

Negotiated Rulemaking

Item A.5

Board Policy No. 2013-005

Texas Water Development Board

P.O. Box 13231, 1700 N. Congress Ave.
Austin, TX 78711-3231, www.twdb.state.tx.us
Phone (512) 463-7847, Fax (512) 475-2053

TO: Board Members

THROUGH: Melanie Callahan, Interim Executive Administrator
Ken Petersen, General Counsel
Carolyn Brittin, Deputy Executive Administrator, Water Resources Planning & Information
Robert Mace, Deputy Executive Administrator, Water Science & Conservation
Dave Mitamura, Deputy Executive Administrator, Program & Policy Development
Amanda Lavin, Deputy Executive Administrator, Project Oversight
Steve Rodriguez, Deputy Executive Administrator, Construction Assistance
Jeff Walker, Director, Project Development
Piper Montemayor, Director, Debt & Portfolio Management

FROM: Michelle A. McFaddin

DATE: October 12, 2011

SUBJECT: Development and Implementation of Policy to encourage Negotiated Rulemaking Procedures

ACTION REQUESTED

TWDB staff is requesting Board approval of a policy relating to the use of negotiated rulemaking.

BACKGROUND

In 1997, the Texas Legislature declared that “it is the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution procedures in appropriate aspects of the governmental body’s operations.” Beginning in the summer of 2002, the Sunset Commission began to implement this policy by recommending a standard statutory provision for all state agencies undergoing Sunset Review.

In 2010, the TWDB underwent Sunset Review. The Sunset Commission noted in its December, 2010 decision that the TWDB’s governing statute does not include the standard provision relating to alternative (negotiated) rulemaking. The Commission recommended that the TWDB develop and implement a policy to encourage alternative procedures for rulemaking, conforming,

<p>Our Mission : Board Members</p> <p>To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas :</p>	<p>Edward G. Vaughan, Chairman</p> <p>Joe M. Crutcher, Vice Chairman</p> <p>Melanie Callahan, Interim Executive Administrator</p>	<p>Thomas Weir Labatt III, Member</p> <p>Lewis H. McMahan, Member</p>	<p>Billy R. Bradford Jr., Member</p> <p>Monte Cluck, Member</p>
---	---	---	---

to the extent possible, to the model guidelines established by the State Office of Administrative Hearings (“SOAH”).

In response to the Sunset Commission’s various recommendations for the TWDB, the 82nd Texas Legislature enacted S.B. 660.¹ Section 2 of this bill added a new §6.113, Water Code, which requires the TWDB to develop and implement a policy to encourage the use of negotiated rulemaking procedures under Chapter 2008, Government Code, prior to the adoption of TWDB rules.² The TWDB is further required to (1) coordinate the implementation of this new policy; (2) provide training as needed to implement the procedures for negotiated rulemaking; and (3) collect data concerning the effectiveness of these new negotiated rulemaking procedures.

31 Texas Administrative Code (TAC) §353.60 (relating to Advisory Conference on Rules) already provides the TWDB with the legal authority to use the procedures of negotiated rulemaking established by the Negotiated Rulemaking Act in Chapter 2008, Government Code so there is no need to perform additional rulemaking in response to this statutory change. It is incumbent on the TWDB, however, to develop and implement a policy to encourage the use of these procedures, as appropriate, when considering formal rulemaking activities.

DISCUSSION OF NEGOTIATED RULEMAKING

Most state agencies, including the TWDB, have rulemaking authority that is typically exercised either through formal rulemaking proceedings under the Administrative Procedures Act (“APA”), or through negotiated rulemaking under the Texas Negotiated Rulemaking Act. In traditional rulemaking under the APA, an agency drafts a rule and publishes it for public comment in the *Texas Register*. The public is allowed to comment on the proposed rule and the agency is required to consider the public comment when taking final action on the rulemaking. In negotiated rulemaking, the agency convenes a working group comprised of stakeholder representatives and agency staff. The working group, through interest-based negotiation, develops a draft rule that is presented to the agency’s governing body for proposed adoption. The agency commits to publishing the proposed rule in the *Texas Register* and the process then continues in the same manner as traditional rulemaking under the APA.

A state agency that proposes to engage in negotiated rulemaking must appoint a convener to assist the agency in determining whether it is advisable to proceed. The state agency may appoint an agency employee or contract with another individual to serve as the convener. The convener’s role is to assist the agency in identifying persons who are likely to be affected by the proposed rule, including persons who oppose the issuance of a rule. The convener then files a

¹ S.B. 660, Acts of the 82nd Legislature, R.S., §2 (2011).

