

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: August 5, 2015

DATE OF REQUEST: July 17, 2015

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Sherry Davis, (512) 239-2141

CAPTION: Docket No. 2015-0787-RUL. Consideration for publication of, and hearing on, the following proposed amended sections of 30 Texas Administrative Code: Chapter 1, Purpose of Rules, General Provisions, Section 1.11; Chapter 39, Public Notice, Sections 39.405, 39.419, and 39.602; Chapter 50, Action on Applications and Other Authorizations, Sections 50.115, 50.119, and 50.143; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment, Sections 55.156, 55.201, 55.203, 55.205, 55.210, and 55.211; Chapter 70, Enforcement, Sections 70.10 and 70.106; and Chapter 80, Contested Case Hearings, Sections 80.4, 80.6, 80.17, 80.25, 80.105, 80.108, 80.117, 80.118, 80.127, 80.252, 80.267, 80.272 - 80.274, and proposed new Section 80.276, and corresponding revisions to the State Implementation Plan (SIP). The amendments to Sections 39.405(g)(3) and 39.419(e)(1) are proposed as revisions to the SIP. The amendment to Section 55.156(e) is proposed as a revision to the SIP, or, in the alternative, existing Section 55.156 is proposed to be withdrawn from the SIP.

The primary purpose of the proposed rulemaking is to implement changes made by Senate Bill (SB) 709, 84th Texas Legislature, 2015, Regular Session, to the Texas Water Code, Chapter 5, and Texas Government Code, Chapter 2003 regarding contested case hearings (CCH) on certain applications received by the commission, requests for CCH by individual entities and groups or associations, determination of affected persons and disputed issues for CCH, procedures for CCH, and providing web-based and mailed notice of permit applications. In addition, the rulemaking is proposed to implement changes made by SB 1267, 84th Texas Legislature, 2015, Regular Session, to the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, regarding the procedures for providing notice of the commission's decisions or orders, and the procedures and timelines concerning motions for rehearing. (Janis Hudson) (Rule Project No. 2015-018-080-LS)

Robert Martinez for Caroline Sweeney
Deputy Director

Robert Martinez
Division Director

Sherry L. Davis
Agenda Coordinator

Copy to CCC Secretary? NO X YES

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** July 17, 2015

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Caroline Sweeney, Deputy Director
Janis Hudson, Attorney
Office of Legal Services

Docket No.: 2015-0787-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 1, Purpose of Rules, General Provisions
Chapter 39, Public Notice
Chapter 50, Action on Applications and Other Authorizations
Chapter 55, Requests for Reconsideration and Contested Case Hearings;
Public Comment
Chapter 70, Enforcement
Chapter 80, Contested Case Hearings
SB 709 and SB 1267: Contested Case Hearings and Post Hearings
Rule Project No. 2015-018-080-LS

Background and reason(s) for the rulemaking:

Senate Bill (SB) 709

SB 709 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current contested case hearing (CCH) process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed below.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a hearing. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address, in its timely CCH request a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires the Texas Commission on Environmental Quality (TCEQ) to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications filed on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Re: Docket No. 2015-0787-RUL

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. The bill also prohibits the commission from finding a group or association is affected unless their CCH request has timely and specifically identified, by name and physical address, a member who would be affected in the member's own right. The issues submitted by the commission to the State Office of Administrative Hearings (SOAH) for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. The bill allows for extensions beyond 180 days based upon agreement of the parties, with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267, also passed by the 84th Texas Legislature, amends the Texas Administrative Procedure Act (APA), codified in Chapter 2001 of the Texas Government Code, which is applicable to all state agencies. This bill revises and creates numerous requirements related to notice of CCHs and agency decisions, signature and timeliness of agency decisions, presumption of the date notice that an agency decision is received, motions for rehearing of agency decisions, and the procedures for judicial review of agency decisions.

The changes to the APA for which TCEQ rulemaking is necessary are as follows.

First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, the bill creates a process through which a party that alleges that notice of

Re: Docket No. 2015-0787-RUL

the commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the beginning date is altered for a party that does not receive notice of the commission's decision or order until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

For SB 709: The rule amendments in Chapters 39, 50, 55, and 80 will primarily apply to applications filed on or after September 1, 2015, include:

1. Specifying that requests for CCH by individual entities and groups or associations cannot rely on comments submitted by others, and groups or associations must timely provide the name and physical address of its member(s) who would be an affected person in their own right.
2. Adding discretionary information that the commission may consider in its determinations of affected persons.
3. Requiring the commission to determine that someone is an affected person only if the person timely submitted comments on the application.
4. Requiring the ED's response to comments be filed before a preliminary hearing is held.
5. Amending other hearing procedures in Chapter 80, including:
 - a. Requiring copies of the application from the applicant for certification as part of the administrative record;
 - b. Specifying that the administrative record will be provided to SOAH when the notice of hearing is issued;
 - c. Limiting the deadline for submittal of the ALJ's Proposal for Decision to 180 days from date of preliminary hearing, with extensions only to address constitutional concerns of the parties, or by agreement of the parties with approval by the ALJ;
 - d. Providing for the prima facie case; and
 - e. Amending the role of the executive director in the hearing.
6. Requiring the TCEQ to provide written notification of draft permits to state senators and representatives and to also provide web-based notice of administratively complete applications for permits and licenses.
7. Establishing criteria for ED consideration for determination of "substantially similar" re-filed applications.

For SB 1267: New §80.276 and amended rules in Chapters 1, 55, 70, and 80 update procedures for providing notice of the commission's decisions or orders and the

Re: Docket No. 2015-0787-RUL

procedures and timelines concerning motions for rehearing to ensure consistency with the APA.

The rule amendments also provide that the effective date of an agreed order shall be the date the order is signed by the commission or the executive director, unless stated otherwise in the agreed order.

B.) Scope required by federal regulations or state statutes:

There is no federal law that will be implemented by this rulemaking, and the rules do not affect the United States Environmental Protection Agency approval or delegation of these permitting programs. Sections 39.405(g)(3) and 39.419(e)(1) are proposed as revisions to the State Implementation Plan (SIP). The amendment to Section 55.156(e) is proposed as a revision to the SIP, or, in the alternative, existing Section 55.156 is proposed to be withdrawn from the SIP.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

SB 709 and SB 1267, 84th Texas Legislature (2015); Texas Water Code, §§5.013, 5.102, 5.103, 5.105, 5.115, 5.5553, and 7.001, *et seq.*; Texas Health and Safety Code, §§382.002, 382.011, 382.012, and 382.017; Texas Government Code, §§2001.004, 2001.006, 2001.142, 2001.146, and 2003.047; Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*

Effect on the:

The proposed rules do not affect persons not previously affected, and there will be no fiscal impact on any of the following groups.

A.) Regulated community: All applicants for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits whose applications receive requests for CCH will be subject to changes in procedures for CCH and motions for rehearing.

B.) Public: Those who submit comments and hearing requests regarding applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits will be subject to changes regarding submitting comments and hearing requests, as well as changes in procedures for CCH and motions for rehearing.

C.) Agency programs: Technical and legal staff who work on air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to comments and hearing requests will be subject to new procedures for notification and in CCH. The Office of the Chief Clerk will have somewhat

Commissioners

Page 5

July 17, 2015

Re: Docket No. 2015-0787-RUL

different procedures for applications received on or after September 1, 2015; for procedures for providing notice of the commission's decisions or orders; and the procedures and timelines concerning motions for rehearing.

Stakeholder meetings:

No stakeholder meetings were held.

Potential controversial concerns and legislative interest:

Nature and timing of notification of draft permit to state senators and elected officials.

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

The notification to state senators and representatives is a new task in the application review process.

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

The consequences of not going forward with this rulemaking would be that the TCEQ's rules would conflict with the changes to the statutes made in SB 709 and SB 1267, and this would cause confusion for the public and the regulated community. For this reason, and because SB 709 requires rules be adopted no later than January 1, 2016, there are no alternatives to rulemaking. The rulemaking to implement SB 1267 is to ensure that TCEQ rules are consistent with the APA.

Key points in the proposal rulemaking schedule:

Anticipated proposal date:	August 5, 2015
Anticipated <i>Texas Register</i> publication date:	August 21, 2015
Anticipated public hearing date (if any):	September 15, 2015
Anticipated public comment period:	August 7, 2015 – September 21, 2015
Anticipated adoption date:	December 9, 2015

Agency contacts:

Janis Hudson, Rule Project Manager, (512) 239-0466, Environmental Law Division
Sherry Davis, Texas Register Coordinator, (512) 239-2141

Attachments

SB 709
SB 1267

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Stephen Tatum

Commissioners

Page 6

July 17, 2015

Re: Docket No. 2015-0787-RUL

Office of General Counsel

Janis Hudson

Sherry Davis

AN ACT

relating to procedures for certain environmental permit applications.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2003.047, Government Code, is amended by adding Subsections (e-1), (e-2), (e-3), (e-4), (e-5), (i-1), (i-2), and (i-3) to read as follows:

(e-1) This subsection applies only to a matter referred under Section 5.556, Water Code. Each issue referred by the commission must have been raised by an affected person in a comment submitted by that affected person in response to a permit application in a timely manner. The list of issues submitted under Subsection (e) must:

(1) be detailed and complete; and

(2) contain either:

(A) only factual questions; or

(B) mixed questions of fact and law.

(e-2) For a matter referred under Section 5.556 or 5.557, Water Code, the administrative law judge must complete the proceeding and provide a proposal for decision to the commission not later than the earlier of:

(1) the 180th day after the date of the preliminary hearing; or

(2) the date specified by the commission.

1 (e-3) The deadline specified by Subsection (e-2) may be
2 extended:

3 (1) by agreement of the parties with the approval of
4 the administrative law judge; or

5 (2) by the administrative law judge if the judge
6 determines that failure to extend the deadline would unduly deprive
7 a party of due process or another constitutional right.

8 (e-4) For the purposes of Subsection (e-3)(2), a political
9 subdivision has the same constitutional rights as an individual.

10 (e-5) This subsection applies only to a matter referred
11 under Section 5.557, Water Code. The administrative law judge may
12 not hold a preliminary hearing until after the executive director
13 has issued a response to public comments under Section 5.555, Water
14 Code.

15 (i-1) In a contested case regarding a permit application
16 referred under Section 5.556 or 5.557, Water Code, the filing with
17 the office of the application, the draft permit prepared by the
18 executive director of the commission, the preliminary decision
19 issued by the executive director, and other sufficient supporting
20 documentation in the administrative record of the permit
21 application establishes a prima facie demonstration that:

22 (1) the draft permit meets all state and federal legal
23 and technical requirements; and

24 (2) a permit, if issued consistent with the draft
25 permit, would protect human health and safety, the environment, and
26 physical property.

27 (i-2) A party may rebut a demonstration under Subsection

1 (i-1) by presenting evidence that:

2 (1) relates to a matter referred under Section 5.557,
3 Water Code, or an issue included in a list submitted under
4 Subsection (e) in connection with a matter referred under Section
5 5.556, Water Code; and

6 (2) demonstrates that one or more provisions in the
7 draft permit violate a specifically applicable state or federal
8 requirement.

9 (i-3) If in accordance with Subsection (i-2) a party rebuts
10 a presumption established under Subsection (i-1), the applicant and
11 the executive director may present additional evidence to support
12 the draft permit.

13 SECTION 2. Section 5.115, Water Code, is amended by
14 amending Subsections (a) and (d) and adding Subsection (a-1) to
15 read as follows:

16 (a) For the purpose of an administrative hearing held by or
17 for the commission involving a contested case, "affected person,"
18 or "person affected," or "person who may be affected" means a person
19 who has a personal justiciable interest related to a legal right,
20 duty, privilege, power, or economic interest affected by the
21 administrative hearing. An interest common to members of the
22 general public does not qualify as a personal justiciable interest.

23 (a-1) The commission shall adopt rules specifying factors
24 which must be considered in determining whether a person is an
25 affected person in any contested case arising under the air, waste,
26 or water programs within the commission's jurisdiction and whether
27 an affected association is entitled to standing in contested case

1 hearings. For a matter referred under Section 5.556, the
2 commission:

3 (1) may consider:

4 (A) the merits of the underlying application,
5 including whether the application meets the requirements for permit
6 issuance;

7 (B) the likely impact of regulated activity on
8 the health, safety, and use of the property of the hearing
9 requestor;

10 (C) the administrative record, including the
11 permit application and any supporting documentation;

12 (D) the analysis and opinions of the executive
13 director; and

14 (E) any other expert reports, affidavits,
15 opinions, or data submitted on or before any applicable deadline to
16 the commission by the executive director, the applicant, or a
17 hearing requestor; and

18 (2) may not find that:

19 (A) a group or association is an affected person
20 unless the group or association identifies, by name and physical
21 address in a timely request for a contested case hearing, a member
22 of the group or association who would be an affected person in the
23 person's own right; or

24 (B) a hearing requestor is an affected person
25 unless the hearing requestor timely submitted comments on the
26 permit application.

27 (d) The commission shall adopt rules for the notice required

1 by this section. The rules must provide for the notice required by
2 this section to be posted on the Internet by the commission.

3 SECTION 3. Section 5.228(c), Water Code, is amended to read
4 as follows:

5 (c) The executive director shall participate as a party in
6 contested case permit hearings before the commission or the State
7 Office of Administrative Hearings to:

8 (1) provide information to complete the
9 administrative record; and

10 (2) support the executive director's position
11 developed in the underlying proceeding, unless the executive
12 director has revised or reversed that position.

13 SECTION 4. Subchapter M, Chapter 5, Water Code, is amended
14 by adding Section 5.5553 to read as follows:

15 Sec. 5.5553. NOTICE OF DRAFT PERMIT. (a) This section
16 applies only to a permit application that is eligible to be referred
17 for a contested case hearing under Section 5.556 or 5.557.

18 (b) Notwithstanding any other law, not later than the 30th
19 day before the date the commission issues a draft permit in
20 connection with a permit application, the executive director shall
21 provide written notice to the state senator and state
22 representative of the area in which the facility that is the subject
23 of the permit is located.

24 SECTION 5. (a) The changes in law made by this Act apply
25 only to:

26 (1) a permit application that is filed with the Texas
27 Commission on Environmental Quality on or after the effective date

1 of this Act; or

2 (2) a judicial proceeding initiated on or after the
3 effective date of this Act that challenges an act or decision of the
4 Texas Commission on Environmental Quality made during a permit
5 proceeding.

6 (b) A permit application filed or a judicial proceeding
7 initiated before the effective date of this Act is governed by the
8 law in effect when the permit application was filed or the judicial
9 proceeding was initiated, and the former law is continued in effect
10 for that purpose.

11 (c) Notwithstanding Subsection (a), the changes in law made
12 by this Act do not apply to:

13 (1) a permit application:

14 (A) filed after the effective date of this Act;
15 and

16 (B) that is substantially similar to a permit
17 application for which a draft permit has been issued and that was:

18 (i) filed before the effective date of this
19 Act; and

20 (ii) withdrawn at the request of the permit
21 applicant; or

22 (2) a judicial proceeding:

23 (A) initiated after the effective date of this
24 Act; and

25 (B) that is substantially similar to a judicial
26 proceeding initiated before the effective date of this Act that has
27 been dismissed at the request of the permit applicant.

1 (d) Not later than January 1, 2016, the Texas Commission on
2 Environmental Quality shall adopt rules to implement the changes in
3 law made by this Act. For an application filed after the effective
4 date of this Act but before the adoption of rules to implement the
5 changes in law made by this Act, the commission shall provide
6 sufficient notice to the applicant and other participants in the
7 permit proceeding that the changes in law made by this Act apply to
8 the proceeding.

9 SECTION 6. This Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 709 passed the Senate on April 16, 2015, by the following vote: Yeas 22, Nays 9; and that the Senate concurred in House amendments on May 13, 2015, by the following vote: Yeas 21, Nays 10.

Secretary of the Senate

I hereby certify that S.B. No. 709 passed the House, with amendments, on May 1, 2015, by the following vote: Yeas 83, Nays 37, one present not voting.

