt standard permit (which does not require notice), are subject to a "decision by the executive director." As discussed previously, several types of air quality standard permit registrations require either an affirmative action that the executive~~

~~director approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no executive director comments before construction or, for some types of permits, operation can begin. All of these scenarios require a decision by the executive director—either to approve a permit registration, inform an applicant that the executive director has no comments, or simply choose not to object to the registration to use the air quality standard permit. Therefore, as some types of air quality standard permits require some executive director decision, they fall within the statutory directive of THSC, §382.061(b). The commission disagrees with the assertion that only air quality standard permits that require notice or a more extensive review should be subject to commission review through a motion to overturn. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permits registration requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.~~

Comment

TPA suggests that the commission should alter the proposed amendment to limit the change to air quality standard permits for concrete batch plants, permanent rock and concrete crushers, animal carcass incinerators, and permanent hot mix asphalt plants. TPA states that this change would avoid unintended consequences, and that it is erroneous to conclude that any authorization to operate under an air quality standard permit is subject to appeal.

Response

The commission disagrees with TPA's assessment that only air quality standard permits for concrete batch plants, permanent rock and concrete crushers, animal carcass incinerators,

and permanent hot mix asphalt plants (which do not require notice) are subject to a "decision by the executive director." The commission has delegated the decision to authorize use of a standard permit for more types of registrations than those that require notice and comment and the hot mix asphalt standard permit. The commission believes that authorizations to use a standard permit that require the exercise of discretion by the executive director involve a decision that, pursuant to statute, should be reviewable by the commission. However, the commission acknowledges that some types of authorizations to use standard permits do not involve such discretion and decision-making. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permit registrations that require a decision by the executive director are not exempt from the motion to overturn process.

~~Several types of air quality standard permit registrations require either an affirmative action that the executive director either approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no executive director comments before construction or operation can begin. All of these scenarios require either an affirmative action that the executive director approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no executive director comments before construction or, for some types of permits, operation can begin. Therefore, as some types of air quality standard permits require some executive director decision, they fall within the statutory directive of THSC, §382.061(b). The commission disagrees with the assertion that only air quality standard permits that require notice or a more extensive review should be subject to commission review through a motion to overturn. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to~~

~~overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.~~

Comment

TPA states that the appropriate place for the public to comment on a standard permit is when the standard permit is developed by the commission.

Response

The commission agrees that the process of developing an air quality standard permit offers the opportunity for public comment on the air quality standard permit itself. The commission does not agree that the process of obtaining a registration to use an air quality standard permit does not sometimes involve a decision of the executive director. **The commission has delegated the decision to authorize use of a standard permit for certain air standard permits. The commission believes that authorizations to use a standard permit that require the exercise of discretion by the executive director involve a decision that, pursuant to statute, should be reviewable by the commission. However, the commission acknowledges that some types of authorizations to use standard permits do not involve such discretion and decision-making. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permit registrations that require a decision by the executive director are not exempt from the motion to overturn process.**

~~As discussed above, some types of air quality standard permit registrations require more than a simple registration prior to an applicant moving forward with construction or operation. If the executive director does not send comments to an applicant, or if the~~

~~executive director sends a letter that there are no comments by the executive director and an applicant may proceed, both are affirmative actions taken by the executive director and are therefore decisions of the executive director. The language of THSC, §382.061(b) would then apply, and these decisions are reviewable by the commission. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.~~

Comment

TPA comments that subjecting routine standard permit authorizations to commission review would create substantial new burdens for applicants and TCEQ staff and be contrary to the purpose of standard permits and the intent of legislature. TPA believes it would be expensive and time-consuming and require additional staff if the proposed amendment is adopted and the motion to overturn process is opened up to all standard permit registrations.

Response

The commission evaluated the potential impact of the proposed rule and does not agree with the commenters that there will be adverse effects on TCEQ resources or applicants for air quality standard permit registrations. Although the number of actions that may be subject to a motion to overturn will increase, the commission does not anticipate that all such actions will receive challenges. Given the historical record of motions to overturn filed on air quality standard permits, the commission does not have reason to believe that adoption of the proposed amendment would lead to a significant increase in motions to overturn air

*quality standard permit registrations. The commission also disagrees with the commenters that the amendment as proposed is contrary to the intent of the legislature, particularly given the discussion during the April 26, 2023, meeting of the Senate Natural Resources and Economic Development Committee. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director **that** ~~which~~ are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits **that** ~~which~~ require a decision by the executive director ~~do not have an exemption~~ **are not exempt** from the motion to overturn process.*

Comment

TPA's comment suggests that registrations to use agency Permits by Rule, those promulgated under Chapter 106, would also potentially be subject to a motion to overturn under the reasoning that they also do not require any sort of detailed review or decision of the executive director.

Response

The commission disagrees that registration to use an air quality standard permit is the same as obtaining authorization to operate under a permit by rule that has been promulgated under 30 TAC Chapter 106. Air quality standard permits—except those that require only notification or require no registration—involve a delegation of discretion to executive director staff to review the registration and require a decision by the executive director to either approve the registration (through an affirmative approval or, for certain registrations, by not objecting within 45 days) or object to the registration. By contrast, authorization to operate under most PBRs only requires the applicant to satisfy the

conditions of the PBR. Most permits by rule do not require review and some do not even require notification. However, the commission acknowledges that several standard permits similarly do not require registration or merely require notification, and therefore the executive director does not perform a technical review. For these standard permit registrations, the commission has not delegated a decision to the executive director. The commission agrees that only air quality standard permit registrations delegating a decision to the executive director should be subject to a motion to overturn. Therefore, in response to this comment the commission has amended the proposed rule language to specify that air quality standard permits that require a decision by the executive director do not have an exemption from the motion to overturn process.

The commission disagrees that registration to use an air quality standard permit is the same as obtaining authorization to operate under a permit by rule that has been promulgated under 30 TAC Chapter 106. Some types of air quality standard permit registrations involve executive director staff review, however limited, requiring a decision by the executive director to either approve the registration or to not comment or object to the registration, with the latter including a corresponding waiting period prior to commencing construction or operation, even for air quality standard permits that do not require public notice. Permits by rule do not require even this type of limited review; authorization to operate under a PBR only requires that the applicant satisfy the conditions of the PBR. In fact, many types of permits by rule do not even require active registration to be used, and the ones that do require registration do not require the same level of action by the executive director. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard

~~***permits which require a decision by the executive director do not have an exemption from the motion to overturn process.***~~

Comment

State Representative Armando L. Walle supports the proposed amendment to align TCEQ rules with statutory requirements.

