

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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Attachments:

None

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