Chief Clerk of the House

Approved:

Date

Governor

AN ACT

relating to contested cases conducted under the Administrative Procedure Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2001.052, Government Code, is amended to read as follows:

Sec. 2001.052. CONTENTS OF NOTICE. (a) Notice of a hearing in a contested case must include:

(1) a statement of the time, place, and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular sections of the statutes and rules involved; and

(4) a short, plain statement of the factual matters asserted.

(b) If a state agency or other party is unable to state factual matters in detail at the time notice under this section is served, an initial notice may be limited to a statement of the issues involved. On timely written application, a more definite and detailed statement of the facts shall be furnished not less than seven [~~three~~] days before the date set for the hearing. In a proceeding in which the state agency has the burden of proof, a state agency that intends to rely on a section of a statute or rule

1 not previously referenced in the notice of hearing must amend the
2 notice to refer to the section of the statute or rule not later than
3 the seventh day before the date set for the hearing. This
4 subsection does not prohibit the state agency from filing an
5 amendment during the hearing of a contested case provided the
6 opposing party is granted a continuance of at least seven days to
7 prepare its case on request of the opposing party.

8 (c) In a suit for judicial review of a final decision or
9 order of a state agency in a contested case, the state agency's
10 failure to comply with Subsection (a)(3) or (b) shall constitute
11 prejudice to the substantial rights of the appellant under Section
12 2001.174(2) unless the court finds that the failure did not
13 unfairly surprise and prejudice the appellant or that the appellant
14 waived the appellant's rights.

15 SECTION 2. Section 2001.054, Government Code, is amended by
16 adding Subsections (c-1) and (e) to read as follows:

17 (c-1) A state agency that has been granted the power to
18 summarily suspend a license under another statute may determine
19 that an imminent peril to the public health, safety, or welfare
20 requires emergency action and may issue an order to summarily
21 suspend the license holder's license pending proceedings for
22 revocation or other action, provided that the agency incorporates a
23 factual and legal basis establishing that imminent peril in the
24 order. Unless expressly provided otherwise by another statute, the
25 agency shall initiate the proceedings for revocation or other
26 action not later than the 30th day after the date the summary
27 suspension order is signed. The proceedings must be promptly

1 determined, and if the proceedings are not initiated before the
2 30th day after the date the order is signed, the license holder may
3 appeal the summary suspension order to a Travis County district
4 court. This subsection does not grant any state agency the power to
5 suspend a license without notice and an opportunity for a hearing.

6 (e) In a suit for judicial review of a final decision or
7 order of a state agency brought by a license holder, the agency's
8 failure to comply with Subsection (c) shall constitute prejudice to
9 the substantial rights of the license holder under Section
10 2001.174(2) unless the court determines that the failure did not
11 unfairly surprise and prejudice the license holder.

12 SECTION 3. Sections 2001.141(a), (b), and (e), Government
13 Code, are amended to read as follows:

14 (a) A decision or order of a state agency that may become
15 final under Section 2001.144 that is adverse to any [a] party in a
16 contested case must be in writing and signed by a person authorized
17 by the agency to sign the agency decision or order [~~stated in the~~
18 ~~record~~].

19 (b) A decision or order that may become final under Section
20 2001.144 must include findings of fact and conclusions of law,
21 separately stated.

22 (e) If a party submits under a state agency rule proposed
23 findings of fact or conclusions of law, the decision or order shall
24 include a ruling on each proposed finding or conclusion.

25 SECTION 4. Section 2001.142, Government Code, is amended to
26 read as follows:

27 Sec. 2001.142. NOTIFICATION OF DECISIONS AND ORDERS.

1 (a) A state agency shall notify each party to [in] a contested case
2 [shall be notified either personally or by first class mail] of any
3 decision or order of the agency in the following manner:

4 (1) personally;

5 (2) if agreed to by the party to be notified, by
6 electronic means sent to the current e-mail address or telecopier
7 number of the party's attorney of record or of the party if the
8 party is not represented by counsel; or

9 (3) by first class, certified, or registered mail sent
10 to the last known address of the party's attorney of record or of
11 the party if the party is not represented by counsel.

12 (b) When a decision or order [On issuance] in a contested
13 case [of a decision] that may become final under Section 2001.144 is
14 signed or when an order ruling on a motion for rehearing is signed,
15 a state agency shall deliver or send a copy of the decision or order
16 to each party in accordance with Subsection (a). The state agency
17 shall keep a record documenting the provision of the notice
18 provided to each party in accordance with Subsection (a) [by first
19 class mail to the attorneys of record and shall keep an appropriate
20 record of the mailing. If a party is not represented by an attorney
21 of record, the state agency shall send a copy of the decision or
22 order by first class mail to the party and shall keep an appropriate
23 record of the mailing].

24 (c) If an adversely affected party or the party's attorney
25 of record does not receive the notice required by Subsections (a)
26 and (b) or acquire actual knowledge of a signed decision or order
27 before the 15th day after the date the decision or order is signed,

1 a period specified by or agreed to under Section 2001.144(a),
2 2001.146, 2001.147, or 2001.176(a) relating to a decision or order
3 or motion for rehearing begins, with respect to that party, on the
4 date the party receives the notice or acquires actual knowledge of
5 the signed decision or order, whichever occurs first. The period
6 may not begin earlier than the 15th day or later than the 90th day
7 after the date the decision or order was signed [~~A party or attorney~~
8 ~~of record notified by mail under Subsection (b) is presumed to have~~
9 ~~been notified on the third day after the date on which the notice is~~
10 ~~mailed].~~

11 (d) To establish a revised period under Subsection (c), the
12 adversely affected party must prove, on sworn motion and notice,
13 that the date the party received notice from the state agency or
14 acquired actual knowledge of the signing of the decision or order
15 was after the 14th day after the date the decision or order was
16 signed.

17 (e) The state agency must grant or deny the sworn motion not
18 later than the date of the agency's governing board's next meeting
19 or, for a state agency without a governing board with
20 decision-making authority in contested cases, not later than the
21 10th day after the date the agency receives the sworn motion.

22 (f) If the state agency fails to grant or deny the motion at
23 the next meeting or before the 10th day after the date the agency
24 receives the motion, as appropriate, the motion is considered
25 granted.

26 (g) If the sworn motion filed under Subsection (d) is
27 granted with respect to the party filing that motion, all the

1 periods specified by or agreed to under Section 2001.144(a),
2 2001.146, 2001.147, or 2001.176(a) relating to a decision or order,
3 or motion for rehearing, shall begin on the date specified in the
4 sworn motion that the party first received the notice required by
5 Subsections (a) and (b) or acquired actual knowledge of the signed
6 decision or order. The date specified in the sworn motion shall be
7 considered the date the decision or order was signed.

8 SECTION 5. The heading to Section 2001.143, Government
9 Code, is amended to read as follows:

10 Sec. 2001.143. TIME OF [~~RENDERING~~] DECISION.

11 SECTION 6. Sections 2001.143(a) and (b), Government Code,
12 are amended to read as follows:

13 (a) A decision or order that may become final under Section
14 2001.144 in a contested case should [~~must~~] be signed [~~rendered~~] not
15 later than the 60th day after the date on which the hearing is
16 finally closed.

17 (b) In a contested case heard by other than a majority of the
18 officials of a state agency, the agency or the person who conducts
19 the contested case hearing may extend the period in which the
20 decision or order may be signed [~~issued~~].

21 SECTION 7. Section 2001.144, Government Code, is amended to
22 read as follows:

23 Sec. 2001.144. DECISIONS OR ORDERS; WHEN FINAL. (a) A
24 decision or order in a contested case is final:

25 (1) if a motion for rehearing is not filed on time, on
26 the expiration of the period for filing a motion for rehearing;

27 (2) if a motion for rehearing is filed on time, on the

1 date:

2 (A) the order overruling the motion for rehearing
3 is signed [~~rendered~~]; or

4 (B) the motion is overruled by operation of law;

5 (3) if a state agency finds that an imminent peril to
6 the public health, safety, or welfare requires immediate effect of
7 a decision or order, on the date the decision or order is signed,
8 provided that the agency incorporates in the decision or order a
9 factual and legal basis establishing an imminent peril to the
10 public health, safety, or welfare [~~rendered~~]; or

11 (4) on:

12 (A) the date specified in the decision or order
13 for a case in which all parties agree to the specified date in
14 writing or on the record; or

15 (B) [~~7~~] if the agreed specified date is [~~not~~]
16 before the date the decision or order is signed, the date the
17 decision or order is signed [~~or later than the 20th day after the~~
18 ~~date the order was rendered~~].

19 (b) If a decision or order is final under Subsection (a)(3),
20 a state agency must recite in the decision or order the finding made
21 under Subsection (a)(3) and the fact that the decision or order is
22 final and effective on the date signed [~~rendered~~].

23 SECTION 8. Section 2001.145(b), Government Code, is amended
24 to read as follows:

25 (b) A decision or order that is final under Section
26 2001.144(a)(2), (3), or (4) is appealable.

27 SECTION 9. Section 2001.146, Government Code, is amended by

1 amending Subsections (a), (b), (c), (e), and (f) and adding
2 Subsections (g), (h), and (i) to read as follows:

3 (a) A motion for rehearing in a contested case must be filed
4 by a party not later than the 25th [~~20th~~] day after the date [~~on~~
5 ~~which~~] the decision or order that is the subject of the motion is
6 signed, unless the time for filing the motion for rehearing has been
7 extended under Section 2001.142, by an agreement under Section
8 2001.147, or by a written state agency order issued under
9 Subsection (e). On filing of the motion for rehearing, copies of
10 the motion shall be sent to all other parties using the notification
11 procedures specified by Section 2001.142(a) [party or the party's
12 attorney of record is notified as required by Section 2001.142 of a
13 decision or order that may become final under Section 2001.144].

14 (b) A party must file with the state agency a reply, if any,
15 to a motion for rehearing [must be filed with the state agency] not
16 later than the 40th [~~30th~~] day after the date [~~on which the party or~~
17 ~~the party's attorney of record is notified as required by Section~~
18 ~~2001.142 of~~] the decision or order that is the subject of the motion
19 is signed, or not later than the 10th day after the date a motion for
20 rehearing is filed if the time for filing the motion for rehearing
21 has been extended by an agreement under Section 2001.147 or by a
22 written state agency order under Subsection (e). On filing of the
23 reply, copies of the reply shall be sent to all other parties using
24 the notification procedures specified by Section 2001.142(a) [ex
25 order that may become final under Section 2001.144].

26 (c) A state agency shall act on a motion for rehearing not
27 later than the 55th [~~45th~~] day after the date [~~on which the party or~~

1 ~~the party's attorney of record is notified as required by Section~~
2 ~~2001.142 of]~~ the decision or order that is the subject of the motion
3 is signed [~~that may become final under Section 2001.144]~~ or the
4 motion for rehearing is overruled by operation of law.

5 (e) A state agency may, on its own initiative or on the
6 motion of any party for cause shown, by written order extend the
7 time for filing a motion or reply or taking agency action under this
8 section, provided that the agency extends the time or takes the
9 action not later than the 10th day after the date the period for
10 filing a motion or reply or taking agency action expires. An[~~r~~
11 ~~except that an]~~ extension may not extend the period for agency
12 action beyond the 100th [~~90th~~] day after the date [~~on which the~~
13 ~~party or the party's attorney of record is notified as required by~~
14 ~~Section 2001.142 of]~~ the decision or order that is the subject of
15 the motion is signed [~~that may become final under Section~~
16 ~~2001.144]~~.

17 (f) In the event of an extension, a motion for rehearing is
18 overruled by operation of law on the date fixed by the order or, in
19 the absence of a fixed date, the 100th day [~~90 days~~] after the date
20 [~~on which the party or the party's attorney of record is notified as~~
21 ~~required by Section 2001.142 of]~~ the decision or order that is the
22 subject of the motion is signed [~~that may become final under Section~~
23 ~~2001.144]~~.

24 (g) A motion for rehearing must identify with particularity
25 findings of fact or conclusions of law that are the subject of the
26 complaint and any evidentiary or legal ruling claimed to be
27 erroneous. The motion must also state the legal and factual basis

1 for the claimed error.

2 (h) A subsequent motion for rehearing is not required after
3 a state agency rules on a motion for rehearing unless the order
4 disposing of the original motion for rehearing:

5 (1) modifies, corrects, or reforms in any respect the
6 decision or order that is the subject of the complaint, other than a
7 typographical, grammatical, or other clerical change identified as
8 such by the agency in the order, including any modification,
9 correction, or reformation that does not change the outcome of the
10 contested case; or

11 (2) vacates the decision or order that is the subject
12 of the motion and provides for a new decision or order.

13 (i) A subsequent motion for rehearing required by
14 Subsection (h) must be filed not later than the 20th day after the
15 date the order disposing of the original motion for rehearing is
16 signed.

17 SECTION 10. Section 2001.176(a), Government Code, is
18 amended to read as follows:

19 (a) A person initiates judicial review in a contested case
20 by filing a petition not later than the 30th day after the date ~~on~~
21 ~~which~~ the decision or order that is the subject of complaint is
22 final and appealable. In a contested case in which a motion for
23 rehearing is a prerequisite for seeking judicial review, a
24 prematurely filed petition is effective to initiate judicial review
25 and is considered to be filed:

26 (1) on the date the last timely motion for rehearing is
27 overruled; and

1 (2) after the motion is overruled.

2 SECTION 11. The changes in law made by this Act to Chapter
3 2001, Government Code, apply only to an administrative hearing that
4 is set by the State Office of Administrative Hearings, or another
5 state agency conducting an administrative hearing, on or after the
6 effective date of this Act. A hearing set before the effective date
7 of this Act, or any decision issued or appeal from the hearing, is
8 governed by the law in effect when the hearing was set, and the
9 former law is continued in effect for that purpose.

10 SECTION 12. This Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 1267 passed the Senate on May 6, 2015, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

I hereby certify that S.B. No. 1267 passed the House on May 22, 2015, by the following vote: Yeas 140, Nays 0, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §1.11.

Background and Summary of the Factual Basis for the Proposed Rule

Senate Bill (SB) 1267, passed by the 84th Texas Legislature (2015), amends the Texas Administrative Procedure Act (APA), codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of contested case hearings (CCH) and agency decisions, signature and timeliness of agency decisions, presumption of the date that notice of an agency decision is received, motions for rehearing regarding agency decisions, and the procedures for judicial review of agency decisions.

The changes to the APA for which TCEQ rulemaking is necessary are as follows.

First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the beginning date is altered for a party that does not receive notice of the commission's decision or order until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed. Finally, SB

1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to 30 Texas Administrative Code (TAC) Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings. SB 709 is implemented by rules proposed in Chapters 39, 50, 55, and 80. Sections 4, 6, 7, and 9 of SB 1267 are implemented by rules proposed in Chapters 1, 50, 55, 70, and 80.

Section Discussion

In addition to the proposed amendments associated with this rulemaking, the proposed rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

The amendment to §1.11(d) and (e) is proposed to implement SB 1267, Section 4, which amends Texas Government Code, §2001.142. These subsections would be amended to provide that the exceptions regarding notification of the commission's decisions or orders in Texas Government Code, §2001.142 apply. Specifically, Texas Government Code, §2001.142 was amended by SB 1267 to provide that a state agency shall notify each party to a contested case personally, by email to the party or his or her counsel where the party agrees, or by first class, certified, or registered mail. Additionally, SB 1267 amended Texas Government Code, §2001.142 by removing the presumption that a party or attorney of record receives notice of the commission's decision or order on the third day after the date on which notice of the decision or order is mailed.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government. The proposed rule is procedural in nature and does not directly impact the cost of providing or receiving notice of commission orders in contested cases under the proposed rule.

SB 1267, passed by the 84th Texas Legislature, amends the APA, codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to the notice of CCH and agency

decisions, signature and timeliness of agency decisions, presumption of the date notice that an agency decision is received, motions for rehearing of agency decisions, and the procedures for judicial review of agency decisions. The proposed rule would implement portions of SB 1267, specifically SB 1267, Sections 4, 6, 7, and 9.

The changes to the APA for which TCEQ rulemaking is necessary are as follows. First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the beginning date is altered for a party that does not receive notice of the commission's decision or order, until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing. The amendment to Chapter 1 implements SB 1267 by removing the presumption that notice of the commission's decisions or orders are received on the third day after mailing.