Response

The commission appreciates the support for the proposed rulemaking. No changes were made in response to this comment.

SUCHAPTER G: ACTION BY THE EXECUTIVE DIRECTOR

§50.131

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director.

The amendments are also adopted under Texas Health and Safety Code (THSC), §382.011, which authorizes the commission to control the quality of the state's air; THSC, §382.017, which authorizes the commission to adopt any rules necessary to carry out its powers and duties to control the quality of the state's air; and THSC, §382.061, which concerns the delegation of powers and duties from the commission to the executive director. In addition, the amendments are also adopted under Texas Government Code (Tex. Gov't Code), §2001.004, which requires state agencies to adopt procedural rules and Tex. Gov't Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The rulemaking implements TWC, §§5.013, 5.102, 5.103, and 5.122; and THSC, §§382.011, 382.017, and 382.061.

§50.131, Purpose and Applicability.

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the

commission. This subchapter does not affect the executive director's authority to act on an application where that authority is delegated elsewhere.

(b) This subchapter applies to applications that are administratively complete on or after September 1, 1999 and to certifications of Water Quality Management Plan (WQMP) updates. Except as provided by subsection (c) of this section, this subchapter applies to:

(1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);

(2) appointments to the board of directors of districts created by special law;

(3) certificates of adjudication;

(4) district matters under Texas Water Code (TWC), Chapters 49 - 66;

(5) districts' proposed impact fees, charges, assessments, or contributions approvable under Texas Local Government Code, Chapter 395;

(6) extensions of time to commence or complete construction;

(7) industrial and hazardous waste permits;

(8) municipal solid waste permits;

- (9) on-site wastewater disposal system permits;
- (10) radioactive waste or radioactive material permits or licenses;
- (11) underground injection control permits;
- (12) water rights permits;
- (13) wastewater permits;
- (14) weather modification measures permits;
- (15) driller licenses under TWC, Chapter 32;
- (16) pump installer licenses under TWC, Chapter 33;
- (17) irrigator or installer registrations under TWC, Chapter 34; and
- (18) municipal management district matters under Texas Local Government Code, Chapter 375.

(c) In addition to those things excluded from coverage under §50.102 of this title (relating to Applicability), this subchapter does not apply to:

~~†~~(1) air quality standard permits under Chapter 116 of this title, **except for air quality standard permits that require a decision by the executive director;**

~~†~~(2) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Permits by Rule) except for concrete batch plants which are not contiguous or adjacent to a public works project;

~~†~~(3) consolidated proceedings covering additional matters not within the scope of subsection (b) of this section;

~~†~~(4) district matters under TWC, Chapters 49 - 66, as follows:

(A) an appeal under TWC, §49.052 by a member of a district board concerning his removal from the board;

(B) an application under TWC, Chapter 49, Subchapter K, for the dissolution of a district;

(C) an application under TWC, §49.456 for authority to proceed in bankruptcy;

(D) an appeal under TWC, §54.239, of a board decision involving the cost, purchase, or use of facilities; or

(E) an application under TWC, §54.030 for conversion of a district to a municipal utility district;

~~(4)~~(5) actions of the executive director under Chapters 101, 111 - 115, 117, and 118 of this title (relating to General Air Quality Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution From Nitrogen Compounds; and Control of Air Pollution Episodes);

(6) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting); and

(7) an application for creation of a municipal management district under Texas Local Government Code, Chapter 375.

(d) Regardless of subsection (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.139(b) - (f) of this title (relating to Motion to Overturn Executive Director's Decision) applies. If the rules under which the executive director evaluates a registration application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Rulemaking Adoption

AGENDA REQUESTED: September 27, 2023

DATE OF REQUEST: September 14, 2023

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Gwen Ricco, Rule/Agenda Coordinator, (512) 239-2678

CAPTION: Docket No. 2023-0583-RUL. Consideration for adoption of amendments to Section 50.131(c) of 30 Texas Administrative Code (TAC) Chapter 50, Action on Applications and Other Authorizations.

The rulemaking adoption will reconcile an inconsistency between 30 TAC Section 50.131(c)(1) and the statutory requirements of Texas Health and Safety Code, Section 382.061(b), which requires executive director (ED) actions on permits to be reviewable by the commission. This will amend the exemption for a motion to overturn the ED's decision on registrations for authorization under air quality standard permits. The proposed rules were published in the July 14, 2023, *Texas Register* (48 TexReg 3832). (Booker Harrison, Amy Browning, Rule Project No. 2023-130-050-LS)

Erin E. Chancellor
Director

Charmaine Backens
Division Deputy Director

Gwen Ricco
Agenda Coordinator

Copy to CCC Secretary? NO YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** September 14, 2023

Thru: Laurie Gharis, Chief Clerk
Kelly Keel, Interim Executive Director

From: Erin E. Chancellor, Director
Office of Legal Services

Docket No.: 2023-0583-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 50, Actions on Applications and Other Authorizations
Update to 30 TAC §50.131
Rule Project No. 2023-130-050-LS

Background and reason(s) for the rulemaking adoption:

Recent interest in air standard permit applications has brought to light an inconsistency between the Texas Commission on Environmental Quality (TCEQ, agency, or commission) rules in Chapter 50 and statutory requirements in Texas Health and Safety Code (THSC), §382.061(b). The rulemaking would clarify that air quality standard permits are reviewable through the commission's motion to overturn process by amending 30 Texas Administrative Code (TAC) §50.131(c)(1) to state that the exemption applies except when a registration to use a standard permit requires a decision by the executive director.

