

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: June 28, 2023

DATE OF REQUEST: June 9, 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 publication of, and hearing on, proposed amendments to Section 50.131(c) of 30 Texas Administrative Code (TAC) Chapter 50, Action on Applications and Other Authorizations.

The proposed rulemaking would reconcile an inconsistency between an agency rule 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. The agency is proposing to delete 30 TAC Section 50.131(c)(1) and renumber the remaining parts of Section 50.131(c). This will remove the exemption for a motion to overturn the ED's decision on registrations for authorization under an air quality standard permit. (Booker Harrison, Amy Browning, Rule Project No. 2023-130-050-LS)

Charmaine K. Backens
Director

Guy Henry
Division Deputy Director

Gwen Ricco
Agenda Coordinator

Copy to CCC Secretary? NO YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** June 9, 2023

Thru: Laurie Gharis, Chief Clerk
Erin E. Chancellor, Interim Executive Director

From: Charmaine K. Backens, Acting Director
Office of Legal Services

Docket No.: 2023-0583-RUL

Subject: Commission Approval for Proposed Rulemaking
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:

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 standard permits are reviewable through the commission's motion to overturn process by deleting 30 Texas Administrative Code (TAC) §50.131(c)(1), which currently exempts decisions by the executive director on standard permit registrations from the motion to overturn process.

Scope of the rulemaking:

This is a rulemaking to conform an agency rule with statutory requirements. The rulemaking would delete 30 TAC §50.131(c)(1) and renumber the remaining parts of §50.131(c). This would remove the exemption from a motion to overturn the executive director's decision on registrations to be authorized under a standard permit. Once the change in the rule is adopted and becomes effective, it would 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 generally requires executive director actions on air standard permits to be reviewable by the commission.

A.) Summary of what the rulemaking would do: Delete current §50.131(c)(1) and renumber the remaining parts of §50.131(c).

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

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(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 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.

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

This rulemaking would remove a current exemption in agency rules from the motion to overturn process for the executive director's decision on a registration for authorization under an air quality standard permit.

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 proposal rulemaking schedule:

Anticipated proposal date: June 28, 2023

Anticipated *Texas Register* publication date: July 14, 2023

Anticipated public hearing date: August 1, 2023

Anticipated public comment period: July 14 - August 14, 2023

Anticipated adoption date: September 27, 2023

Commissioners

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Agency contacts:

Booker Harrison, Rule Project Manager, Environmental Law Division, (512) 239-4113

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) 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. Girten 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.

Draft Regulatory Impact Analysis Determination [if full RIA not required]

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/l/meetup-join/19%3ameeting_ZTFhMzIwYjctMWVmYi00N2M0LWFiYzUtMzAzMzhiOTU3ZTQ3%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%22IsBroadcastMeeting%22%3a%22true%22%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.

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;]

(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.