The proposed amendment to Chapter 1 is procedural in nature and does not directly impact the cost of providing or receiving notice of commission orders in contested cases under the proposed rule. No fiscal implications are anticipated for the TCEQ to implement SB 1267.

For purposes of notification by the commission under the proposed amendment, a unit of state government would be affected in the same way as other governmental entities. The amendment to Chapter 1 implements SB 1267 by removing the presumption that notice of the commission's decisions or orders are received on the third day after mailing. The proposed amendment is procedural in nature does not directly impact the cost of providing or receiving notice of commission orders in contested cases under the proposed rule. No significant fiscal implications are anticipated for units of state or local government as a result of the administration or enforcement of the proposed rule.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule would be compliance with state law.

No fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rule. The rulemaking to implement SB 1267 concerns

the timing and filing of Motions for Rehearing regarding commission decisions or orders. This rulemaking is procedural in nature and does not directly impact the cost of providing or receiving notice of commission orders in contested cases under the proposed rule.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule would have the same effect on a small business as it does on a large business. The rulemaking to implement SB 1267 concerns the timing and filing of Motions for Rehearing regarding commission decisions or orders and is procedural in nature. The proposed rule is procedural in nature and does not directly impact the cost of receiving notice of commission orders in contested cases under the proposed rule.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is necessary to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft 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 amendment to §1.11 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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, the amendment implements the commission's procedures for notice in contested cases by ensuring that the rule is

consistent with the APA.

As defined in the 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 amendment to §1.11 does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but is 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).

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 amendment to §1.11 implements the commission's procedures for notice in contested cases by ensuring that the rule is consistent with the APA. The change in procedure will not burden private real property. The proposed rule does 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). The proposed rule does not directly prevent a nuisance or prevent an immediate threat to life or property. 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 proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendment affect any action or 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 may be submitted to the

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

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 15, 2015, at 2:00 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.

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

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to

comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-018-080-LS. The comment period closes on September 21, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, at (512) 239-0466.

CHAPTER 1: PURPOSE OF RULES, GENERAL PROVISIONS

§1.11

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. Additional relevant sections are 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; and Texas Government Code, §2001.142, which prescribes requirements for the notification of decisions and orders of a state agency.

The proposed amendment implements Texas Government Code, §2001.142, and Senate Bill 1267 (84th Texas Legislature, 2015).

§1.11. Service on Judge, Parties, and Interested Persons.

(a) For responses and replies to responses concerning hearing requests filed under Chapter 55 of this title (relating to Requests [Request] for Reconsideration and Contested Case Hearings; Public Comment [Hearing]), copies of all documents filed with the chief clerk shall be served on the executive director, the public interest counsel, the applicant, and any persons filing hearing requests, no later than the day of filing.

(b) For contested case hearings referred to State Office of Administrative Hearings (SOAH) [SOAH], copies of all documents filed with the chief clerk shall be served on the judge and all parties or their representatives no later than the day of filing.

(c) All documents filed and served under these rules, except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier-receipted delivery or by mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the commission or judge in their discretion may direct.

(d) Except as provided by Texas Government Code, §2001.142 regarding notification of a decision or order in a contested case, service [Service] by mail is

complete three days after deposit of the document, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by courier-receipted delivery is complete upon the courier taking possession. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Service by telephonic document transfer must be followed by serving an extra copy in person, by mail, or by carrier receipted delivery within one day. Judges may impose different service requirements in SOAH proceedings.

(e) Except as provided by Texas Government Code, §2001.142 regarding notification of a decision or order in a contested case, whenever [Whenever] a party has the right or is required to do some act within a prescribed period after the service of a document upon the party and the document is served by mail or by telephonic document transfer, three days shall be added to the prescribed period. Three days will not be added when documents are filed for consideration in a commission meeting.

(f) The party or attorney of record shall certify compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a document shall be prima facie evidence of the fact of service.

(g) Nothing herein shall preclude any party from offering proof that the notice or instrument was not received, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the commission or judge may extend the time for taking the action required of such party or grant such other relief as they deem just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§39.405, 39.419, and 39.602.

The amendments to §39.405(g)(3) and §39.419(e)(1) are proposed as revisions to the State Implementation Plan.

Background and Summary of the Factual Basis for the Proposed Rules

Senate Bill (SB) 709

SB 709 was passed by the 84th Texas Legislature (2015), with an effective date of September 1, 2015. SB 709 makes several changes to the current contested case hearing (CCH) process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a CCH. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications filed on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their CCH request has timely and specifically identified, by name and physical address, a member who would be affected in the member's own right. The issues submitted by the commission to the State Office of Administrative Hearings (SOAH) for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment and physical property. The prima facie case may be rebutted

by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. The bill allows for extensions beyond 180 days based upon agreement of the parties with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to implement both SB 709 and SB 1267, also

passed by the 84th Texas Legislature. The amendments are proposed rules in 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings. SB 709 is implemented by rules proposed in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9 (84th Texas Legislature, 2015), are implemented by rules proposed in Chapters 1, 50, 55, 70, and 80.

Section by Section Discussion

In addition to the amendments associated with this rulemaking, the proposed rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§39.405, Applicability and General Provisions

Subsection (k) is proposed to implement amended Texas Water Code (TWC), §5.115(d) in SB 709, Section 2 and Section 5(a)(1), which requires the commission to adopt rules to provide for notice of administratively complete applications to be posted on the commission's webpage. In addition, the prior applicability text that referenced the

effective date of the section in subsection (g)(3) is updated to provide the precise date of June 24, 2010.

§39.419, Notice of Application and Preliminary Decision

Proposed amendment to subsection (a) implements new TWC, §5.5553 in SB 709, Section 4 and Section 5(a)(1). For applications filed on or after September 1, 2015, that are subject to a CCH under TWC, §5.556 or §5.557, written notification of the draft permit must be provided to the state senator and state representative of the area where the facility is or will be located at least 30 days prior to the chief clerk's mailing of the executive director's preliminary decision and Notice of Application and Preliminary Decision. In addition, the prior applicability text that referenced the effective date of the section in subsection (e)(1) is updated to provide the precise date of June 24, 2010.

§39.602, Mailed Notice

Subsection (c) is proposed to implement new TWC, §5.5553 in SB 709, Section 4 and Section 5(a)(1) for air quality permit applications. For applications filed on or after September 1, 2015, that are subject to a CCH under TWC, §5.556 or §5.557, written notification of the draft permit must be provided to the state senator and state representative of the area where the facility is or will be located at least 30 days prior to the chief clerk's mailing of the executive director's preliminary decision and Notice of Application and Preliminary Decision.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government. The proposed rules are procedural in nature and do not directly impact the cost of CCHs.

This rulemaking is proposed to implement SB 709, passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current CCH process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a hearing. A group or association seeking to be considered as an affected person must specifically identify in its comments a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications received on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their comments have timely and specifically identified a member who would be affected in the member's own right. The issues submitted by the commission to the SOAH for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and the permit, if issued, would protect human health and safety, the environment and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit

violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the ALJ's proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by the date specified by the commission. SB 709 allows for continuances based upon agreement of the parties (with the ALJ's approval), or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit

establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Local governments that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant. The number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

The number of units of local governments is a small percentage of the number of applicants for and who comment on air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications. While it is possible that a unit of state government can be a permit applicant, it is rare. If one is, it would be affected in the same way as other governmental entities who are applicants. State agencies are generally prohibited from contesting TCEQ permit applications, so they would not be affected the same as other governmental entities who protest applications and participate in CCHs.

There are fiscal implications for the agency due to the need to revise the Commissioners' Integrated Database to adequately implement SB 709. However, costs to upgrade the database are not expected to be significant and would be absorbed using current

resources.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and greater clarity for the public and also for applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications.

No significant fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to a CCH request will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them

to furnish a copy of their application, though these costs are not expected to be significant.

The rules will apply to applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications. The number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rulemaking would have the same effect on a small business as it does on a large business. The proposed amendments are procedural in nature and do not directly impact the cost of CCHs. It is not known how many applicants would be small or micro-businesses, but for those that are, there may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is

subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant. In addition, the number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking is necessary to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rulemaking is in effect.

Local Employment Impact Statement

The commission has 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 rulemaking is in effect.

Draft 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 to Chapter 39 are procedural in nature and 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, the proposed amendments implement changes made to the TWC in SB 709 by revising procedural rules regarding web-based and mailed notice of permit applications.

As defined in the 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 to Chapter

39 do not exceed an express requirement of state law or a requirement of a delegation agreement, and were not developed solely under the general powers of the agency, but are authorized by specific sections of the TWC 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).

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 assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments to Chapter 39 revise procedural rules regarding web-based and mailed notice of permit applications and are procedural in nature. Promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed rules 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). Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, the

proposed rules do partially fulfill a federal mandate under 42 United States Code, §7410. Consequently, the exemption that applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. 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 proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 15, 2015, at 2:00 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.

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

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-018-080-LS. The comment period closes on September 21, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, at (512) 239-0466.

SUBCHAPTER H: APPLICABILITY AND GENERAL PROVISIONS

§39.405, §39.419

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; TWC, §5.1733, concerning Electronic Posting of Information, which authorizes the commission to post public information on its website; and TWC, §5.5553, concerning Notice of Draft Permit, which requires the commission to provide notice of draft permit to certain state officials. The amendments are also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC,

§382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air.

In addition, the amendments to §39.405(g)(3) and §39.419(e) are also proposed under Federal Clean Air Act, 42 United States Code, §§7404, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and 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.

The proposed amendments implement TWC, §§5.115, 5.1733, and 5.5553; THSC, §382.012; and Senate Bill 709 (84th Texas Legislature, 2015).

§39.405. General Notice Provisions.

(a) Failure to publish notice. If the chief clerk prepares a newspaper notice that is required by Subchapters G - J, L, and M of this chapter (relating to Public Notice for Applications for Consolidated Permits;[,] Applicability and General Provisions;[,] Public Notice of Solid Waste Applications;[,] Public Notice of Water Quality Applications and Water Quality Management Plans;[,] Public Notice of Injection Well and Other Specific Applications;[,] and Public Notice for Radioactive Material Licenses) and the applicant does not cause the notice to be published within 45 days of mailing of the notice from the chief clerk, or for Notice of Receipt of Application and Intent to Obtain Permit, within 30 days after the executive director declares the application administratively complete, or fails to submit the copies of notices or affidavit required in subsection (e) of this section, the executive director may cause one of the following actions to occur.

(1) The chief clerk may cause the notice to be published and the applicant shall reimburse the agency for the cost of publication.

(2) The executive director may suspend further processing or return the application. If the application is resubmitted within six months of the date of the return of the application, it will be exempt from any application fee requirements.

(b) Electronic mailing lists. The chief clerk may require the applicant to provide necessary mailing lists in electronic form.

(c) Mail or hand delivery. When Subchapters G - L of this chapter require notice by mail, notice by hand delivery may be substituted. Mailing is complete upon deposit of the document, enclosed in a prepaid, properly addressed wrapper, in a post office or official depository of the United States Postal Service. If hand delivery is by courier-receipted delivery, the delivery is complete upon the courier taking possession.

(d) Combined notice. Notice may be combined to satisfy more than one applicable section of this chapter.

(e) Notice and affidavit. When Subchapters G - J and L of this chapter require an applicant to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice which shows the date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (a) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

(f) **Published notice.** When this chapter requires notice to be published under this subsection:

(1) the applicant shall publish notice in the newspaper of largest circulation in the county in which the facility is located or proposed to be located or, if the facility is located or proposed to be located in a municipality, the applicant shall publish notice in any newspaper of general circulation in the municipality;

(2) for applications for solid waste permits and injection well permits, the applicant shall publish notice in the newspaper of largest general circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county, the notice must be published in any newspaper of general circulation in the county in which the facility is located or proposed to be located. The requirements of this subsection may be satisfied by one publication if the newspaper is both published in the county and is the newspaper of largest general circulation in the county; and

(3) air quality permit applications required by Subchapters H and K of this chapter (relating to Applicability and General Provisions and Public Notice of Air Quality

Permit Applications, respectively) to publish notice shall comply with the requirements of §39.603 of this title (relating to Newspaper Notice).

(g) Copy of application. The applicant shall make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located. If the application is submitted with confidential information marked as confidential by the applicant, the applicant shall indicate in the public file that there is additional information in a confidential file. The copy of the application must comply with the following.

(1) A copy of the administratively complete application must be available for review and copying beginning on the first day of newspaper publication of Notice of Receipt of Application and Intent to Obtain Permit and remain available for the publications' designated comment period.

(2) A copy of the complete application (including any subsequent revisions to the application) and executive director's preliminary decision must be available for review and copying beginning on the first day of newspaper publication required by this section and remain available until the commission has taken action on the application or the commission refers issues to State Office of Administrative Hearings; and

(3) where applicable, for air quality permit applications filed on or after June 24, 2010 [the effective date of this section], the applicant shall also make available the executive director's draft permit, preliminary determination summary and air quality analysis for review and copying beginning on the first day of newspaper publication required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) and remain available until the commission has taken action on the application or the commission refers issues to State Office of Administrative Hearings.

(h) Alternative language newspaper notice.

(1) Applicability. The following are subject to this subsection:

(A) Air quality permit applications [that are declared administratively complete by the executive director on or after September 1, 1999, are subject to this subsection]; and

(B) Permit applications other than air quality permit applications that are required to comply with §39.418 or §39.419 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit; and Notice of Application and Preliminary Decision) that are filed on or after November 30, 2005 [are subject to the requirements of this subsection].

(2) This subsection applies whenever notice is required to be published under §39.418 or §39.419 of this title, and either the elementary or middle school nearest to the facility or proposed facility is required to provide a bilingual education program as required by Texas Education Code, Chapter 29, Subchapter B, and 19 TAC §89.1205(a) (relating to Required Bilingual Education and English as a Second Language Programs) and one of the following conditions is met:

(A) students are enrolled in a program at that school;

(B) students from that school attend a bilingual education program at another location; or

(C) the school that otherwise would be required to provide a bilingual education program has been granted an exception from the requirements to provide the program as provided for in 19 TAC §89.1207(a) (relating to Exceptions and Waivers).

(3) Elementary or middle schools that offer English as a second language under 19 TAC §89.1205(e), and are not otherwise affected by 19 TAC §89.1205(a), will not trigger the requirements of this subsection.

(4) The notice must be published in a newspaper or publication that is published primarily in the alternative languages in which the bilingual education program is or would have been taught, and the notice must be in those languages.

(5) The newspaper or publication must be of general circulation in the county in which the facility is located or proposed to be located. If the facility is located or proposed to be located in a municipality, and there exists a newspaper or publication of general circulation in the municipality, the applicant shall publish notice only in the newspaper or publication in the municipality. This paragraph does not apply to notice required to be published for air quality permits under §39.603 of this title.

(6) For notice required to be published in a newspaper or publication under §39.603 of this title, relating to air quality permits, the newspaper or publication must be of general circulation in the municipality or county in which the facility is located or is proposed to be located, and the notice must be published as follows.

(A) One notice must be published in the public notice section of the newspaper and must comply with the applicable portions of §39.411 of this title (relating to Text of Public Notice).

(B) Another notice with a total size of at least six column inches, with a vertical dimension of at least three inches and a horizontal dimension of at least two column widths, or a size of at least 12 square inches, must be published in a prominent location elsewhere in the same issue of the newspaper. This notice must contain the following information:

(i) permit application number;

(ii) company name;

(iii) type of facility;

(iv) description of the location of the facility; and

(v) a note that additional information is in the public notice section of the same issue.

(7) Waste and water quality alternative language must be published in the public notice section of the alternative language newspaper and must comply with §39.411 of this title.

(8) The requirements of this subsection are waived for each language in which no publication exists, or if the publishers of all alternative language publications refuse to publish the notice. If the alternative language publication is published less frequently than once a month, this notice requirement may be waived by the executive director on a case-by-case basis.

(9) Notice under this subsection will only be required to be published within the United States.

(10) Each alternative language publication must follow the requirements of this chapter that are consistent with this subsection.