Scope of the rulemaking:

This is a rulemaking to conform an agency rule with statutory requirements. The rulemaking will amend 30 TAC §50.131(c)(1) to state that the exemption applies except when a registration to use a standard permit requires a decision by the executive director. This is different than the proposed language which would have simply deleted the exemption for standard permits completely. In response to comments, the rule language has been amended to explicitly mirror the statutory language of THSC, §382.061(b). The changed language will remove the exemption for a motion to overturn the executive director's decision on registrations to be authorized under a standard permit when such an authorization requires a decision by the executive director. Once the change in the rule is adopted and becomes effective, it will be clear that applicants and affected persons who wish to appeal the executive director's decision to issue a registration for a standard permit may request that the commission overturn that decision through the agency's established motion to overturn process. This administrative action would be required before such decisions could be challenged in district court. Thus, the administrative remedy would have to be exhausted prior to a judicial challenge. This change is being proposed to align the agency's rules with THSC, §382.061(b), which requires executive director decisions to be reviewable by the commission.

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A.) Summary of what the rulemaking will do: Amend 30 TAC §50.131(c)(1) to state that the exemption applies except when a registration to use an air quality standard permit requires a decision by the executive director.

B.) Scope required by federal regulations or state statutes: This change is required for consistency with THSC, §382.061(b), which generally requires executive director actions on permits to be reviewable by the commission.

C.) Additional staff recommendations that are not required by federal rule or state statute:
None.

Statutory authority:

Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules. Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation. Texas Water Code (TWC), §§5.102, 5.103, 5.105, and 5.112. THSC, §§382.011, 382.017, 382.0515, 382.056, 382.058, and 382.061.

Effect on the:

A.) Regulated community: A small number of applications for air quality standard permit registrations may face additional challenge by interested parties, and executive director decisions on their permit approvals may be subject to review by the commission.

B.) Public: The public may gain clarity regarding the process for challenging executive director decisions on applications for registrations for air quality standard permits.

C.) Agency programs: This rule change is expected to have minimal impact on agency activities. Executive director decisions on applications for registrations of standard permits are currently subject to appeal before the commission pursuant to THSC, §382.061(b), and the commission currently reviews appeals on their merits. Clarifying to applicants and the public that the commission's motion to overturn process is available may result in a small number of additional motions to overturn that must be reviewed each year.

Stakeholder meetings:

There were no stakeholder meetings for this rule project.

Public comment:

The commission offered two public hearings on August 1, 2023, and August 15, 2023. The comment period closed at 11:59 p.m. on August 18, 2023. Comments were received from State Senator Carol Alvarado; Energy Transfer LP (ET); a joint letter from Texas Chemical Council (TCC) and the Texas Oil and Gas Association (TXOGA); Texas Industry Project (TIP); Texas Pipeline Association (TPA); and State Representative Armando Walle.

TCC, TXOGA, and TPA jointly requested that the commission extend the comment period for the proposed rulemaking from August 15, 2023, until August 29, 2023. The commission granted a limited extension of the comment period to August 18, 2023.

Senator Alvarado and Representative Walle were supportive of the proposed amendment. The remaining commentors expressed support for a more limited change than what the commission proposed and suggested changes to the proposed amendment. These comments expressed

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concern that the proposed amendment has the potential to greatly impact the timeframe for claiming standard permits, the Texas economy as a whole, TCEQ executive director staff resources, TCEQ commission staff resources and potentially Alternative Dispute and State Office of Administrative Hearings staff resources; these commenters requested that the proposed amendment be narrowed to only apply to standard permits that require a more in-depth review by the executive director and that have the opportunity for comment and a response to those comments from TCEQ. In response to these comments, the proposed language was changed to mirror the specific language in the statute, so that the exemption from a motion to overturn for air quality standard permit registrations does not apply when obtaining such a registration requires a decision by the executive director.

Significant changes from proposal:

The rulemaking will amend 30 TAC §50.131(c)(1) to state that the exemption applies except when a registration to use an air quality standard permit requires a decision by the executive director. This is different than the proposed language which would have simply deleted the exemption for air quality standard permits. In response to comments, the rule language has been amended to mirror the statutory language of THSC, §382.061(b). The changed language will remove the exemption for a motion to overturn the executive director's decision on registrations to be authorized under an air quality standard permit when such an authorization requires a decision by the executive director.

Public Involvement Plan

A Public Involvement Plan was developed for this rulemaking.

Alternative Language Requirements

Spanish.

Potential controversial concerns and legislative interest:

There has been legislative interest in this issue, including from Senators Birdwell and Alvarado. At a Senate Natural Resources & Economic Development Committee meeting during the 88th legislative session, the chairman of the committee, Senator Birdwell, indicated that the agency should work to expeditiously resolve the inconsistency between the agency's rules and the requirements of THSC, §382.061(b), which generally requires executive director actions on permits to be reviewable by the commission.

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

This rulemaking will remove a current exemption in agency rules from the motion to overturn process when there is an executive director decision to issue an air quality standard permit registration.

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

If this rulemaking does not go forward, it is expected that the legislature would likely act to require a similar rulemaking in the future.

Key points in the rulemaking adoption schedule:

Texas Register proposal publication date: July 14, 2023

Anticipated *Texas Register* adoption publication date: October 13, 2023

Anticipated effective date: October 19, 2023

Six-month *Texas Register* filing deadline: January 14, 2024

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Re: Docket No. 2023-0583-RUL

Agency contacts:

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Amy Browning, Staff Attorney, Environmental Law Division, (512) 239-0891

Gwen Ricco, Texas Register Rule/Agenda Coordinator, General Law Division, (512) 239-2678

Attachments:

None

cc: Chief Clerk, 2 copies
Executive Director's Office
Jim Rizk
Morgan Johnson
Krista Kyle
Office of General Counsel
Booker Harrison
Amy Browning
Gwen Ricco

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §50.131.

Background and Summary of the Factual Basis for the Adopted Rules

The adopted amendments will conform an agency rule with statutory requirements. The agency will amend 30 Texas Administrative Code (TAC) §50.131(c)(1) to state that the exemption applies except when a registration to use an air quality standard permit requires a decision by the executive director. This will remove the exemption from the agency’s motion to overturn process for the executive director’s decision on registrations for authorization under an air quality standard permit, when such an authorization requires an executive director decision to be issued. When the adopted rule becomes effective, it will be clear that applicants and affected persons who wish to challenge an executive director decision to issue a registration for an air quality standard permit may request that the commission overturn that decision through the agency’s motion to overturn process. This administrative action will be required before such a decision can be challenged in district court. Thus, the administrative remedy will have to be exhausted prior to a judicial challenge. This change is being adopted to align the agency’s rules with Texas Health and Safety Code (THSC), §382.061(b), which requires executive director decisions on permits to be reviewable by the commission. The commission changed the deletion of the exemption that was proposed to the adopted language that mirrors the statutory language in THSC, §382.061(b) in response to comments that not all air quality standard permit registrations require a decision by the executive director before being issued.