² Section 6.113 (a)(2) also directs the TWDB to “develop and implement a policy to encourage the use of ... appropriate dispute resolution procedures under Chapter 2009, Government Code, to assist in the resolution of internal and external disputes under the board’s jurisdiction.” The TWDB has implemented an appropriate policy already for internal disputes, found at Section 10.02 of the Texas Water Development Board Employee Handbook (June 2011) (“Disciplinary Actions, Conflict Resolution and Employee Grievances: Conflict Resolution”). Alternative dispute resolution for external disputes is traditionally used for contested permit hearings and administrative enforcement actions at agencies such as the Texas Commission on Environmental Quality.

report recommending whether negotiated rulemaking is a feasible method to develop the proposed rule.

If the convener's recommendation is to proceed with negotiated rulemaking, the state agency must publish timely notice of its intent to engage in negotiated rulemaking with the Secretary of State for publication in the *Texas Register*. After considering the comments that it receives in response to the notice of proposed negotiated rulemaking, the state agency must establish a negotiated rulemaking committee comprised of individuals that represent the agency as well as other individuals that represent potentially interested stakeholders. Concurrently with its establishment of the negotiated rulemaking committee, the state agency must appoint a facilitator. The agency may appoint an agency employee provided that this person has not been designated to represent the agency on the negotiated rulemaking committee on substantive issues related to the rulemaking, or the agency may contract with another state employee or private individual to serve as the facilitator.

The facilitator presides over meetings of the negotiated rulemaking committee and assists the members of the committee in (1) establishing procedures for conducting negotiations; and (2) discussing, negotiating, mediating, and employing appropriate alternative dispute resolution processes to arrive at a consensus on the proposed rule. It is presumed that the committee has reached a consensus on a matter only if the decision is unanimous unless the committee unanimously agrees to define a consensus to mean a majority rather than a unanimous decision or agrees to define the term in another manner. The facilitator should encourage the members of the committee to reach a consensus but may not compel or coerce the members to do so. At the conclusion of the negotiations, the committee sends a written report to the agency that contains the text of the proposed rule if the committee reached a consensus on the proposed rule or that specifies the issues on which the committee reached consensus, the issues that remain unsolved, and any other information, recommendations, or materials that the committee considers important. The state agency is required to provide appropriate administrative support to the committee.

SOAH has published model guidelines relating to negotiated rulemaking.³ These model guidelines also address a more informal process known as “policy dialogue leading to agency rulemaking” that is similar to negotiated rulemaking but lacks its formality. There are no procedural guidelines for this more informal rulemaking process but generally a working group of potentially interested parties and agency representatives would be assembled to discuss concepts and drafts that could then be incorporated into a proposed rule. The draft would then be considered by the state agency. At its sole discretion, the agency can then decide whether to publish the proposed rule, or a modified version of the proposed rule, in the *Texas Register*, thereby initiating formal APA rulemaking procedures.

There may be cases where the more formal negotiated rulemaking process is appropriate. Some factors that could be considered in evaluating whether to use formal versus informal procedures are as follows: (1) whether there is a legislative mandate to engage in complex and controversial rulemaking on a particular issue; (2) whether multiple agencies have a necessary role in the

³ SOAH, Model Guidelines for the Use of Alternative Dispute Resolution by Texas State Agencies, § III.B . (Undated).

proposed rulemaking (e.g., the legislation requires several agencies to come together to develop rules on a particular issue); and (3) whether an informal negotiated rulemaking has failed at reaching consensus on a proposed rule.

Because the TWDB is not a regulatory agency and generally works closely with easily identifiable stakeholders on rulemaking issues of high interest, the more time-consuming and cumbersome procedures set forth in the Texas Negotiated Rulemaking Act are not necessary to accomplish the objectives of negotiated rulemaking. The more informal process whereby a working group of potentially interested parties is assembled to work on drafting a rule that the TWDB may or may not wish to pursue presents a more appropriate approach to negotiated rulemaking techniques in a manner that is both flexible and cost-effective.

RECOMMENDED POLICY

It is the TWDB's policy to encourage the use of negotiated rulemaking techniques, as appropriate, when engaging in rulemaking activities through an informal process of policy dialogue and to consider the use of more formal negotiated rulemaking in circumstances that involve multiple stakeholders on complex and/or controversial matters where an informal process has not been successful.

Michelle A. McFaddin, Staff Attorney
Legal Services