(11) If a waiver is received under this subsection on an air quality permit application, the applicant shall complete a verification and submit it as required under §39.605(3) of this title (relating to Notice to Affected Agencies). If a waiver is received under this subsection on a waste or water quality application, the applicant shall complete a verification and submit it to the chief clerk and the executive director.

(i) Failure to publish notice of air quality permit applications. If the chief clerk prepares a newspaper notice that is required by Subchapters H and K of this chapter for air quality permit applications and the applicant does not cause the notice to be

published within 45 days of mailing of the notice from the chief clerk, or, for Notice of Receipt of Application and Intent to Obtain Permit, within 30 days after the executive director declares the application administratively complete, or fails to submit the copies of notices or affidavit required in subsection (j) of this section, the executive director may cause one of the following actions to occur.

(1) The chief clerk may cause the notice to be published and the applicant shall reimburse the agency for the cost of publication.

(2) The executive director may suspend further processing or return the application. If the application is resubmitted within six months of the date of the return of the application, it will be exempt from any application fee requirements.

(j) Notice and affidavit for air quality permit applications. When Subchapters H and K of this chapter require an applicant for an air quality permit action to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice which shows the date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice

requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (i) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

(k) For applications filed on or after September 1, 2015, and subject to providing notice as prescribed by Texas Water Code, §5.115, the commission shall make available on the commission's website notice of administratively complete applications for a permit or license authorized under the Texas Water Code and the Texas Health and Safety Code.

§39.419. Notice of Application and Preliminary Decision.

(a) After technical review is complete, the executive director shall file the preliminary decision and the draft permit with the chief clerk, except for air applications under subsection (e) of this section. The chief clerk shall mail the preliminary decision concurrently with the Notice of Application and Preliminary Decision. For applications filed on or after September 1, 2015, this mailing will occur no earlier than 30 days after written notification of the draft permit is provided to the state senator and state representative of the area in which the facility which is the subject of the application is located. Then, when this chapter requires notice under this section, notice must be given as required by subsections (b) - (e) of this section.

(b) The applicant shall publish Notice of Application and Preliminary Decision at least once in the same newspaper as the Notice of Receipt of Application and Intent to Obtain Permit, unless there are different requirements in this section or a specific subchapter in this chapter for a particular type of permit. The applicant shall also publish the notice under §39.405(h) of this title (relating to General Notice Provisions), if applicable.

(c) Unless mailed notice is otherwise provided under this section, the chief clerk shall mail Notice of Application and Preliminary Decision to those listed in §39.413 of this title (relating to Mailed Notice).

(d) The notice must include the information required by §39.411(c) of this title (relating to Text of Public Notice).

(e) For air applications the following apply.

(1) Air quality permit applications that are filed on or after June 24, 2010 [the effective date of this section], are subject to this paragraph. Applications filed before June 24, 2010 [the effective date of this section] are governed by the rules as they existed immediately before June 24, 2010 [the effective date of this section], and those

rules are continued in effect for that purpose. After technical review is complete for applications subject to the [requirements of] requirements for Prevention of Significant Deterioration and Nonattainment permits in Chapter 116, Subchapter B of this title (relating to New Source Review Permits), the executive director shall file the executive director's draft permit and preliminary decision, the preliminary determination summary and air quality analysis, as applicable, with the chief clerk and the chief clerk shall post these on the commission's website [Web site]. Notice of Application and Preliminary Decision must be published as specified in Subchapter K of this chapter (relating to Public Notice of Air Quality Permit Applications) and, as applicable, under §39.405(h) of this title, unless the application is for any renewal application of an air quality permit that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted and the application does not involve a facility for which the applicant's compliance history is in the lowest classification under Texas Water Code, §5.753 and §5.754 and the commission's rules in Chapter 60 of this title (relating to Compliance History).

(2) If notice under this section is required, the chief clerk shall mail notice according to §39.602 of this title (relating to Mailed Notice).

(3) If the applicant is seeking authorization by permit, registration, license, or other type of authorization required to construct, operate, or authorize a component

of the FutureGen project as defined in §91.30 of this title (relating to Definitions), any application submitted on or before January 1, 2018, shall be subject to the public notice and participation requirements in Chapter 116, Subchapter L of this title (relating to Permits for Specific Designated Facilities).

**SUBCHAPTER K: PUBLIC NOTICE OF AIR QUALITY PERMIT
APPLICATIONS
§39.602**

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; and TWC, §5.5553, concerning Notice of Draft Permit, which requires the commission to provide notice of draft permit to certain state officials. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which

authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and 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.

The proposed amendment implements TWC, §5.5553, THSC, §382.012, and Senate Bill 709 (84th Texas Legislature, 2015).

§39.602. Mailed Notice.

(a) When this chapter requires notice for air quality permit applications, the chief clerk shall mail notice to:

(1) the applicant;

(2) persons on a relevant mailing list kept under §39.407 of this title (relating to Mailing Lists);

(3) persons who filed public comment or hearing requests on or before the deadline for filing public comment or hearing requests; and

(4) any other person the executive director or chief clerk may elect to include.

(b) When Notice of Receipt of Application and Intent to Obtain Permit is required, mailed notice shall be sent to the state senator and representative who represent the area in which the facility is or will be located.

(c) For applications received on or after September 1, 2015, written notification of the draft permit shall be sent to the state senator and representative who represent the area where the facility is or will be located at least 30 days prior to the chief clerk's mailing of the executive director's preliminary decision and Notice of Application and Preliminary Decision.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§50.115, 50.119, and 50.143.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking is proposed to implement Senate Bills (SB) 709 and 1267, both adopted by the 84th Texas Legislature (2015) with an effective date of September 1, 2015.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 39, Public Notice; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings. SB 709 is implemented by rules proposed in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9 are implemented by rules proposed in Chapters 1, 50, 55, 70, and 80.

SB 709

SB 709 makes several changes to the current contested case hearing (CCH) process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a CCH. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications filed on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their CCH request has timely and specifically identified, by name and physical address, a member who would be affected in the member's own right. The issues submitted by the commission to the State Office of Administrative Hearings (SOAH) for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. SB 709 allows for extensions beyond 180 days based upon agreement of the parties with the ALJ's

approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267 amends the Texas Administrative Procedure Act (APA), codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCHs and agency decisions, signature and timeliness of agency decisions, presumption of the date that notice of an agency decision is received, motions for rehearing regarding agency decisions, and the procedures for judicial review of agency decisions.

The changes to the APA for which TCEQ rulemaking is necessary are as follows.

First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the beginning date is altered for a party that does not receive notice of the commission's decision or order, until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed.

Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing.

Section by Section Discussion

In addition to the amendments associated with this rulemaking, the proposed rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§50.115, Scope of Contested Case Hearings

The amendment to §50.115(c)(2) is proposed to implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1. The amendment would provide that the commission may not refer an issue to SOAH for a CCH unless the commission determines that, for applications filed on or after September 1, 2015, the issue involves disputed question of fact or a mixed question of law and fact that was timely raised in public comment made by the affected person.

The amendment to §50.115(d) is proposed to implement new Texas Government Code, §2003.047(e-2) and (e-3) in SB 709, Section 1 and Section 5(a)(1). Subsection (d)(1) is proposed to add the date applicability for applications filed before September 1, 2015, to the existing rule. Subsection (d)(2) is proposed to provide that, for applications received by the commission on or after September 1, 2015, the maximum length of the hearing is proposed to be 180 days (reduced from the current maximum length of one year) from the first day of the preliminary hearing to the date the proposal for decision is issued, unless the commission specifies a shorter duration, or the hearing is extended by the judge. The amendment would also provide that a judge may extend any hearing if the judge determines that failure to grant an extension will unduly deprive a party of due process or another constitutional right, or by agreement of the parties with approval of the judge.

§50.119, Notice of Commission Action, Motion for Rehearing

The amendment to §50.119 is proposed to implement changes to the APA in Texas Government Code, §2001.146(a), as amended in SB 1267, Section 9. The commission proposes to amend subsection (b) to change the deadlines for filing a motion for rehearing from within 20 to not later than 25 days after the date of the commission's final decision or order on the application is signed, unless the time for filing the motion for rehearing has been extended under the APA. The amendment would also remove text regarding the presumption of notice.

The amendment to §50.119 is also proposed to implement changes to the APA in Texas Government Code, §2001.146(g), as amended in SB 1267, Section 9. Proposed subsection (d) would provide that a motion for rehearing must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The motion must also state the legal and factual basis for the claimed error.

§50.143, Withdrawing the Application

The existing rule text is proposed to be designated as subsection (a). Subsection (b) is proposed to implement SB 709, Section 5(a)(1) and (b). Applications filed before September 1, 2015, for which the chief clerk mailed the executive director's preliminary decision and notice of a draft permit that are withdrawn by the applicant on or after September 1, 2015, are governed by the commission's rules as they existed immediately before September 1, 2015, and those rules are continued in effect for that purpose if the application is refiled with the commission, and the executive director determines the refiled with application is substantially similar. The information that the executive director may consider in making a determination of a substantially similar application is listed in subsection (b)(1) - (7).

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government. The proposed rules are procedural in nature and do not directly impact the cost of CCHs. The proposed rules would implement SBs 79 and 1267, both adopted by the 84th Texas Legislature (2015).

SB 709

SB 709 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current CCH process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a hearing. A group or association seeking to be considered as an affected person must specifically identify in its comments a member who would be an affected person in the

person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications received on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their comments have timely and specifically identified a member who would be affected in the member's own right. The issues submitted by the commission to the SOAH for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health

and safety, the environment and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the ALJ's proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by the date specified by the commission. SB 709 allows for continuances based upon agreement of the parties with ALJ approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267, also passed by the 84th Texas Legislature in 2015, amends the APA, codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCH and agency decisions, signature and timeliness of agency decisions, presumption of the date notice that an agency decision is received, motions for rehearing of agency decisions, and the procedures for judicial review of agency decisions. Rulemaking is needed to implement SB 1267, Sections 4, 6, 7, and 9.

The changes to the APA for which TCEQ rulemaking is necessary are as follows. First, the presumption that notice is received on the third day after mailing is removed. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision was not received can seek to alter the timelines for filing a motion for rehearing. Third, the date from which the time period for filing a motion for rehearing will now begin on the date the order is signed, unless altered for a party that does not receive notice of the commission's order until at least 15 days after the commission's decision or order is signed but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission order that modifies, corrects, or reforms a commission order in response to a previously issued motion for rehearing.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Local governments that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

The number of units of local governments is a small percentage of the number of applicants for and who comment on air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications. While it is possible that a unit of state government can be a permit applicant, it is rare. If one is, it would be affected in the same way as other governmental entities who are applicants. State agencies are generally prohibited from contesting TCEQ permit applications, so they would not be affected the same as other governmental entities who protest applications and participate in CCHs.

There are fiscal implications for the agency due to the need to revise the Commissioners'

Integrated Database to adequately implement SB 709. However, costs to upgrade the database are not expected to be significant and would be absorbed using current resources.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and greater clarity for the public and also for applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications.

No significant fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity

of applications and the number of contested issues. Businesses that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

The rules will apply to applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications. The number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. The proposed amendments are procedural in nature and do not directly impact the cost of CCHs. It is not known how many applicants would be small or micro-businesses, but for those that are, there may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount

cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking is necessary to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has 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 rulemaking is in effect.

Draft 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 to Chapter 50 are procedural in nature and 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, they implement requirements for CCHs and for motions for rehearing of commission action, ensuring that the rules are consistent with the APA and the requirements of SB 709 and SB 1267.

As defined in the 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 to Chapter

50 do not exceed an express requirement of state law or a requirement of a delegation agreement, and were not developed solely under the general powers of the agency, but is 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).

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 to Chapter 50 are procedural in nature and implement requirements for CCHs and for motions for rehearing of commission action, ensuring that the rules are consistent with the APA and the requirements of SB 709 and SB 1267. The change in procedure will not burden private real property. 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). The proposed amendments do not directly prevent a nuisance or prevent an immediate threat to life or property. 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 proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendments affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed amendments are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 15, 2015, at 2:00 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.

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

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-018-080-LS. The comment period closes on September 21, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, at (512) 239-0466.

SUBCHAPTER F: ACTION BY THE COMMISSION

§50.115, §50.119

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. Additional relevant sections are 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 Government Code, §2001.146, which authorizes the procedures for motions for rehearing filed with state agencies; and Texas Government Code, §2003.047, which provides the authority for the State Office of Administrative Hearings to conduct hearings on behalf of the commission.

The proposed amendments implement Texas Government Code, §2001.146 and §2003.047; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§50.115. Scope of Contested Case Hearings.

(a) Subsections (b) - (d) of this section apply to applications under Chapters 26 and 27 of the Texas Water Code and Chapters 361 and 382 of the Texas Health and Safety Code. Subsection (e)(1) of this section applies to all applications under this subchapter. Subsections (e)(2) and (f) of this section apply as stated in the subsection.

(b) When the commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be referred to State Office of Administrative Hearings (SOAH) [SOAH] for a hearing.

(c) The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue:

(1) involves a disputed question of fact or a mixed question of law and fact;

(2) was raised during the public comment period, and, for applications filed on or after September 1, 2015, was raised in a comment made by the affected person; and

(3) is relevant and material to the decision on the application.

(d) Consistent with the nature and number of the issues to be considered at the contested case hearing, the commission by order shall specify the maximum expected duration of the hearing by stating the date by which the judge is expected to issue a proposal for decision.

(1) For applications filed before September 1, 2015, no [No] hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. A judge may extend any hearing if the judge determines that failure to grant an extension will deprive a party of due process or another constitutional right.

(2) For applications filed on or after September 1, 2015, no hearing shall be longer than 180 days, or a date specified by the commission, from the first day of the preliminary hearing to the date the proposal for decision is issued, unless the hearing is extended by the judge. A judge may extend any hearing if the judge determines that failure to grant an extension will unduly deprive a party of due process or another constitutional right, or by agreement of the parties with approval of the judge.

(e) The commission may limit the scope of a contested case hearing:

(1) to only those portions of a permit for which the applicant requests action through an amendment or modification. All terms, conditions, and provisions of an existing permit remain in full force and effect during the proceedings, and the permittee shall comply with an existing permit until the commission acts on the application; and

(2) to only those requirements in Texas Health and Safety Code, §382.055 [of the Texas Health and Safety Code] for the review of a permit renewal.

(f) When referring a case to SOAH, for applications other than those filed under Texas Water Code, Chapters 26 and 27 [of the Texas Water Code] and Texas Health and Safety Code, Chapters 361 and 382 [of the Texas Health and Safety Code], the commission or executive director shall provide a list of disputed issues. For hearings on these applications, the disputed issues are deemed to be those defined by law governing these applications, unless the commission orders otherwise under §80.6(d) of this title (relating to Referral to SOAH).

§50.119. Notice of Commission Action, Motion for Rehearing.

(a) If the commission acts on an application, the chief clerk shall mail or otherwise transmit the order and notice of the action to the applicant, executive director, public interest counsel, and to other persons who timely filed public comment, or requests for reconsideration or contested case hearing. The notice shall explain the opportunity to file a motion under §80.272 of this title (relating to Motion for Rehearing). If the commission adopts a response to comments that is different from the executive director's response to comments, the chief clerk shall also mail the final response to comments. The chief clerk need not mail notice of commission action to persons submitting public comment or requests for reconsideration or contested case hearing who have not provided a return mailing address. The chief clerk may mail the information to a representative group of persons when a substantial number of public comments have been submitted.

(b) If the commission acts on an application, §80.272 of this title applies. A motion for rehearing must be filed not later than 25 [within 20] days after the date [the person is notified in writing of] the commission's final decision or order on the application is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, §2001.142 and §80.276 of this title, by agreement under Texas Government Code, §2001.147, or by the commission's written order issued pursuant to Texas Government Code, §2001.146(e). [A person is presumed to have been notified on the third day after the date that the decision or order is mailed

by first class mail.] If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

(c) Motions for rehearing may be filed on:

(1) an issue that was referred to State Office of Administrative Hearings (SOAH) [SOAH] for contested case hearing, or an issue that was added by the judge;

(2) issues that the commission declined to send to SOAH for hearing; and

(3) the commission's decision on an application.