Section by Section Discussion

An amendment to §50.131(c)(1) to state that the exemption applies except when a registration to use an air quality standard permit requires a decision by the executive director is adopted.

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 of §50.131 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they 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. Rather, this rulemaking amends rule language to align the rule with statutory requirements relating to the review by the commission of executive director decisions on air quality standard permit registrations through a motion-to-overturn opportunity in the commission's rules.

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. The adopted amendment of §50.131 do not exceed a standard set by federal law, exceed an express

requirement of state law, exceed a requirement of a delegation agreement or contract, and were not developed solely under the general powers of the agency but are authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments on the Draft Regulatory Impact Analysis were received.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The adopted amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would 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). 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 rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is 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. No comments were received during the public comment period.

Effect on Sites Subject to the Federal Operating Permits Program

Section 50.131 is not an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; and therefore, no effect on sites subject to the Federal Operating Permits program is expected when the commission adopts this rule.

Public Comment

The commission offered two public hearings, on August 1, and August 15, 2023. The comment period closed at 11:59 p.m. on August 18, 2023. The commission received comments from State Senator Carol Alvarado; Energy Transfer LP (ET); Texas Chemical Council (TCC) and the Texas Oil and Gas Association (TXOGA), jointly; Texas Industry Project (TIP); Texas Pipeline Association (TPA); and State Representative Armando Walle. Senator Alvarado and Representative Walle were supportive of the proposed amendment. The remaining comments expressed support for a more limited change than what the commission proposed and suggested changes to the proposed amendment. TCC, TXOGA, and TPA jointly requested that the commission extend the comment period for the proposed rulemaking from August 15, 2023, until August 29, 2023. The commission granted a limited extension of the comment period to August 18, 2023. The commission made changes to the proposed rule amendment in response to the comments that were received. In response to comments, the rule language has been amended to explicitly mirror the statutory language of THSC, §382.061(b).

Response to Comments

Comment

State Senator Carol Alvarado supports the proposed amendments to align TCEQ rules with statutory requirements.

Response

The commission appreciates the support for the proposed rulemaking. No changes were made in response to this comment.

Comment

Energy Transfer LP (ET) opposes the proposed amendments to 30 TAC §50.131. ET disagrees that the proposed amendment is necessary to reconcile the rule with the statutory requirement of THSC, §382.061(b). ET states that standard permits are exempted from coverage under §50.131 because they are claimed registrations and not issued permits. ET states that action by the executive director occurs on standard permits when the specific standard permit is promulgated; and when a standard permit is registered for a process, there is no further executive director decision that occurs that would be addressed with a motion to overturn. ET states that if the proposed amendment is adopted, it will have an adverse impact on energy reliability in Texas and needlessly increase the costs and time spent by the commission and operators who use standard permits.

Response

The commission disagrees with the assertion that the proposed amendment is not necessary. The discrepancy between 30 TAC §50.131(c)(1) and THSC, §382.061(b) was identified and discussed at the April 26, 2023, hearing of the Senate Natural Resources and Economic

Development Committee during the 88th Regular Legislative Session. Although it is possible that the commission may receive an increased number of motions to overturn for air quality standard permit registrations, the commission does not anticipate any undue burden on either the commission or on the regulated community. The commission understands that air quality standard permits themselves are generally open for public comment when the standard permit itself is promulgated; however, approval of a registration to use some types of air quality standard permits is still a decision of the executive director that, according to statute, must be reviewable by the commission. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.

Comment

TCC, TXOGA, and TPA requested an extension of the comment period on the proposed rulemaking until August 29, 2023.

Response

The commission extended the comment period for this rulemaking to Friday, August 18, 2023.

Comment

TCC and TXOGA state that the proposed rule amendment will remove all standard permits issued under 30 TAC Chapter 116 from the scope of actions that are exempt from motion to overturn procedures.

Response

TCC and TXOGA are correct that the proposed rule amendment would have meant that all registrations for authorization under an air quality standard permit issued under Chapter 116 are subject to a motion to overturn. In response to comment, the commission has clarified in the adopted rule language that it is the issuance of registrations to use an air quality standard permit that require a decision of the executive director to be issued that do not have an exemption from the motion to overturn process.

Comment

TCC and TXOGA state that the proposed rulemaking is three separate rulemakings in one.

Response

Commenters are incorrect. The amendments to the proposed rule are one rulemaking that has been undertaken to align TCEQ rules with statutory requirements as discussed in the rule preamble. No changes were made in response to this comment.

Comment

TCC and TXOGA state that the proposed rule amendment will impact an average of 850-1000 standard permits a year, allow for potential challenges through the motion to overturn process, and has the potential to greatly impact the timeframe for claiming standard permits, the Texas economy as a whole, TCEQ ED staff resources, TCEQ commission staff resources, and potentially Alternative Dispute and State Office of Administrative Hearings staff resources.

Response

The commission evaluated the potential impact of the proposed rule and does not agree with the commenters that there will be adverse effects on the Texas economy, TCEQ resources, or SOAH resources. Although the number of actions that may be subject to a motion to overturn will increase, the commission does not anticipate that all such actions will receive challenges. Given that few motions to overturn have historically been filed on air quality standard permits, the commission does not believe that adoption of the proposed amendment would significantly impact the number of motions to overturn filed on air quality standard permit registrations. No changes were made in response to this comment.

Comment

TCC and TXOGA detail the process for promulgating a standard permit, and state that the appropriate place for the public to comment on a standard permit is when the standard permit is developed by the commission. The commenters state that a registration to use a standard permit is not a decision by the executive director that should be subject to a motion to overturn as contemplated by THSC, §382.061(b). TCC and TXOGA state that only standard permit registrations that require notice, specifically, the Concrete Batch Plant, Concrete Batch Plants with Enhanced Controls, Permanent Rock and Concrete Crushers, Animal Carcass Incinerators, and Hot Mix Asphalt Plant Standard Permits, should be subject to a motion to overturn. Commenters state that other standard permit registrations do not require a decision by the executive director, and therefore, the commission should change the proposed amendment to limit the opportunity for a motion to overturn to those specific enumerated types of standard permits.

