

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 registrations under an air quality standard permit that require an executive director decision. When the adopted rule becomes effective, it will be clear that applicants (i.e., registrants) and affected persons who wish to challenge an executive director decision to approve or deny 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.

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, the approval or denial of a registration to use some types of air quality standard permits is still a decision delegated to the executive director. Accordingly, pursuant to statute, these authorizations should be reviewable by the commission. The commission agrees that the rule language should only encompass authorizations involving a decision by the executive director. Therefore, in response to comment the commission has amended the proposed rule language to specify that air quality standard permits that require a decision by the executive director 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 registrations do not require a decision by the executive director. In response to comment, the commission has clarified in the adopted rule language that only those air quality standard permit registrations that require a decision of the executive director are subject to a motion to overturn.

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 agrees that the rule language should be explicit that only those air quality standard permit registrations that require a decision by the executive director, such as those for concrete batch plants, permanent rock and concrete crushers, and animal carcass incinerators, are subject to a motion to overturn. Because these standard permit registrations require public notice and an opportunity for public comment and require the executive director to decide whether to approve (or “grant”) or deny the registration, they involve a decision by the executive director that is subject to appeal to the commission. By contrast, those standard permit registrations, including registrations for hot mix asphalt plants, that become effective (1) without notice or registration, or (2) immediately upon registration, or (3) when they are “accepted” or received with “no objection,” or (4) a certain number of days after registration if there is no response from the executive director do not involve an appealable decision by the executive director. 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.

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 agrees that the rule language should be explicit that only those air quality standard permit registrations that require a decision by the executive director, such as those for concrete batch plants, permanent rock and concrete crushers, and animal carcass incinerators, are subject to a motion to overturn. Because these standard permit registrations require public notice and an opportunity for public comment and require the executive director to decide whether to approve (or “grant”) or deny the registration, they involve a decision by the executive director that is subject to appeal to the commission. By contrast, those standard permit registrations, including registrations for hot mix asphalt plants, that become effective (1) without notice or registration, or (2) immediately upon registration, or (3) when they are “accepted” or received with “no objection,” or (4) a certain number of days after registration if there is no response from the executive director do not involve an appealable decision by the executive director. 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.

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 agrees that the rule language should be explicit that only those air quality standard permit registrations that require a decision by the executive director, such as those for concrete batch plants, permanent rock and concrete crushers, and animal carcass incinerators, are subject to a motion to overturn. Because these standard permit registrations require public notice and an opportunity for public comment and require the executive director to decide whether to approve (or “grant”) or deny the registration, they involve a decision by the executive director that is subject to appeal to the commission. By contrast, those standard permit registrations, including registrations for hot mix asphalt plants, that become effective (1) without notice or registration, or (2) immediately upon registration, or (3) when they are “accepted” or received with “no objection,” or (4) a certain number of days after registration if there is no response from the executive director do not involve an appealable decision by the executive director. 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.

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 agrees that the rule language should be explicit that only those air quality standard permit registrations that require a decision by the executive director, such as those for concrete batch plants, permanent rock and concrete crushers, and animal carcass incinerators, are subject to a motion to overturn. Because these standard permit registrations require public notice and an opportunity for public comment and require the executive director to decide whether to approve (or “grant”) or deny the registration, they involve a decision by the executive director that is subject to appeal to the commission. By contrast, those standard permit registrations, including registrations for hot mix asphalt plants, that become effective (1) without notice or registration, or (2) immediately upon registration, or (3) when they are “accepted” or received with “no objection,” or (4) a certain number of days after registration if there is no response from the executive director do not involve an appealable decision by the executive director. 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.

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 and issuing an air quality standard permit offers the opportunity for public comment on the air quality standard permit itself. However, the process of registering to use certain air quality standard permits may still require a decision of the executive director. As discussed above, some types of air quality standard permits involve a process more like an application than a simple registration, including public notice, an opportunity for public comment, and the express approval of the commission or the executive director before an applicant can move forward with construction or operation. Decisions on registrations for these types of standard permits are subject to motions to overturn. 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.

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 only those registrations of air quality standard permits that require a decision by the executive director 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 require a decision by the executive director 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 registrations to use permits by rule promulgated under 30 TAC Chapter 106 are the same as registrations to use an air quality standard permit. While permits by rule and air quality standard permits share similar features, there are no permits by rule that require a decision by the executive director to approve or deny the

registration following public notice and comment. Therefore, permits by rule do not involve executive director decisions subject to 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;

(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.