(d) A motion for rehearing must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The motion must also state the legal and factual basis for the claimed error.

SUBCHAPTER G: ACTION BY THE EXECUTIVE DIRECTOR

§50.143

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. Additional relevant sections are Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and 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.

The proposed amendment implements Senate Bill 709 (84th Texas Legislature, 2015).

§50.143. Withdrawing the Application.

(a) Upon a request by the applicant at any time before the application is referred to State Office Of Administrative Hearings (SOAH) [SOAH], the executive director shall

allow the withdrawal of the application and shall file a written acknowledgment of the withdrawal with the chief clerk. If the application has been scheduled for a commission meeting, the chief clerk shall remove it from the commission's agenda. For purposes of this rule, an application is referred to SOAH when the commission votes during a public meeting for referral or when the executive director or the applicant file a request to refer with the chief clerk under §55.210 of this title (relating to Direct Referrals) [§55.209(h) of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing)].

(b) Applications filed before September 1, 2015, for which chief clerk mailed the executive director's preliminary decision and notice of a draft permit under §39.419 of this title (relating to Notice of Application and Preliminary Decision) that are subsequently withdrawn by the applicant on or after September 1, 2015, are governed by the commission's rules as they existed immediately before September 1, 2015, and those rules are continued in effect for that purpose if the application is refiled with the commission and the executive director determines the resubmitted application is substantially similar. For purposes of making this determination, the executive director may consider the following information contained in the withdrawn application and the refiled application:

(1) the name of the applicant;

(2) the location or proposed location of the construction, activity or discharge, to be authorized by the application;

(3) the air contaminants to be emitted;

(4) the area to be served by a wastewater treatment facility;

(5) the volume and nature of the wastewater to be treated by a wastewater treatment facility;

(6) the volume and type of waste to be disposed; or

(7) any other factor the executive director determines is relevant to this determination.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§55.156, 55.201, 55.203, 55.205, 55.210, and 55.211.

Section 55.156(e) is proposed to be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP), or, in the alternative, existing §55.156 is proposed to be withdrawn from the SIP.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking is proposed to implement Senate Bills (SB) 709 and 1267, both adopted by the 84th Texas Legislature (2015) with an effective date of September 1, 2015.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings. SB 709 is implemented by rules proposed in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9 is implemented by rules proposed in Chapters 1, 50, 55, 70, and 80.

SB 709

SB 709 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current contested case hearing

(CCH) process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed below.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a CCH. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications filed on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the

commission from finding a group or association is affected unless their CCH request has timely and specifically identified, by name and physical address, a member who would be affected in the member's own right. The issues submitted by the commission to the State Office of Administrative Hearings (SOAH) for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. SB 709 allows for extensions beyond 180 days based upon agreement of the parties, with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267, also passed by the 84th Texas Legislature (2015), amends the Texas Administrative Procedure Act (APA), codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCH and agency decisions, signature and timeliness of agency decisions, presumption of the date that notice of an agency decision is received, motions for rehearing regarding agency decisions, and the procedures for judicial review of agency decisions.

Rulemaking is needed to implement SB 1267, Sections 4, 6, 7, and 9. The changes to the APA for which TCEQ rulemaking is necessary are as follows.

First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the beginning date is altered for a party that does not receive notice of the commission's decision or order, until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing.

Section by Section Discussion

In addition to the proposed amendments associated with this rulemaking, various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§55.156, Public Comment Processing

Proposed subsections (d)(3) and (e)(3) would implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1 and Section 5(a)(1). These subsections would be amended by adding a date so that these subsections apply to applications filed before September 1, 2015. Proposed subsections (d)(4) and (e)(4) would also implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1. Proposed subsections (d)(4) and (e)(4) would provide that only relevant and material disputed issues of fact raised during the comment period by a hearing requestor who is an affected person and whose request is granted for an application filed with the commission on or after September 1, 2015. Existing subsections (d)(4) and (e)(4) would be re-designated as subsections (d)(5) and (e)(5), respectively. Non-substantive changes are also proposed in subsections (d) and (e) to improve readability and to conform to agency style and usage guidelines. In addition, the applicability text that referenced the effective date of the section in subsection (f) is updated to provide the precise date of June 24, 2010.

Section §55.156(e) is proposed to be submitted to the EPA as a revision to or to be withdrawn from the SIP. The commission solicits comments on whether subsection (e) is necessary to meet requirements for SIPs in the Federal Clean Air Act.

§55.201, Requests for Reconsideration or Contested Case Hearing

The amendment to §55.201 is proposed to implement new Texas Government Code, §2003.047(e-1) and SB 709, Section 1 and Section 5(a)(1). Subsection (c) would be

amended to provide that for applications filed on or after September 1, 2015, a request for a CCH must be based on the affected person's timely comments.

Subsection (d)(4) would be amended by restructuring the paragraph to add applicable date restrictions so that the existing text is re-designated as paragraph (A) and applies to applications filed before September 1, 2015. Proposed paragraph (B) would also provide, for applications filed on or after September 1, 2015, that a hearing requestor must list all relevant and material disputed issues of fact that were raised by that person during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law.

§55.203, Determination of Affected Person

Subsection (c)(6) is proposed to implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1, Texas Water Code, §5.115(a-1)(2)(B) in SB 709, Section 2 and Section 5(a)(1). The rule would provide that, for hearing requests on applications filed on or after September 1, 2015, the commission must consider whether the requestor timely submitted comments on the permit application. Existing subsection (c)(6) is proposed to be re-designated as subsection (c)(7).

Subsection (d) is proposed to implement the amendments to Texas Water Code, §5.115(a-1)(1)(A), (C), (D) and (E) in SB 709, Section 2 and Section 5(a)(1). Subsection (d) would provide that, in determining whether a person is an affected person for the purpose of granting a hearing request on an application filed on or after September 1, 2015, the commission may also consider: 1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance; 2) the analysis and opinions of the executive director; and 3) any other expert reports, affidavits, opinions, or data submitted by the executive director, applicant, or hearing requestor.

§55.205, Request by Group or Association

The amendment to §55.205 is proposed to implement the amendments to Texas Water Code, §5.115(a-1) and (2) in SB 709, Section 2 and Section 5(a)(1). Proposed subsection (b)(3) and (4) carries forward two existing requirements in subsection (a)(2) and (3). Subsection (b) would also specifically implement Texas Water Code, §5.115(a-1)(2)(A) in proposed subsection (b)(1) and (2). Proposed subsection (b)(1) and (2) would provide that a request for a CCH from a group or association on an application filed on or after September 1, 2015, may not be granted unless the group or association timely submits comments on the application and identifies one or more members of the group or

association by name and physical address. Existing subsection (b) is proposed to be re-designated as subsection (c).

§55.210, Direct Referrals

The amendment to §55.210 is proposed to implement new Texas Government Code, §2003.047(e-5) in SB 709, Section 1 and Section 5(a)(1). Subsection (e) would be amended to clarify the applicability of the procedures for when Notice of Application and Preliminary Decision is provided at or after direct referral under this section. Specifically, those procedures would only apply to applications received by the commission before September 1, 2015.

Proposed subsection (f) would prohibit an administrative law judge from holding a preliminary hearing on applications filed on or after September 1, 2015, until after the issuance of the executive director's response to comment.

§55.211, Commission Action on Requests for Reconsideration and Contested Case Hearing

The amendment to §55.211(c)(2)(A) is proposed to implement new Texas Government Code, §2003.047(e-1) in SB 709, Section 1 and Section 5(a)(1). Subsection (c)(2)(A) is restructured into clauses (i) and (ii). Clause (i) is amended by adding an applicability

clause to the existing rule that provides that this paragraph is applicable to applications filed before September 1, 2015.

Proposed subsection (c)(2)(A)(ii) would provide that, for an application that was filed on or after September 1, 2015, the requestor must have raised disputed issues of fact during the comment period, which were not withdrawn and that are relevant and material to the commission's decision.

The amendment to subsection (f) is proposed to implement SB 1267, Section 9, which amends the APA (Texas Government Code, §2001.146), and would change the date for filing a motion for rehearing from within 20 days after notification to not later than the 25 days after the commission's decision or order is signed. However, the deadline may be extended under prescribed sections of the APA. The amendment removes the text regarding the presumption that notification of the commission's decision or order is received on the third day after it is mailed. Concurrent with this rulemaking, §80.272 is proposed to be amended to include similar changes.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local

government. The proposed rules are procedural in nature and do not directly impact the cost of CCHs. The proposed rules would implement SBs 709 and 1267, both adopted by the 84th Texas Legislature (2015).

SB 709

SB 709 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current CCH process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a hearing. A group or association seeking to be considered as an affected person must specifically identify in its comments a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior

to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications received on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their comments have timely and specifically identified a member who would be affected in the member's own right. The issues submitted by the commission to the SOAH for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to

support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the ALJ's proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by the date specified by the commission. SB 709 allows for continuances based upon agreement of the parties with the approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267, also passed by the 84th Texas Legislature, amends the APA, codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCH and agency decisions, signature and timeliness of agency decisions, presumption of the date notice

that an agency decision is received, motions for rehearing of agency decisions, and the procedures for judicial review of agency decisions. Rulemaking is needed to implement SB 1267, Sections 4, 6, 7, and 9.

The changes to the APA for which TCEQ rulemaking is necessary are as follows. First, the presumption that notice is received on the third day after mailing is removed. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision was not received can seek to alter the timelines for filing a motion for rehearing. Third, the date from which the time period for filing a motion for rehearing will now begin on the date the order is signed, unless altered for a party that does not receive notice of the commission's order until at least 15 days after the commission's decision or order is signed but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission order that modifies, corrects, or reforms a commission order in response to a previously issued motion for rehearing.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal

requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Local governments that are permit applicants and are subject to a CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

The number of units of local governments is a small percentage of the number of applicants for and who comment on air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications. While it is possible that a unit of state government can be a permit applicant, it is rare. If one is, it would be affected in the same way as other governmental entities who are applicants. State agencies are generally prohibited from contesting TCEQ permit applications, so they would not be affected the same as other governmental entities who protest applications and participate in CCHs.

There are fiscal implications for the agency due to the need to revise the Commissioners' Integrated Database to adequately implement SB 709. However, costs to upgrade the database are not expected to be significant and would be absorbed using current resources.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and greater clarity for the public and also for applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications.

No significant fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to a CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected

to be significant.

The rules will apply to applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications. The number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. The proposed amendments are procedural in nature and do not directly impact the cost of CCHs. It is not known how many applicants would be small or micro-businesses, but for those that are, there may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to a CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy

of their application, though these costs are not expected to be significant.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking is necessary to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rulemaking is in effect.

Local Employment Impact Statement

The commission has 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 rulemaking is in effect.

Draft 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 to Chapter 55 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Rather, they are procedural in nature and implement changes made to the Texas Water Code in SB 709, and to the APA in SB 1267 by revising rules regarding requests for CCH by individual entities and groups or associations, determination of affected persons and disputed issues for CCH on certain applications, and commission action on requests for CCH.

The rulemaking is procedural in nature and does not 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.

As defined in the 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 powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to Chapter 55 are procedural in nature and implement changes made to the Texas Water Code in SB 709, and to the APA in SB 1267 by amending rules regarding requests for CCH by individual entities and groups or associations, determination of affected persons and disputed issues for CCH on certain applications, and commission action on requests for CCH. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the law described in the Statutory Authority section of this rulemaking.

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 assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments to Chapter 55 revise rules regarding requests for CCH by individual entities and groups or associations, determination of affected persons and disputed

issues for CCH on certain applications, and commission action on requests for CCH and are procedural in nature. The primary purpose of the proposed rulemaking is to implement changes made to the Texas Water Code in SB 709, and to the APA in SB 1267. Promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed rules 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). Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do partially fulfill a federal mandate under 42 United States Code, §7410. Consequently, the exemption that applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. 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 proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendments affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 15, 2015, at 2:00 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.

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

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-

3087, or faxed to (512) 239-4808. Electronic comments may be submitted at:

<http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-018-080-LS. The comment period closes on September 21, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Janis Hudson, Environmental Law Division, at (512) 239-0466.

SUBCHAPTER E: PUBLIC COMMENT AND PUBLIC MEETINGS

§55.156

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; and TWC, Subchapter M, concerning Environmental Permitting Procedures, which requires the commission to establish public participation procedures for certain permit applications. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011,

concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. Additional relevant sections are 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; and Texas Government Code, §2001.142, which prescribes requirements for the notification of decisions and orders of a state agency. In addition, the amendment to §55.156(e) is also proposed under Federal Clean Air Act, 42 United States Code, §§7401, *et seq.*, which requires states to submit State Implementation Plan revisions that specify the manner in which the national ambient air quality standards will be achieved and maintained within each air quality control region of the state.

The proposed amendment implements TWC, §5.115; and §5.1733; TWC, Subchapter M, including TWC, §5.5553; THSC, §382.012; Texas Government Code, §2001.142; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§55.156. Public Comment Processing.

(a) The chief clerk shall deliver or mail to the executive director, the Office of Public Interest Counsel, the Office of Public Assistance, the director of the Alternative Dispute Resolution Office, and the applicant copies of all documents filed with the chief clerk in response to public notice of an application.

(b) If comments are received, the following procedures apply to the executive director.

(1) Before an application is approved, the executive director shall prepare a response to all timely, relevant and material, or significant public comment, whether or not withdrawn, and specify if a comment has been withdrawn. Before any air quality permit application for a Prevention of Significant Deterioration or Nonattainment permit subject to Chapter 116, Subchapter B of this title (relating to New Source Review Permits) or for applications for the establishment or renewal of, or an increase in, a plant-wide applicability limit permit under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), filed on or after the effective date of this section, is approved, the executive director shall prepare a response to all comments received. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes.

(2) The executive director may call and conduct public meetings, under §55.154 of this title (relating to Public Meetings), in response to public comment.

(3) The executive director shall file the response to comments with the chief clerk within the shortest practical time after the comment period ends, not to exceed 60 days.

(c) After the executive director files the response to comments, the chief clerk shall mail (or otherwise transmit) the executive director's decision, the executive director's response to public comments, and instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing. The chief clerk shall provide the information required by this section to the applicant, any person who submitted comments during the public comment period, any person who requested to be on the mailing list for the permit action, any person who timely filed a request for a contested case hearing in response to the Notice of Receipt of Application and Intent to Obtain a Permit for an air application, the Office of Public Interest Counsel, and the Office of Public Assistance. Instructions for requesting reconsideration of the executive director's decision or requesting a contested case hearing are not required to be included in this transmittal for the applications listed in:

(1) §39.420(e) of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision); and

(2) §39.420(f) and (g) of this title.

(d) The instructions sent under §39.420(a) of this title regarding how to request a contested case hearing shall include at least the following statements, however, this subsection does not apply to post-closure order applications:

(1) [that] a contested case hearing request must include the requestor's location relative to the proposed facility or activity;

(2) [that] a contested case hearing request should include a description of how and why the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(3) [that] only relevant and material disputed issues of fact raised during the comment period can be considered if a contested case hearing request is granted for an application filed before September 1, 2015; [and]

(4) only relevant and material disputed issues of fact raised during the comment period by a hearing requestor who is an affected person and whose request is granted can be considered if a contested case hearing request is granted for an application filed on or after September 1, 2015; and

(5) [(4) that] a contested case hearing request may not be based on issues raised solely in a comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(e) The instructions sent under §39.420(c) of this title regarding how to request a contested case hearing shall include at least the following statements:

(1) [that] a contested case hearing request must include the requestor's location relative to the proposed facility or activity;

(2) [that] a contested case hearing request should include a description of how and why the requestor will be adversely affected by the proposed facility or activity in a manner not common to the general public, including a description of the requestor's uses of property which may be impacted by the proposed facility or activity;

(3) [that] only relevant and material disputed issues of fact raised during the comment period can be considered if a contested case hearing request is granted for an application filed before September 1, 2015;

(4) only relevant and material disputed issues of fact raised during the comment period by a hearing requestor who is an affected person and whose request is granted can be considered if a contested case hearing request is granted for an application filed on or after September 1, 2015; and

(5) [(4) that] a contested case hearing request may not be based on issues raised solely in a comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment.