Response

The commission disagrees with commenters assessment that only air quality standard permits that require notice, or the hot mix asphalt standard permit (which does not require

notice), are subject to a "decision by the executive director." Several types of air quality standard permit registrations require either an affirmative action that the executive director approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no comments before construction or, for some types of permits, operation can begin. All of these scenarios require a decision by the executive director - either to approve a permit registration or let an applicant know that the executive director has no comments on or objections to the registration to use the air quality standard permit. Therefore, as some types of air quality standard permits require some executive director decision, they fall within the statutory directive of THSC, §382.061(b). The commission disagrees with the assertion that only air quality standard permits that require notice or a more extensive review should be subject to the opportunity for commission review. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permit registrations which require a decision by the executive director to be issued do not have an exemption from the motion to overturn process.

Comment

TCC and TXOGA state that the proposed amendment should be narrowed to only apply to standard permits that require a more in-depth review by the executive director and that have the opportunity for public comment and a response to those comments from TCEQ.

Response

The commission disagrees that only air quality standard permits that require a more extensive review by the executive director or that have an opportunity for public comment,

or the hot mix asphalt standard permit (which does not require notice), should be subject to a motion to overturn under the statutory requirement. As previously discussed, several types of air quality standard permit registrations require either an affirmative action that the executive director approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no executive director comments before construction or, for some types of permits, operation can begin. All of these scenarios require a decision by the executive director - either to approve a permit registration, inform an applicant that the executive director has no comments, or simply choose not to object to the registration to use the air quality standard permit. Therefore, as some types of air quality standard permits require some executive director decision, they fall within the statutory directive of THSC, §382.061(b). The commission disagrees with the assertion that only air quality standard permits that require notice or a more extensive review should be subject to commission review through a motion to overturn. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.

Comment

TIP believes that the proposed amendment would have unintended consequences. TIP states that the proposed amendment would make any response by the executive director to a standard permit registration under Chapter 116 a "decision of the executive director" that would be subject to the motion to overturn. TIP states that this reading is inconsistent with the standard permit rules and with conditions of standard permits that require only registration, such as the Oil and

Gas Standard Permit and Pollution Control Standard Permits. TIP contrasts these types of standard permits with those that require notice, including the Concrete Batch Plant, Permanent Rock and Concrete Crushers, Animal Carcass Incinerators, and Hot Mix Asphalt Plant Standard Permits. TIP asks the commission to amend the rule proposal to leave the exemption for standard permits in place except for these specific types of standard permits.

Response

The commission disagrees with TIP's assessment that only air quality standard permits that require notice, or the hot mix asphalt standard permit (which does not require notice), are subject to a "decision by the executive director." As discussed previously, several types of air quality standard permit registrations require either an affirmative action that the executive director approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no executive director comments before construction or, for some types of permits, operation can begin. All of these scenarios require a decision by the executive director - either to approve a permit registration, inform an applicant that the executive director has no comments, or simply choose not to object to the registration to use the air quality standard permit. Therefore, as some types of air quality standard permits require some executive director decision, they fall within the statutory directive of THSC, §382.061(b). The commission disagrees with the assertion that only air quality standard permits that require notice or a more extensive review should be subject to commission review through a motion to overturn. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permits registration requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the

proposed rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.

Comment

TPA suggests that the commission should alter the proposed amendment to limit the change to air quality standard permits for concrete batch plants, permanent rock and concrete crushers, animal carcass incinerators, and permanent hot mix asphalt plants. TPA states that this change would avoid unintended consequences, and that it is erroneous to conclude that any authorization to operate under an air quality standard permit is subject to appeal.

Response

The commission disagrees with TPA's assessment that only air quality standard permits for concrete batch plants, permanent rock and concrete crushers, animal carcass incinerators, and permanent hot mix asphalt plants (which do not require notice) are subject to a "decision by the executive director." Several types of air quality standard permit registrations require either an affirmative action that the executive director either approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no executive director comments before construction or operation can begin. All of these scenarios require either an affirmative action that the executive director approves the registration or has no objections to the registration, or require that a registrant must wait a specified period of time with no executive director comments before construction or, for some types of permits, operation can begin. Therefore, as some types of air quality standard permits require some executive director decision, they fall within the statutory directive of THSC, §382.061(b). The commission disagrees with the assertion that only air quality standard permits that require notice or a more extensive review should be subject to commission review through a motion to overturn. However, the

commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.

Comment

TPA states state that the appropriate place for the public to comment on a standard permit is when the standard permit is developed by the commission.

Response

The commission agrees that the process of developing an air quality standard permit offers the opportunity for public comment on the air quality standard permit itself. The commission does not agree that the process of obtaining a registration to use an air quality standard permit does not sometimes involve a decision of the executive director. As discussed above, some types of air quality standard permit registrations require more than a simple registration prior to an applicant moving forward with construction or operation. If the executive director does not send comments to an applicant, or if the executive director sends a letter that there are no comments by the executive director and an applicant may proceed, both are affirmative actions taken by the executive director and are therefore decisions of the executive director. The language of THSC, §382.061(b) would then apply, and these decisions are reviewable by the commission. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed

rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.

Comment

TPA comments that subjecting routine standard permit authorizations to commission review would create substantial new burdens for applicants and TCEQ staff and be contrary to the purpose of standard permits and the intent of legislature. TPA believes it would be expensive and time-consuming and require additional staff if the proposed amendment is adopted and the motion to overturn process is opened up to all standard permit registrations.

Response

The commission evaluated the potential impact of the proposed rule and does not agree with the commenters that there will be adverse effects on TCEQ resources or applicants for air quality standard permit registrations. Although the number of actions that may be subject to a motion to overturn will increase, the commission does not anticipate that all such actions will receive challenges. Given the historical record of motions to overturn filed on air quality standard permits, the commission does not have reason to believe that adoption of the proposed amendment would lead to a significant increase in motions to overturn air quality standard permit registrations. The commission also disagrees with the commenters that the amendment as proposed is contrary to the intent of the legislature, particularly given the discussion during the April 26, 2023, meeting of the Senate Natural Resources and Economic Development Committee. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed

rule language to specify that air quality standard permits which require a decision by the executive director do not have an exemption from the motion to overturn process.

Comment

TPA's comment suggests that registrations to use agency Permits by Rule, those promulgated under Chapter 106, would also potentially be subject to a motion to overturn under the reasoning that they also do not require any sort of detailed review or decision of the executive director.

Response

The commission disagrees that registration to use an air quality standard permit is the same as obtaining authorization to operate under a permit by rule that has been promulgated under 30 TAC Chapter 106. Some types of air quality standard permit registrations involve executive director staff review, however limited, requiring a decision by the executive director to either approve the registration or to not comment or object to the registration, with the latter including a corresponding waiting period prior to commencing construction or operation, even for air quality standard permits that do not require public notice. Permits by rule do not require even this type of limited review; authorization to operate under a PBR only requires that the applicant satisfy the conditions of the PBR. In fact, many types of permits by rule do not even require active registration to be used, and the ones that do require registration do not require the same level of action by the executive director. However, the commission does agree that the rule language should be explicit that it is the issuance of air quality standard permit registrations requiring a decision by the executive director which are subject to a motion to overturn. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard

permits which require a decision by the executive director do not have an exemption from the motion to overturn process.

Comment

State Representative Armando L. Walle supports the proposed amendment to align TCEQ rules with statutory requirements.

Response

The commission appreciates the support for the proposed rulemaking. No changes were made in response to this comment.

SUCHAPTER G: ACTION BY THE EXECUTIVE DIRECTOR

§50.131

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director.

The amendments are also adopted under Texas Health and Safety Code (THSC), §382.011, which authorizes the commission to control the quality of the state's air; THSC, §382.017, which authorizes the commission to adopt any rules necessary to carry out its powers and duties to control the quality of the state's air; and THSC, §382.061, which concerns the delegation of powers and duties from the commission to the executive director. In addition, the amendments are also adopted under Texas Government Code (Tex. Gov't Code), §2001.004, which requires state agencies to adopt procedural rules and Tex. Gov't Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The rulemaking implements TWC, §§5.013, 5.102, 5.103, and 5.122; and THSC, §§382.011, 382.017, and 382.061.

§50.131, Purpose and Applicability.

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the

commission. This subchapter does not affect the executive director's authority to act on an application where that authority is delegated elsewhere.

(b) This subchapter applies to applications that are administratively complete on or after September 1, 1999 and to certifications of Water Quality Management Plan (WQMP) updates. Except as provided by subsection (c) of this section, this subchapter applies to:

- (1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);
- (2) appointments to the board of directors of districts created by special law;
- (3) certificates of adjudication;
- (4) district matters under Texas Water Code (TWC), Chapters 49 - 66;
- (5) districts' proposed impact fees, charges, assessments, or contributions approvable under Texas Local Government Code, Chapter 395;
- (6) extensions of time to commence or complete construction;
- (7) industrial and hazardous waste permits;
- (8) municipal solid waste permits;

- (9) on-site wastewater disposal system permits;
- (10) radioactive waste or radioactive material permits or licenses;
- (11) underground injection control permits;
- (12) water rights permits;
- (13) wastewater permits;
- (14) weather modification measures permits;
- (15) driller licenses under TWC, Chapter 32;
- (16) pump installer licenses under TWC, Chapter 33;
- (17) irrigator or installer registrations under TWC, Chapter 34; and
- (18) municipal management district matters under Texas Local Government Code, Chapter 375.

(c) In addition to those things excluded from coverage under §50.102 of this title (relating to Applicability), this subchapter does not apply to:

~~†~~(1) air quality standard permits under Chapter 116 of this title, **except for air quality standard permits that require a decision by the executive director;**

~~†~~(2) air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Permits by Rule) except for concrete batch plants which are not contiguous or adjacent to a public works project;

~~†~~(3) consolidated proceedings covering additional matters not within the scope of subsection (b) of this section;

~~†~~(4) district matters under TWC, Chapters 49 - 66, as follows:

(A) an appeal under TWC, §49.052 by a member of a district board concerning his removal from the board;

(B) an application under TWC, Chapter 49, Subchapter K, for the dissolution of a district;

(C) an application under TWC, §49.456 for authority to proceed in bankruptcy;

(D) an appeal under TWC, §54.239, of a board decision involving the cost, purchase, or use of facilities; or

(E) an application under TWC, §54.030 for conversion of a district to a municipal utility district;

~~(4)~~(5) actions of the executive director under Chapters 101, 111 - 115, 117, and 118 of this title (relating to General Air Quality Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution From Nitrogen Compounds; and Control of Air Pollution Episodes);

(6) all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting); and

(7) an application for creation of a municipal management district under Texas Local Government Code, Chapter 375.

(d) Regardless of subsection (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.139(b) - (f) of this title (relating to Motion to Overturn Executive Director's Decision) applies. If the rules under which the executive director evaluates a registration application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.

(c) Treatment standards. For the purpose of this section, the department adopts the treatment standards in the 27th edition of the MCG Care Guidelines and the 3rd edition of the American Society of Addiction Medicine (ASAM) Criteria.

(d) Coverage required. For any treatment for which coverage is required under Insurance Code Chapter 1368, a group health benefit plan must use the MCG Care Guidelines or ASAM Criteria, as applicable to the treatment and care provided.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 28, 2023.

TRD-202302351

Jessica Barta

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: August 13, 2023

For further information, please call: (512) 676-6555



TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 50. ACTION ON APPLICATIONS AND OTHER AUTHORIZATIONS

SUBCHAPTER G. ACTION BY THE EXECUTIVE DIRECTOR

30 TAC §50.131

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments of §50.131.

Background and Summary of the Factual Basis for the Proposed Rules

The proposed amendments would conform an agency rule with statutory requirements. The agency would delete 30 Texas Administrative Code (TAC) §50.131(c)(1) and renumber the remaining parts of §50.131(c). This would remove the exemption from the agency's motion to overturn process for the executive director's (ED) decision on registrations for authorization under an air quality standard permit. If the proposed change in the rule is adopted and becomes effective, it would be clear that applicants and affected persons who wish to challenge the ED's decision to issue a registration for a standard permit may request that the commission overturn that decision through the agency's motion to overturn process. This administrative action would be required before such a decision could be challenged in district court. Thus, the administrative remedy would have to be exhausted prior to a judicial challenge. This change is being proposed to more closely align the agency's rules with Texas Health and Safety Code, §382.061(b), which requires all ED actions on permits to be reviewable by the commission.