(f) For applications referred to State Office of Administrative Hearings under §55.210 of this title (relating to Direct Referrals):

(1) for air quality permit applications filed on or after June 24, 2010 [the effective date of this section] subsections (c) and (d) of this section do not apply; and

(2) for all other permit applications, subsections (b)(2), (c), and (d) of this section do not apply.

(g) Notwithstanding the requirements in §39.420 of this title, the commission shall make available by electronic means on the commission's website [Web site] the executive director's decision and the executive director's response to public comments.

**SUBCHAPTER F: REQUESTS FOR RECONSIDERATION OR CONTESTED
CASE HEARING**

§§55.201, 55.203, 55.205, 55.210, 55.211

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.115, concerning Persons Affected in Commission Hearings' Notice of Application, which requires the commission to determine affected persons and provide certain notice of applications; and TWC, Subchapter M, concerning Environmental Permitting Procedures, which requires the commission to establish public participation procedures for certain permit applications. Additional relevant sections are 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 Government Code, §2001.142, which prescribes requirements for the

notification of decisions and orders of a state agency; and Texas Government Code, §2003.047, which provides the authority for State Office of Administrative Hearings to conduct hearings on behalf of the commission.

The proposed amendments implement TWC, §5.115, Texas Government Code, §2001.142 and §2003.047; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§55.201. Requests for Reconsideration or Contested Case Hearing.

(a) A request for reconsideration or contested case hearing must be filed no later than 30 days after the chief clerk mails (or otherwise transmits) the executive director's decision and response to comments and provides instructions for requesting that the commission reconsider the executive director's decision or hold a contested case hearing.

(b) The following may request a contested case hearing under this chapter:

(1) the commission;

(2) the executive director;

(3) the applicant; and

(4) affected persons, when authorized by law.

(c) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by subsection (a) of this section, [and] may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

(d) A hearing request must substantially comply with the following:

(1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) for applications filed:

(A) before September 1, 2015, list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; or [and]

(B) on or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by the requestor during the public comment

period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and

(5) provide any other information specified in the public notice of application.

(e) Any person, other than a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title (relating to Definitions), may file a request for reconsideration of the executive director's decision. The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk within the time provided by subsection (a) of this section. The request should also contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. The request for reconsideration must expressly state that the person is requesting reconsideration of the executive director's decision, and give reasons why the decision should be reconsidered.

(f) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request reconsideration or a contested case hearing shall be treated as public comment.

(g) Procedures for late filed public comments, requests for reconsideration, or contested case hearing are as follows.

(1) A request for reconsideration or contested case hearing, or public comment shall be processed under §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing) or under §55.156 of this title (relating to Public Comment Processing), respectively, if it is filed by the deadline. The chief clerk shall accept a request for reconsideration or contested case hearing, or public comment that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) The commission may extend the time allowed to file a request for reconsideration, or a request for a contested case hearing.

(h) Any person, except the applicant, the executive director, the public interest counsel, and a state agency that is prohibited by law from contesting the issuance of a permit or license as set forth in §55.103 of this title, who was provided notice as required

under Chapter 39 of this title (relating to Public Notice) but who failed to file timely public comment, failed to file a timely hearing request, failed to participate in the public meeting held under §55.154 of this title (relating to Public Meetings), and failed to participate in the contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings) may file a motion for rehearing under §50.119 of this title (relating to Notice of Commission Action, Motion for Rehearing), or §80.272 of this title (relating to Motion for Rehearing) or may file a motion to overturn the executive director's decision under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) only to the extent of the changes from the draft permit to the final permit decision.

(i) Applications for which there is no right to a contested case hearing include:

(1) a minor amendment or minor modification of a permit under Chapter 305, Subchapter D of this title (relating to Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits);

(2) a Class 1 or Class 2 modification of a permit under Chapter 305, Subchapter D of this title;

(3) any air permit application for the following:

(A) initial issuance of a voluntary emission reduction permit or an electric generating facility permit;

(B) permits issued under Chapter 122 of this title (relating to Federal Operating Permits Program);

(C) a permit issued under Chapter 116, Subchapter B, Division 6 of this title (relating to Prevention of Significant Deterioration Review) that would authorize only emissions of greenhouse gases as defined in §101.1 of this title (relating to Definitions); or

(D) amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. The commission may hold a contested case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations;

(4) hazardous waste permit renewals under §305.65(8) of this title
(relating to Renewal);

(5) an application, under Texas Water Code, Chapter 26, to renew or
amend a permit if:

(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to
be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit
will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant
public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit;

(6) an application for a Class I injection well permit used only for the disposal of nonhazardous brine produced by a desalination operation or nonhazardous drinking water treatment residuals under Texas Water Code, §27.021, concerning Permit for Disposal of Brine from [From] Desalination Operations or of Drinking Water Treatment Residuals in Class I Injection Wells;

(7) the issuance, amendment, renewal, suspension, revocation, or cancellation of a general permit, or the authorization for the use of an injection well under a general permit under Texas Water Code, §27.023, concerning General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals;

(8) an application for a pre-injection unit registration under §331.17 of this title (relating to Pre-injection Units Registration);

(9) an application for a permit, registration, license, or other type of authorization required to construct, operate, or authorize a component of the FutureGen

project as defined in §91.30 of this title (relating to Definitions), if the application was submitted on or before January 1, 2018;

(10) other types of applications where a contested case hearing request has been filed, but no opportunity for hearing is provided by law; and

(11) an application for a production area authorization, except as provided in accordance with §331.108 of this title (relating to Opportunity for a Contested Case Hearing on a Production Area Authorization Application).

§55.203. Determination of Affected Person.

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Except as provided by §55.103 of this title (relating to Definitions), governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; [and]

(6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and

(7) [(6)] for governmental entities, their statutory authority over or interest in the issues relevant to the application.

(d) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the commission may also consider the following:

(1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;

(2) the analysis and opinions of the executive director; and

(3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

§55.205. Request by Group or Association.

(a) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(b) For applications filed on or after September 1, 2015, a request by a group or association for a contested case may not be granted unless all of the following requirements are met:

(1) comments on the application are timely submitted by the group or association;

(2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;

(3) the interests the group or association seeks to protect are germane to the organization's purpose; and

(4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(c) [(b)] The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a) or (b) of this section. The request and reply shall be filed according to the procedure in §55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing).

§55.210. Direct Referrals.

(a) The executive director or the applicant may file a request with the chief clerk that the application be sent directly to State Office of Administrative Hearings (SOAH) for a hearing on the application.

(b) After receipt of a request filed under this section and after the executive director has issued his preliminary decision on the application, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

(c) A case which has been referred to SOAH under this section shall not be subject to the public meeting requirements of §55.154 of this title (relating to Public Meetings). The agency may, however, call and conduct public meetings in response to public comment. A public meeting is intended for the taking of public comment, and is not a contested case proceeding under the Administrative Procedure Act. Public meetings held under this section shall be subject to following procedures.

(1) The executive director shall hold a public meeting when there is a significant degree of public interest in a draft permit, or when required by law.

(2) To the extent practicable, the public meeting for any case referred under this section shall be held prior to or on the same date as the preliminary hearing.

(3) Public notice of a public meeting may be abbreviated to facilitate the convening of the public meeting prior to or on the same date as the preliminary hearing,

unless the timing of notice is set by statute or a federal regulation governing a permit under a federally authorized program. In any case, public notice must be provided at least ten days before the meeting.

(4) The public comment period shall be extended to the close of any public meeting.

(5) The applicant shall attend any public meeting held.

(6) A tape recording or written transcript of the public meeting shall be filed with the chief clerk and will be included in the chief clerk's case file to be sent to SOAH as provided by §80.6 of this title (relating to Referral to SOAH).

(d) A case which has been referred to SOAH under this section shall be subject to the public comment processing requirements of §55.156(a) and (b)(1) and (3) of this title (relating to Public Comment Processing).

(e) For applications filed before September 1, 2015, if [If] Notice of Application and Preliminary Decision is provided at or after direct referral under this section, this notice shall include, in lieu of the information required by §39.411(c) and (e) of this title (relating to Text of Public Notice), the following:

(1) the information required by §39.411(b)(1) - (3), (4)(A), (6) - (11), and (13) and (e)(10), (11)(A), (C) and (D), (13) and (14) of this title;

(2) the information required by §39.411(c)(4) and (5) of this title; and

(3) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted, the deadline to file public comments or request a public meeting, and a statement that a public meeting will be held by the executive director if there is significant public interest in the proposed activity. These public comment procedures must be printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice.

(f) For applications filed on or after September 1, 2015, the administrative law judge may not hold a preliminary hearing until after the issuance of the executive director's response to comment.

§55.211. Commission Action on Requests for Reconsideration and Contested Case Hearing.

(a) Commission consideration of the following items is not itself a contested case subject to the Administrative Procedure Act (APA) [APA]:

- (1) public comment;
- (2) executive director's response to comment;
- (3) request for reconsideration; or
- (4) request for contested case hearing.

(b) The commission will evaluate public comment, executive director's response to comment, requests for reconsideration, and requests for contested case hearing and may:

- (1) grant or deny the request for reconsideration;
- (2) determine that a hearing request does not meet the requirements of this subchapter, and act on the application; or

(3) determine that a hearing request meets the requirements of this subchapter and:

(A) if the request raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment, and that are relevant and material to the commission's decision on the application:

(i) specify the number and scope of the specific factual issues to be referred to State Office of Administrative Hearings (SOAH) [SOAH];

(ii) specify the maximum expected duration of the hearing;
and

(iii) direct the chief clerk to refer the issues to SOAH for a hearing; or

(B) if the request raises only disputed issues of law or policy, make a decision on the issues and act on the application; or

(4) direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the requestor is an affected person. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the APA. If the commission determines that a requestor is an affected person, SOAH may proceed with a contested case hearing on the application if either the commission has specified, or the parties have agreed to, the number and scope of the issues and maximum expected duration of the hearing.

(c) A request for a contested case hearing shall be granted if the request is:

(1) made by the applicant or the executive director;

(2) made by an affected person if the request:

(A) is on an application filed:

(i) [A] before September 1, 2015, raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the

executive director's response to comment, and that are relevant and material to the commission's decision on the application; or

(ii) on or after September 1, 2015, raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

(B) is timely filed with the chief clerk;

(C) is pursuant to a right to hearing authorized by law; and

(D) complies with the requirements of §55.201 of this title (relating to Requests for Reconsideration or Contested Case Hearing).

(d) Notwithstanding any other commission rules, the commission may refer an application to SOAH if the commission determines that:

(1) a hearing would be in the public interest; or

(2) the application is for an amendment, modification, or renewal of an air permit under Texas Health and Safety Code, §382.0518 or §382.055 that involves a facility for which the applicant's compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations.

(3) the application is for renewal of a hazardous waste permit, subject to §305.65(8) [§305.65(a)(8)] of this title (relating to Renewal) and the applicant's compliance history as determined under Chapter 60 of this title (relating to Compliance History) raises an issue regarding the applicant's ability to comply with a material term of its permit.

(4) the application is for renewal or amendment of a wastewater discharge permit and the applicant's compliance history as determined under Chapter 60 of this title raises an issue regarding the applicant's ability to comply with a material term of its permit.

(e) If a request for a contested case hearing is granted, a decision on a request for reconsideration or contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under

§80.109 of this title (relating to Designation of Parties) or the issues referred to SOAH under this section. A judge may consider additional issues beyond the list referred by the commission as provided by §80.4(c)(16) of this title (relating to Judges). A person whose request for reconsideration or contested case hearing is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's request for reconsideration or hearing request.

(f) If all requests for reconsideration or contested case hearing are denied, §80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed not later than 25 [no more than 20] days after the date that [the person or attorney of record is notified of] the commission's final decision or order is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, §2001.142 and §80.276 of this title, by agreement under Texas Government Code, §2001.147, or by the commission's written order issued pursuant to Texas Government Code, §2001.146(e). [A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail.] If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code, §5.351 or Texas Health and Safety Code, §361.321 or §382.032, or under the APA.

(g) If all hearing requestors whose requests for a contested case hearing were granted with regard to an issue, withdraw in writing their hearing requests with regard to the issue before issuance of the notice of the contested case hearing, the scope of the hearing no longer includes that issue except as authorized under §80.4(c)(16) of this title.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §70.10 and §70.106.

Background and Summary of the Factual Basis for the Proposed Rules

Senate Bill (SB) 1267 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015, amends the Texas Administrative Procedure Act (APA), codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of contested case hearings (CCH) and agency decisions, signature and timeliness of agency decisions, presumption of the date that notice of an agency decision is received, motions for rehearing regarding agency decisions, and the procedures for judicial review of agency decisions.

The changes to the APA for which TCEQ rulemaking is necessary are as follows:

First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the beginning date is altered for a party that does not receive notice of the commission's decision or order, until at least 15 days after the commission's decision or order is

signed, but no later than 90 days after the commission's decision or order is signed.

Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing.

The commission is proposing amendments to §70.10 and §70.106 to implement SB 1267, Section 4. SB 1267, Section 4 amended Texas Government Code, §2001.142 to provide that a state agency shall notify each party to a contested case personally, by email to the party or his counsel where the party agrees, or by first class, certified, or registered mail. Additionally, SB 1267 amended Texas Government Code, §2001.142 by removing the presumption that a party or attorney of record receives notice of the commission's decision or order on the third day after the date on which notice of the decision or order is mailed. The proposed amendments to Chapter 70 conform to SB 1267 by changing the effective date of agreed orders and default orders, which were previously based on the presumed receipt of the commission's order, to the date that they are signed by the commission or executive director.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 39, Public Notice; Chapter 50, Action

on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 80, Contested Case Hearings. SB 709 84th Texas Legislature (2015) is implemented by rules proposed in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9 are implemented by rules proposed in Chapters 1, 50, 55, 70, and 80.

Section by Section Discussion

In addition to the proposed amendments associated with this rulemaking, various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§70.10, Agreed Orders

The amendment to §70.10(b) is proposed to establish that the effective date of an agreed order is the date that the agreed order is signed by the commission or executive director, unless the parties agree to establish an alternative effective date and state the effective date in the agreed order. Currently, subsection (b) provides that the effective date is based on service of notice of the agreed order, under the Texas Government Code, §2001.142. SB 1267 removed the presumption that notice of commission decisions are received on the third day after mailing. Consequently, in order to create a date certain

from which compliance deadlines will begin, the amendment to subsection (b) is necessary. The proposed change does not conflict with the statutory amendments in SB 1267.

While the proposed amendment would establish a date certain for the effective date of agreed orders, it would not affect the timelines for filing a motion for rehearing established by Texas Government Code, §2001.142 and §2001.146 or the agreed order's date of finality.

§70.106, Default Order

The amendment to §70.106(c) is proposed to require that notice of default orders is to be provided in accordance with Texas Government Code, §2001.142.

In addition, the amendment to §70.106(d) is proposed to establish the effective date of a default order as the date on which the default order is signed by the commission or executive director. This amendment is being proposed to make the effective dates of agreed orders and default orders consistent with one another.

While the amendment to §70.106(d) would establish a new date on which a default order becomes effective, it would not affect the timelines for filing a motion for

rehearing established by Texas Government Code, §2001.142 and §2001.146, or the default order's date of finality.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government. The proposed rules are procedural in nature and do not directly impact the cost of compliance with agreed orders in the commission's enforcement cases.

SB 1267, passed by the 84th Texas Legislature (2015), amends the APA, codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCH and agency decisions, signature and timeliness of agency decisions, presumption of the date that notice of an agency decision is received, motions for rehearing regarding agency decisions, and the procedures for judicial review of agency decisions. Rulemaking is needed to implement portions of SB 1267, specifically Sections 4, 6, 7, and 9.

The changes to the APA for which TCEQ rulemaking is necessary are as follows. First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, SB 1267 creates a process through which a party that alleges that notice of the

commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now run from the date that the commission's decision or order is signed, unless the start date is altered for a party that does not receive notice of the commission's decision or order, until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order issued in response to a previous motion for rehearing and that modifies, corrects, or reforms the original commission decision or order in response to a previously issued motion for rehearing.