Section by Section Discussion

Current §50.131(c)(1) is proposed for repeal. The remaining paragraphs of §50.131(c) are proposed to be renumbered from (c)(2) - (c)(7) to (c)(1) - (c)(6).

Fiscal Note: Costs to State and Local Government

Kyle Girtten, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of implementation or enforcement of the proposed rule.

Public Benefits and Costs

Mr. Girtten determined that for each year of the first five years the proposed rules are in effect, the benefit is increased consistency with statutory requirements, and the public will have an increased ability to challenge the ED's decisions on applications for registration to use standard permits. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Rural Community Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation of the proposed rule for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking amends an existing regulation. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

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 proposed amendments of §50.131 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they 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. Rather, this rulemaking removes language from the rule to more closely align the rule with statutory requirements relating to the review by the commission of ED decisions on air quality standard permit registrations through a motion-to-overturn opportunity in the commission's rules.

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. The proposed amendments of §50.131 do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement or contract, and were not developed solely under the general powers of the agency but are authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invites public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments do not affect private property in a manner that restricts or limits an owner's right to the property that would 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). Therefore, this rulemaking action would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking with the Coastal Management Program may be submitted to the contact

person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

Section 50.131 is not an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; and therefore, no effect on sites subject to the Federal Operating Permits program is expected if the commission adopts this proposed rule.

Announcement of Hearing

The commission will hold a hybrid virtual and in-person public hearing on this proposal in Austin on August 1, 2023, at 10:00 a.m. in Building E, Room 201S at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Individuals who plan to attend the hearing virtually and want to provide oral comments and/or want their attendance on record must register by Friday, July 28, 2023. To register for the hearing, please email Rules@tceq.texas.gov and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on Monday, July 31, 2023, to those who register for the hearing.

Members of the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

https://teams.microsoft.com/join/19%3ameeting_ZT-FhMzIwYjctMWVmYi00N2M0LWFiYzUtMzAzMzhiOTU3ZTQ3%40thread.v2/0?context=%7b%22Tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22Oid%22%3a%22e74a40ea-69d4-469d-a8ef-06f2c9ac2a80%22%2c%22Is-BroadcastMeeting%22%3atrue%7d

Persons who are planning to attend the hearing and have special communication or other accommodation needs should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Gwen Ricco, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to fax4808@tceq.texas.gov. Electronic comments may be submitted at: <https://tceq.commentinput.com/comment/search>. File size restrictions may apply to comments being submitted via the TCEQ Public Comments system. All comments should reference Rule Project Number 2023-130-050-LS. The comment period closes on August 14, 2023. Please choose one of the methods provided to submit your written comments.

Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Amy Browning, Environmental Law Division, amy.browning@tceq.texas.gov, (512) 239-0891.

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; and TWC, §5.122, which authorizes the commission to delegate uncontested matters to the executive director. The amendments are also adopted under Texas Health and Safety Code (THSC), §382.011, which authorizes the commission to control the quality of the state's air; THSC, §382.017, which authorizes the commission to adopt any rules necessary to carry out its powers and duties to control the quality of the state's air; and THSC §382.061, which concerns the delegation of powers and duties from the commission to the executive director. In addition, the amendments are also adopted under Texas Government Code (Tex. Gov't Code), §2001.004, which requires state agencies to adopt procedural rules and Tex. Gov't Code §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to implement legislation.

The rulemaking implements TWC, §§5.013, 5.102, 5.103, and 5.122; and THSC, §§382.011, 382.017, and 382.061.

§50.131 , Purpose and Applicability.

(a) The purpose of this subchapter is to delegate authority to the executive director and to specify applications on which the executive director may take action on behalf of the commission. This subchapter does not affect the executive director's authority to act on an application where that authority is delegated elsewhere.

(b) This subchapter applies to applications that are administratively complete on or after September 1, 1999 and to certifications of Water Quality Management Plan (WQMP) updates. Except as provided by subsection (c) of this section, this subchapter applies to:

- (1) air quality permits under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification);
- (2) appointments to the board of directors of districts created by special law;
- (3) certificates of adjudication;
- (4) district matters under Texas Water Code (TWC), Chapters 49 - 66;
- (5) districts' proposed impact fees, charges, assessments, or contributions approvable under Texas Local Government Code, Chapter 395;
- (6) extensions of time to commence or complete construction;
- (7) industrial and hazardous waste permits;
- (8) municipal solid waste permits;
- (9) on-site wastewater disposal system permits;
- (10) radioactive waste or radioactive material permits or licenses;
- (11) underground injection control permits;
- (12) water rights permits;
- (13) wastewater permits;
- (14) weather modification measures permits;

- (15) driller licenses under TWC, Chapter 32;
- (16) pump installer licenses under TWC, Chapter 33;
- (17) irrigator or installer registrations under TWC, Chapter 34; and
- (18) municipal management district matters under Texas Local Government Code, Chapter 375.

(c) In addition to those things excluded from coverage under §50.102 of this title (relating to Applicability), this subchapter does not apply to:

~~(1) air quality standard permits under Chapter 116 of this title;~~

(1) ~~[(2)]~~ air quality exemptions from permitting and permits by rule under Chapter 106 of this title (relating to Permits by Rule) except for concrete batch plants which are not contiguous or adjacent to a public works project;

(2) ~~[(3)]~~ consolidated proceedings covering additional matters not within the scope of subsection (b) of this section;

(3) ~~[(4)]~~ district matters under TWC, Chapters 49 - 66, as follows:

(A) an appeal under TWC, §49.052 by a member of a district board concerning his removal from the board;

(B) an application under TWC, Chapter 49, Subchapter K, for the dissolution of a district;

(C) an application under TWC, §49.456 for authority to proceed in bankruptcy;

(D) an appeal under TWC, §54.239, of a board decision involving the cost, purchase, or use of facilities; or

(E) an application under TWC, §54.030 for conversion of a district to a municipal utility district;

(4) ~~[(5)]~~ actions of the executive director under Chapters 101, 111 - 115, 117, and 118 of this title (relating to General Air Quality Rules; Control of Air Pollution From Visible Emissions and Particulate Matter; Control of Air Pollution From Sulfur Compounds; Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants; Control of Air Pollution From Motor Vehicles; Control of Air Pollution From Volatile Organic Compounds; Control of Air Pollution From Nitrogen Compounds; and Control of Air Pollution Episodes);

(5) ~~[(6)]~~ all compost facilities authorized to operate by registration under Chapter 332 of this title (relating to Composting); and

(6) ~~[(7)]~~ an application for creation of a municipal management district under Texas Local Government Code, Chapter 375.