The proposed amendments to Chapter 70 conform to SB 1267 by changing the effective date of agreed orders and default orders, which were previously based on the presumed receipt of the commission's order, to the date that they are signed by the commission or executive director.

The proposed amendments to Chapter 70 are procedural in nature and do not directly impact the cost of compliance with agreed orders or default orders in the commission's enforcement cases. No fiscal implications are anticipated for the TCEQ to implement SB 1267.

A unit of state government can be a party to an agreed order to resolve a commission enforcement case, or can be subject to a default order. If one is, it would be affected in the same way as other governmental entities who are subject to commission enforcement. The amendments to Chapter 70 change the effective date of agreed orders and default orders, which were previously based on the presumed receipt of the commission's order, to the date that they are signed by the commission or executive director. The proposed amendments are procedural in nature and do not directly impact the cost of compliance with agreed orders or default orders. No significant fiscal implications are anticipated for units of state or local government as a result of the administration or enforcement of the proposed rules.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state.

No fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules. The rulemaking to implement SB 1267 concerns the timing of the initial compliance date of a commission agreed order and the effective date of default orders. It is procedural in nature and does not directly impact the cost of compliance with commission agreed orders or default orders.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small business as they do on a large business. The rulemaking concerns the effective date for agreed orders and default orders in commission enforcement cases. The proposed amendments are procedural in nature and do not directly impact the cost of compliance with agreed orders or default orders in the commission's enforcement cases.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are necessary to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rulemaking is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed amendments do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft 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 to §70.10 and §70.106 are procedural in nature and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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, the amendments establish that the effective date of an agreed order or a default order is the date that the order is signed by the commission or executive director, and, for agreed orders, provide that the the parties may agree to establish an alternative effective date and state the effective date in the agreed order.

As defined in the 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 to §70.10 and §70.106 do not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but is 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).

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 to §70.10 and §70.106 would establish that the effective date of an agreed order or a default order is the date that the order is signed by the commission or executive director, and, for agreed orders, provide that the the parties may agree to establish an alternative effective date and state the effective date in the agreed order. The change in procedure will not burden private real property. The proposed rulemaking does 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). The proposed rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property. 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 proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendments affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the

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

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 15, 2015, at 2:00 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.

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

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to

comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-018-080-LS. The comment period closes on September 21, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Janis Hudson, Environmental Law Division, at (512) 239-0466.

SUBCHAPTER A: ENFORCEMENT GENERALLY

§70.10

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC, §§7.001 *et seq.*, which establishes the commission's enforcement authority and provides specific requirements governing that authority. Additional relevant sections are 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; and Texas Government Code, §2001.142, which prescribes requirements for the notification of decisions and orders of a state agency.

The proposed amendment implements TWC, §7.001; Texas Government Code, §§2001.004, 2001.142, and 201.146; and Senate Bill 1267 (84th Texas Legislature, 2015).

§70.10. Agreed Orders.

(a) The executive director and the respondent may reach an agreement, or settlement, in an enforcement action. In order to have legal effect as an order of the agency, and in any case in which penalties are assessed, an agreed order must be approved and issued by the commission or the executive director. In such an agreed order, the respondent may agree to:

- (1) admit to none, any, or all of the violations alleged in any Executive Director Preliminary Report or petition in the case;
- (2) assessment of a specific administrative penalty;
- (3) remedial ordering provisions;
- (4) any combination of these; and
- (5) any other lawful provisions agreed to by the executive director and the respondent.

(b) The effective date of an agreed order [, for purposes of compliance with its terms and conditions, including deadlines,] shall be the date the order is signed by the commission or the executive director, unless stated otherwise in the agreed order [on which service of notice of the order is achieved under the Administrative Procedure Act, §2001.142].

(c) When an agreement is reached, the executive director shall publish notice of the proposed agreed order in the *Texas Register*, providing 30 days for public comment. Unless delegated to the executive director, after the public comment period, the proposed agreed order shall be scheduled for consideration by the commissioners during a commission meeting under Chapter 10 of this title (relating to Commission Meetings). If the proposed agreed order is to be issued by the executive director, the agreed order shall be scheduled for the executive director's agenda. If the enforcement action is under the jurisdiction of the State Office of Administrative Hearings, the judge shall remand the action to the executive director who will file the agreed order with the chief clerk for commission or executive director consideration. The judge is not required to prepare a proposal for decision or memorandum regarding the settlement.

SUBCHAPTER C: ENFORCEMENT REFERRALS TO SOAH

§70.106

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; and TWC §§7.001 *et seq*, which establishes the commission's enforcement authority and provides specific requirements governing that authority. Additional relevant sections are 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; and Texas Government Code, §2001.142, which prescribes requirements for the notification of decisions and orders of a state agency.

The proposed amendment implements TWC, §7.001; Texas Government Code, §§2001.004, 2001.142, and 2001.146; and Senate Bill 1267 (84th Texas Legislature, 2015).

§70.106. Default Order.

(a) If any respondent to an executive director's preliminary report (EDPR) [EDPR] or petition initiating an enforcement action fails to timely file an answer as required by §70.105 of this title (relating to Answer), the executive director may file a motion with the chief clerk recommending that a default order be entered against the respondent. The executive director may support the motion with such documentary evidence, including affidavits, exhibits and pleadings, and oral testimony, to demonstrate that the respondent received proper notice under §70.103 or §70.104 of this title (relating to Petitions Which Initiate a Cause of Action and Notice of Executive Director's Preliminary Report [EDPR]) of the pleading initiating the cause of action; and that the respondent failed to timely file an answer under §70.105 of this title and that the respondent is liable for the violations asserted in the cause of action. The chief clerk will schedule the default order for consideration at a commission meeting under Chapter 10 of this title (relating to Commission Meetings). The executive director may also present documentary evidence and oral testimony regarding the amount of penalties that should be assessed against the respondent. In the motion for default order, or at the hearing on the motion, the executive director may also ask for additional penalties for violations alleged in the EDPR or petition, which have continued from the time of the filing of the EDPR or petition, up to the date of the default order. If the

executive director recommends additional penalties for continuing violations, he shall briefly describe, either orally or in writing, the continuing violations and the evidence, circumstantial or otherwise, that form the basis for the allegation that the violations are in fact continuing. The commission may grant the relief recommended in the EDPR or petition, or such other amount as may be justified by the evidence presented by the executive director.

(b) Even though some or all of the parties fail to appear at a contested enforcement case hearing in person or through their duly authorized representatives, the commission may consider fully and dispose of the matter pending if notice has been given in accordance with law.

(c) Upon issuance of a default order, notice of such order shall be given to the respondent in accordance with Texas Government Code, §2001.142 [according to the provisions of §70.104 of this title].

(d) The effective date of a default order shall be the date on which the order is signed by the commission or the executive director [that the order is final under §80.273 of this title (relating to Decision Final and Appealable) and APA, §2001.144].

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§80.4, 80.6, 80.17, 80.25, 80.105, 80.108, 80.117, 80.118, 80.127, 80.252, 80.267, 80.272, 80.273, and 80.274 and add new §80.276.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking is proposed to implement Senate Bills (SB) 709 and 1267, both adopted by the 84th Texas Legislature (2015) with an effective date of September 1, 2015.

Concurrently with this proposal, and published in this issue of the *Texas Register*, the commission is proposing amendments to 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 70, Enforcement. SB 709 is implemented by rules proposed in Chapters 39, 50, 55, and 80. Sections 4, 6, 7, and 9 of SB 1267 are implemented by rules proposed in Chapters 1, 50, 55, 70, and 80.

SB 709

SB 709 makes several changes to the current contested case hearing (CCH) process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a CCH. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications filed on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their CCH request has timely and specifically identified, by name and physical address, a member who would be affected in the member's own right. The issues submitted by the commission to the State Office of Administrative Hearings (SOAH) for the CCH must be detailed and

complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. The bill allows for

extensions beyond 180 days based upon agreement of the parties with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267 amends the Texas Administrative Procedure Act (APA), codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCH and agency decisions, signature and timeliness of agency decisions, presumption of the date that notice of an agency decision is received, motions for rehearing regarding agency decisions, and the procedures for judicial review of agency decisions.

The changes to the APA for which TCEQ rulemaking is necessary are as follows.

First, SB 1267 removes the presumption that notice is received on the third day after mailing. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the

beginning date is altered for a party that does not receive notice of the commission's decision or order, until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing.

Section by Section Discussion

In addition to the proposed amendments associated with this rulemaking, the proposed rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§80.4, Judges

Proposed §80.4(c)(17) and (18) implement new Texas Government Code, §2003.047(e-2) and (e-3) in SB 709, Section 1 and Section 5(a)(1) and (b). Subsection (c)(17) is proposed to be amended by adding that it applies to permit applications filed before September 1, 2015. Subsection (c)(18) implements the new requirement that SOAH

complete the portion of a CCH between the preliminary hearing and submittal of the ALJ's proposal for decision to the commission in 180 days, or an earlier date specified by the commission. For applications filed on or after September 1, 2015, the proposed amendments allow the judge to extend the proceeding beyond the specified time if the judge determines that failure to grant an extension would unduly deprive a party of due process or another constitutional right, or by agreement of the parties with approval of the judge. Existing subsection (c)(18) is proposed to be re-designated as subsection(c)(19).

Subsection (d) is proposed to implement new Texas Government Code, §2003.047(e-4) in SB 709, Section 1 and Section 5(a)(1). It would provide that, for purposes of making a determination to extend the length of a hearing based on a constitutional right, a political subdivision has the same constitutional rights as an individual.

The commission also proposes to remove existing subsection (d) because it is no longer needed.

§80.6, Referral to SOAH

Section 80.6(b)(4) and (5) is proposed to implement new Texas Government Code, §2003.047(e-5) in SB 709, Section 1 and Section 5(a)(1). The proposed amendment to subsection (b)(4) would provide that, for applications filed before September 1, 2015,

the chief clerk shall send a copy of the chief clerk's case file to SOAH. The proposed amendment to subsection (b)(5) would provide, for applications filed on or after September 1, 2015, which are referred for hearing, that the chief clerk file the administrative record described in §80.118. Existing subsection (b)(5) would be re-designated as subsection (b)(6).

§80.17, Burden of Proof

Subsection (b) is proposed to be removed and subsection (c) is proposed to be amended because the TCEQ no longer has jurisdiction over proceedings involving a proposed change of water and sewer rates. Existing subsections (c) and (d) would be re-designated as subsections (b) and (c).

Subsection (d) is proposed to implement Texas Government Code, §2003.047(i-1), (i-2), and (i-3) in SB 709, Section 1 and Section 5(a)(1). Proposed subsection (d) applies to applications filed on or after September 1, 2015, and would provide that in a CCH regarding a permit application referred under Texas Water Code (TWC), §5.556 or §5.557 the filing of the administrative record as described in §80.118(c) establishes a prima facie demonstration that the executive director's draft permit meets all legal requirements, and, if issued, would protect human health and safety, the environment and physical property. Subsection (d)(2) provides that in a CCH, a party may rebut the presumption that the draft permit meets all legal requirements by presenting evidence

regarding the referred issues demonstrating that the draft permit violates an applicable legal requirement. Subsection (d)(3) provides that if a rebuttal case is presented by a party under subsection (d)(2), the applicant and executive director may present additional evidence to support the executive director's draft permit.

§80.25, Withdrawing the Application

Subsection (f) is proposed to implement SB 709, Sections 5(a)(1) and (b). Applications filed before September 1, 2015, for which the chief clerk has mailed the executive director's preliminary decision and Notice of Draft Permit that are withdrawn by the applicant on or after September 1, 2015, are governed by the commission's rules as they existed immediately before September 1, 2015, and those rules are continued in effect for that purpose if the application is refiled, and the executive director determines the refiled application is substantially similar. Subsection (f)(1) - (7) lists the information in the withdrawn application and the refiled application that the executive director may consider in making this determination.

§80.105, Preliminary Hearings

Subsection (e) is proposed to implement Texas Government Code, §2003.047(e-5) in SB 709, Section 1 and Section 5(a)(1). This amendment would provide that, for applications directly referred to a CCH at SOAH, a preliminary hearing may not be held until the executive director's response to public comment has been filed by the executive director

and provided by the Office of the Chief Clerk.

§80.108, Executive Director Party Status in Permit Hearings.

The amendment to §80.108 is proposed to implement the amendment to Texas Water Code, §5.228(c) in SB 709, Section 3 and Section 5(a)(1). This amendment provides that executive director may revise or reverse his position based on the evidence presented in a CCH.

§80.117, Order of Presentation

The amendment to §80.117 is proposed to implement the Texas Government Code, §2003.047(i-1), (i-2), and (i-3) in SB 709, Section 1 and Section 5(a)(1). Subsection (b) would be amended to provide that for applications subject to subsection (c), the applicant's presentation of evidence to meet its burden of proof may consist solely of filing with SOAH and admittance by the judge of the administrative record described in §80.118(c), concerning Administrative Record.

Proposed subsection (c) would provide that for contested cases regarding a permit application filed on or after September 1, 2015, and referred to SOAH under TWC, §5.556 or §5.557, the filing of the administrative record establishes a prima facie demonstration that the draft permit meets all applicable legal requirements; and a permit issued by the commission that is consistent with the draft permit in the

administrative record would protect human health and safety, the environment, and physical property. Further, subsection (c) would provide that the applicant, protesting parties, the public interest counsel, and the executive director may present evidence after admittance of the administrative record by the ALJ. Any party may present evidence to rebut the prima facie demonstration to demonstrate that one or more provisions in the draft permit violate a specifically applicable state or federal requirement. If the prima facie demonstration is rebutted, the applicant or the executive director may present evidence to support the executive director's draft permit. Existing subsection (c) is proposed to be re-designated as subsection (d).

§80.118, Administrative Record

The amendment to §80.118 is proposed to implement Texas Government Code, §2003.047(i-1) in SB 709, Section 1 and Section 5(a)(1). Subsection (a) is proposed to be amended to clarify that certain documents must be included in the administrative record for all permit hearings, except as provided for in subsection (c).

Subsection (a) is proposed to be amended to reference proposed subsection (c), and to clarify in subsection (a)(1) that the final draft permit is the one prepared by the executive director. In addition, the word "regarding" is proposed to replace "of" in subsection (a)(5).

Subsection (c) is proposed to establish the contents of the administrative record for applications filed on or after September 1, 2015 which are referred under TWC, §5.556 or §5.557 that will be filed by the chief clerk. The record will contain the items listed in subsection (a)(1) - (6), as well as the permit application provided by the applicant as required by proposed subsection (d), and any agency documents in the record that demonstrate that the draft permit meets all applicable requirements and, if issued, would protect human health and safety, the environment, and physical property.

Proposed subsection (d) would require an applicant to provide a duplicate of the original application to the chief clerk for inclusion in the administrative record, for hearings that are for applications filed on or after September 1, 2015, no later than 10 days after the chief clerk mails the commission order for applications referred by the commission, and no later than 10 days after the chief clerk mails the executive director's response to comments for applications referred by the applicant or the executive director. The application must include all revisions to the application and be organized in a format prescribed by agency guidance.

Proposed subsection (e) would provide that, for hearings referred to SOAH under TWC, §5.556 or §5.557 regarding applications filed on or after September 1, 2015, the chief clerk shall file the administrative record with SOAH at least 30 days prior to the hearing.

§80.127, Evidence

Subsection (f) is proposed for repeal because it is no longer needed. This section pre-dates the statutory and regulatory requirements for the executive director to prepare a response to comments, which was not a requirement in state law at the time subsection (f) was adopted to implement federal requirements for program approvals. Further, §80.111 was repealed in the rulemaking that implemented HB 801 (76th Texas Legislature, 1999), which made extensive changes in the agency's public participation requirements. An update is made to the citation from the Texas Rules of Evidence. Existing subsections (g) and (h) are proposed to be re-designated as subsections (f) and (g).

Subsection (h) is proposed to implement Texas Government Code, §2003.047(i-1) in SB 709, Section 1 and Section 5(a)(1). In contested cases regarding a permit application filed on or after September 1, 2015, and referred under TWC, §5.556 or §5.557, the filing of the administrative record establishes a prima facie demonstration that the executive director's draft permit meets all legal requirements, and, if issued, would protect human health and safety, the environment, and physical property.