(d) Regardless of subsection (b) or (c) of this section, when the rules governing a particular type of application allow a motion for reconsideration, §50.139(b) - (f) of this title (relating to Motion to Overturn Executive Director's Decision) applies. If the rules under which the executive director evaluates a registration application provide criteria for evaluating the application, the commission's reconsideration will be limited to those criteria.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on June 30, 2023.
TRD-202302386

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CHAPTER 290. PUBLIC DRINKING WATER
SUBCHAPTER D. RULES AND
REGULATIONS FOR PUBLIC WATER
SYSTEMS

30 TAC §§290.38, 290.39, 290.41 - 290.47

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figures in 30 TAC §290.47 are not included in the print version of the Texas Register. The figures are available in the on-line version of the July 14, 2023, issue of the Texas Register.)

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to 30 Texas Administrative Code §§290.38, 290.39, and 290.41 - 290.47.

Background and Summary of the Factual Basis for the Proposed Rules

In 2021, the 87th Legislature passed Senate Bill (SB) 3, which relates to preparing for, preventing, and responding to weather emergencies and power outages. SB 3 requires that certain water service providers ensure emergency operations during an extended power outage. SB 3 amended Texas Water Code (TWC), Chapter 13, by adding §13.1394, Standards of Emergency Operations, and amending §13.1395, Standards of Emergency Operations in Certain Counties. New TWC §13.1394, requires that affected utilities create an emergency preparedness plan that shows how an affected utility will provide emergency operations and submit that plan to the commission for review and approval. TWC §13.1394, stipulates that a water service provider must maintain 20 pounds per square inch (psi) of pressure, or a water pressure approved by the executive director, during power outages that last longer than 24 hours as soon as it is safe and practicable following a natural disaster. The statute also specifies that the commission has 90 days to review the plan, once the plan is submitted, and either approve it or recommend changes. Once the commission approves the plan the water service provider must operate in accordance with the plan and maintain any generators in accordance with manufacturer's specifications. TWC §13.1394 also specifies that the commission will conduct inspections to ensure compliance and that waivers to these requirements are available under certain circumstances. SB 3 stated in Section 36(b) that each affected utility was to submit to the commission an emergency preparedness plan required by TWC §13.1394, no later than March 1, 2022, and stated in 36(c) that the emergency preparedness plan was to be implemented no later than July 1, 2022, unless the affected utility had obtained an adjusted, commission approved timeline.

Amended TWC §13.1395, excludes from the requirement of creating an emergency preparedness plan those raw water services that are unnecessary or otherwise subject to interruption or curtailment during emergencies pursuant to contract.

In response to the widespread power and equipment failures and drinking water outages and shortages during Winter Storm Uri in 2021, the commission organized an after-action review to evaluate the factors that impacted public water systems across the state. This review resulted in findings and recommendations to enhance and integrate additional public water system critical infrastructure resiliency measures. These findings and recommendations were presented to the commission during a work session, held on May 19, 2022.

Section by Section Discussion

§290.38, Definitions

The commission proposes to add a definition to §290.38 for "accredited laboratory" to clarify the requirements for laboratories used to analyze drinking water samples for determination of compliance with maximum contaminant levels, actions levels, and microbial contaminants. This proposed change corresponds to the definition of "certified laboratory" in §290.38(12), which indicates that laboratories must be accredited, rather than certified, after June 30, 2008. Laboratory accreditation is issued by the commission under Texas Water Code, Chapter 5, Subchapter R, and its associated commission rules.

The commission proposes to add a definition to §290.38 for "adverse weather conditions". This proposed change is a recommendation which resulted from the after-action review findings.

The commission proposes to amend the definition of "affected utility" by adding language to encompass the definitions of affected utility in TWC §13.1394 and §13.1395. The commission proposes these amendments to reflect the requirements of TWC §13.1394(a)(1) and §13.1395(a)(1).

The commission proposes to amend the definition of "approved laboratory" to clarify that laboratory approval is required for determining compliance with treatment technique requirements in addition to maximum or minimum allowable constituent levels currently stated in rule.

The commission proposes to amend the definition of "emergency operations" to clarify the minimum required water pressure that affected utilities must provide during emergency operations. This clarification is consistent with the requirements under TWC §13.1394, which is 20 pounds per square inch, or a pressure approved by the executive director, and TWC §13.1395, which is 35 pounds per square inch.

The commission also proposes to amend sequential numbering for this section as necessary.

§290.39, General Provisions

The commission's proposed amendments for this section will clarify existing rules and also add provisions relating to TWC §13.1394 and §13.1395 to implement SB 3.

The commission proposes to amend §290.39(a) to include a statement that authority for this subchapter includes TWC §13.1394.

The commission proposes to amend §290.39(c)(4) by adding language that references TWC §13.1394 and §13.1395, replacing §§290.39(c)(4)(A) through 290.39(c)(4)(E) with a reference to §290.39(o) instead. This will reduce repetitive language already contained in §290.39(o).

The commission proposes to amend §290.39(n) to add a subsection tagline. This amendment will meet Texas Register rule

Texas Commission on Environmental Quality



ORDER ADOPTING AMENDED RULES

Docket No. 2023-0583-RUL

Rule Project No. 2023-130-050-LS

On September 27, 2023, the Texas Commission on Environmental Quality (Commission) adopted amended rules in 30 Texas Administrative Code Chapter 50, concerning Action on Applications and Other Authorizations. The proposed rules were published for comment in the July 14, 2023, *Texas Register* (48 TexReg 3832).

IT IS THEREFORE ORDERED BY THE COMMISSION that the amended rules are hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rules necessary to comply with *Texas Register* requirements. The adopted rules and the preamble to the adopted rules are incorporated by reference in this Order as if set forth at length verbatim in this Order.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Tex. Gov't Code Ann., Chapter 2001 (West 2016).

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Jon Niermann, Chairman

Date Signed