§80.252, Judge's Proposal for Decision

Proposed §80.252(b) and (c) would implement Texas Government Code, §2003.047(e-2) in SB 709, Section 1 and Sections 5(a)(1) and (b). Specifically, §80.252 is amended to

specify the new deadline for the ALJ to file a proposal for decision within 180 days or a specific earlier date set by the commission, unless extended by the ALJ pursuant to Texas Government Code, §2003.047(e-2). Subsection (b) would be amended to clarify that it applies to proposals for decisions on applications filed before September 1, 2015. Subsection (c) will apply only to applications filed on or after September 1, 2015, and establishes a deadline for the ALJ to file a proposal for decision within 180 days after the preliminary hearing, an earlier date set by the commission, or the date to which the deadline was extended pursuant to Texas Government Code, §2003.047(e-3), whichever occurs last. Current subsections (c) and (d) are re-designated as subsection (d) and (e), respectively.

§80.267, Decision

The amendment to §80.267 is proposed to implement SB 1267, Section 6, which amends the APA in Texas Government Code, §2001.143. Subsection (b) would be amended to replace the current language with the statutory language that the commission's decision or order should be signed not later than 60 days after the date on which the hearing is finally closed. Subsection (b) is also revised to allow the commission or an ALJ to extend the period in which the decision or order must be signed.

§80.272, Motion for Rehearing

The amendment to §80.272 is proposed to implement SB 1267, Section 9, which amends the APA in Texas Government Code, §2001.146. In subsection (b) the date for filing a motion for rehearing is proposed to be changed from within 20 days after notification to not later than 25 days after the commission's decision or order is signed, and provides the methods that may be used to provide notice to the parties. Subsection (b) would also provide that the deadline for filing a motion for rehearing may be extended under prescribed sections of the APA. The amendment would remove the text regarding the presumption that notification of the commission's decision or order is received on the third day after it is mailed. Concurrent with this rulemaking, §55.211(f) is proposed to be amended to include similar changes.

Additionally, subsection (b) would allow copies of the motion to be sent to all parties by personal delivery; email or telecopier (if agreed to by the party or attorney to be notified); or by first class, certified, or registered mail. This revision was made to maintain consistency between the means of providing notice of the motion and notice of replies to the motion.

Consistent with Texas Government Code, §2001.146(g), part of existing subsection (b) is proposed to be re-designated as subsection (c) and proposed subsection (c)(4) would be added to provide that the motion for rehearing shall contain findings of fact or conclusions of law, identified with particularity, that are the subject of the complaint

and any evidentiary or legal ruling claimed to be erroneous. Existing subsection (c)(4) will be re-designated as subsection (c)(5) and amended to add that the motion must include a statement of the legal and factual basis for the claimed, rather than a concise statement of each allegation of error.

Consistent with Texas Government Code, §2001.146(b), existing subsection (c) is proposed to be re-designated as subsection (d) and amended to change the deadline for filing a reply to a motion for rehearing from within 30 days to no later than 40 days after the commission's decision or order is signed. Additionally, subsection (d) would allow copies of the motion to be sent to all parties by personal delivery; email or telecopier (if agreed to by the party or attorney to be notified); or by first class, certified, or registered mail. This revision was made to maintain consistency between the means of providing notice of the motion and notice of replies to the motion. In addition, the re-designated subsection (d) specifies that copies of the reply shall be sent to all other parties by personal delivery; email or telecopier (if agreed to by the party or attorney to be notified); or by first class, certified, or registered mail.

Existing subsection (d) is proposed to be re-designated as subsection (e) and amended to change the time that a motion for rehearing is overruled by operation of law from within 45 days to not later than 55 days after the date of the commission's decision or order that is the subject of the motion is signed.

Existing subsection (e) is proposed to be re-designated as subsection (f) and amended to add that, on a motion of any party for cause shown, the commission or the general counsel may, by written order, extend the period of time for filing motions for rehearing and replies and for taking action on the motions so long as the period for taking agency action provided that the agency extends the time or takes the action not later than 10 days after the date the period for filing a motion or reply or taking agency action expires. In addition, the maximum time period that the commission can extend the deadline to take action on a motion for rehearing is changed from 90 days to 100 days after the date that the commission's decision or order is signed. In addition, the amendment would remove the reference to calculation of the date based on notification to the party.

Existing subsection (f) is proposed to be re-designated as subsection (g) and amended to provide that in the event of an extension granted pursuant to subsection (f), the motion for rehearing will overrule by operation of law on the date fixed by the order extending the commission's time to act, or, in the absence of a fixed date, the deadline for the commission to act is extended to 100 days after the date that the commission's decision or order is signed. The amendment would remove the reference to calculation of the date based on notification to the party.

Consistent with Texas Government Code, §2001.146(g), subsection (h) is proposed to provide that a subsequent motion for rehearing is not required after the commission rules on a motion for rehearing unless the order disposing of the original motion for rehearing makes changes to the commission's decision or order that would change the outcome of the contested case or vacate the commission's decision or order that is the subject of the motion and provides for a new decision or order.

Finally, proposed subsection (i) would provide that a subsequent motion for rehearing required by subsection (h) must be filed not later than 20 days after the date the order disposing of the original motion for rehearing is signed.

§80.273, Decision Final and Appealable

The amendment to §80.273 is proposed to implement SB 1267, Section 9, which amends the APA in Texas Government Code, §2001.146. The amendment would specify that a decision or order of the commission is final and appealable on the date of the order overruling the final motion for rehearing or on the date the motion is overruled by operation of law. This amendment is made to account for the potential of a second motion for rehearing under proposed §80.272(h).

§80.274, Motion for Rehearing Not Required in Certain Cases

The amendment to subsection (b) is proposed to implement SB 1267, Section 9, which amends the APA in Texas Government Code, §2001.146. The amendment would remove the text that allows for the order to be signed later than the 20th day after the date the order was rendered, and the text that provides that, for purposes of subsection (b), the order is rendered on the date the chief clerk mails the decision or order by first class mail to the parties.

§80.276. Request for Extension to File Motion for Rehearing

New §80.276 is proposed to implement SB 1267, Section 4, which amends the APA in Texas Government Code, §2001.142. This new section would provide, in subsection (a) that if an adversely affected party or the party's attorney of record does not receive the notice or acquire actual knowledge of a signed commission decision or order before 15 days after the date that the decision or order is signed, a period specified by or agreed to under the APA relating to a decision or order or motion for rehearing, begins for that party on the date that the party receives the notice or acquires actual knowledge of the signed decision or order, whichever occurs first. The commission reads this language to mean that if the affected party or the party's attorney of record receives notice of the commission's signed decision or order, then sufficient notice has been achieved. Notice is not required to be achieved through the receipt of notice of the commission's signed decision or order by both the adversely affected party and the party's attorney of record.

The period provided for in subsection (a) may not begin earlier than 15 days or later than 90 days after the date that the decision or order was signed. Subsection (b) would provide that in order to establish a revised period under subsection (a), the adversely affected party must prove that the date the party received notice from the commission or acquired actual knowledge of the signing of the decision or order was more than 15 days after the date that the decision or order was signed.

Proposed subsection (c) would provide that the commission must grant or deny the sworn motion not later than the date of the next commission's agenda meeting for which proper notice can be provided.

Proposed subsection (d) would provide that if the commission fails to grant or deny the motion at the next meeting, the motion is considered granted.

The commission's language in subsections (c) and (d) varies from the statutory language in order to clarify that the "next meeting" provided in Texas Government Code, §2001.142(e) and (f) is intended to be the commission's next meeting for which proper notice can be provided.

Finally, proposed new subsection (e) would provide that if the sworn motion filed under subsection (b) is granted with respect to the party filing that motion, all the periods

specified by or agreed to under the APA relating to a decision or order, or motion for rehearing, shall begin on the date specified in the sworn motion that the party first received the notice required by Texas Government Code, §2001.142(a) and (b) or acquired actual knowledge of the signed decision or order. Thus, with respect to the party filing that motion, the date specified in the sworn motion shall be considered the date the decision or order was signed.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government. The proposed rules are procedural in nature and do not directly impact the cost of CCHs. The proposed rules would implement SBs 709 and 1267, both adopted by the 84th Texas Legislature (2015).

SB 709

SB 709 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current CCH process for applications for air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015.

The specific changes to the CCH process are discussed further.

First, members of the public or interested groups or associations must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a hearing. A group or association seeking to be considered as an affected person must specifically identify in its comments a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications received on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their comments have timely and specifically identified a member who would be affected in the member's own right. The issues submitted by the commission to SOAH for the CCH must be detailed

and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and, the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application hearings, not only the types of applications named above.

Finally, SB 709 limits the time for the issuance of the ALJ's proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by the date specified by the commission. SB 709 allows for continuances based upon agreement of

the parties with ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267, also passed by the 84th Texas Legislature, amends the APA, codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCHs and agency decisions, signature and timeliness of agency decisions, presumption of the date notice that an agency decision is received, motions for rehearing of agency decisions, and the procedures for judicial review of agency decisions. Rulemaking is needed to implement SB 1267, Sections 4, 6, 7, and 9.

The changes to the APA for which TCEQ rulemaking is necessary are as follows. First, the presumption that notice is received on the third day after mailing is removed. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision was not received can seek to alter the timelines for filing a motion for rehearing. Third, the date from which the time period for filing a motion for rehearing will now begin on the date the order is signed, unless altered for a party that does not receive notice of the commission's order until at least 15 days after the

commission's decision or order is signed but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission order that modifies, corrects, or reforms a commission order in response to a previously issued motion for rehearing.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Local governments that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

The number of units of local governments is a small percentage of the number of applicants for and who comment on air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications. While it is possible that a unit of state government can be a permit applicant, it is rare. If one is, it

would be affected in the same way as other governmental entities who are applicants. State agencies are generally prohibited from contesting TCEQ permit applications, so they would not be affected the same as other governmental entities who protest applications and participate in CCHs.

There are fiscal implications for the agency due to the need to revise the Commissioners' Integrated Database to adequately implement SB 709. However, costs to upgrade the database are not expected to be significant and would be absorbed using current resources.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rule would be compliance with state law and greater clarity for the public and also for applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications.

No significant fiscal implications are anticipated for businesses or individuals as a result of the implementation of the proposed rules.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

The rules will apply to applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications. The number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small

business as it does on a large business. The proposed amendments are procedural in nature and do not directly impact the cost of CCHs. It is not known how many applicants would be small or micro-businesses, but for those that are, there may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking is necessary to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rulemaking is in effect.

Local Employment Impact Statement

The commission has 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 rulemaking is in effect.

Draft 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 to Chapter 80 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Rather, they are procedural in nature and implement changes made to the TWC, in SB 709, and to the APA in SB 1267 regarding CCHs and related commission action.

The rulemaking is procedural in nature and does not 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.

As defined in the 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 powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments to Chapter 80 are procedural in nature and implement changes made to the TWC, in SB 709, and to the APA in SB 1267 regarding CCHs and related commission action. This proposed rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but was specifically developed to meet the requirements of the law described in the Statutory Authority section of this rulemaking.

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 to Chapter 80 are procedural in nature and implement requirements for CCHs and related commission action, ensuring that the rules are consistent with the APA and the requirements of SB 709 and SB 1267. The change in procedure will not burden private real property. 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). The proposed amendments do not directly prevent a nuisance or prevent an immediate threat to life or property. 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 proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the amendments affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule amendments are not subject to the Texas Coastal Management Program.

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.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 15, 2015, at 2:00 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.

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

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-

3087, or faxed to (512) 239-4808. Electronic comments may be submitted at:

<http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-018-080-LS. The comment period closes on September 21, 2015. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further information, please contact Janis Hudson, Environmental Law Division, at (512) 239-0466.

SUBCHAPTER A: GENERAL RULES

§§80.4, 80.6, 80.17, 80.25

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.228, concerning Appearances at Hearings (SOAH), which establishes the executive director's authority to participate in contested case hearings; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings; Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation; Texas Government Code, §2001.142, which prescribes requirements for the notification of decisions and orders of a state agency; and Texas Government Code,

§2003.047, which provides the authority for SOAH to conduct hearings on behalf of the commission.

The proposed amendments implement Texas Government Code, §2001.142 and §2003.047; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§80.4. Judges.

(a) Applicability and delegation is as follows:

(1) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(2) The commission delegates to the State Office of Administrative Hearings (SOAH) [SOAH] the authority to conduct hearings designated by the commission.

(b) The chief administrative law judge will assign judges to hearings. When more than one judge is assigned to a hearing, one of the judges will be designated as the presiding judge and shall resolve all procedural questions. Evidentiary questions will

ordinarily be resolved by the judge sitting in that phase of the case, but may be referred by that judge to the presiding judge.

(c) Judges shall have authority to:

(1) set hearing dates;

(2) convene the hearing at the time and place specified in the notice for the hearing;

(3) establish the jurisdiction of the commission;

(4) rule on motions and on the admissibility of evidence and amendments to pleadings;

(5) designate and align parties and establish the order for presentation of evidence, except that the executive director and the public interest counsel shall not be aligned with any other party;

(6) examine and administer oaths to witnesses;

(7) issue subpoenas to compel the attendance of witnesses, or the production of papers and documents;

(8) authorize the taking of depositions and compel other forms of discovery;

(9) set prehearing conferences and issue prehearing orders;

(10) ensure that information and testimony are introduced as conveniently and expeditiously as possible, including limiting the time of argument and presentation of evidence and examination of witnesses without unfairly prejudicing any rights of parties to the proceeding;

(11) limit testimony to matters under the commission's jurisdiction;

(12) continue any hearing from time to time and from place to place;

(13) reopen the record of a hearing, before a proposal for decision is issued, for additional evidence where necessary to make the record more complete;

(14) impose appropriate sanctions;

(15) issue interim rate orders under Texas Water Code, Chapter 13;

(16) consider additional issues beyond the list referred by the commission

when:

(A) the issues are material;

(B) the issues are supported by evidence; and

(C) there are good reasons for the failure to supply available information regarding the issues during the public comment period;

(17) for permit applications filed before September 1, 2015, extend the proceeding beyond the maximum expected completion date if:

(A) the judge determines that failure to grant an extension would deprive a party of due process or another constitutional right; or [and]

(B) by agreement of the parties;

(18) for permit applications filed on or after September 1, 2015, extend the proceeding beyond 180 days after the preliminary hearing or on an earlier date specified by the commission if:

(A) the judge determines that failure to grant an extension would unduly deprive a party of due process or another constitutional right; or

(B) by agreement of the parties with approval of the judge;
and

(19) [(18)] exercise any other appropriate powers necessary or convenient to carry out his responsibilities.

(d) For the purposes of subsection (c)(17) and (18) of this section, a political subdivision has the same constitutional rights as an individual.

[(d) For applications declared administratively complete on or after September 1, 1999, notwithstanding §80.127(f) of this title (relating to Evidence), the judge is not required to accept public comment into the evidentiary record. This subsection supercedes §80.127(f) of this title.]

§80.6. Referral to SOAH.

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) When a case is referred to the State Office of Administrative Hearings (SOAH) [SOAH], the chief clerk shall:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing;

(3) issue public notice of the hearing as required by law and commission rules;

(4) for applications filed before September 1, 2015, send a copy of the chief clerk's case file to SOAH which, in permitting matters, shall include certified copies of the following [certified copies of] documents:

(A) the documents described in §80.118 of this title (relating to Administrative Record); and

(B) for cases referred under §55.210 of this title (relating to Direct Referrals) any public comment and the executive director's response to comments to be included in the administrative record, except that these documents may be sent to SOAH after referral of the case, if they are filed subsequent to referral; [and]

(5) for applications filed on or after September 1, 2015, which are referred for hearing by the commission, file with SOAH the administrative record described in §80.118 of this title; and

(6) [(5)] send the commission's list of disputed issues and maximum expected duration of the hearing to SOAH unless the case is referred under §55.210 of this title.

(c) In an enforcement case, the executive director's petition or Executive Director Preliminary Report shall serve as the list of issues or areas that must be addressed.

(d) When a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title (relating to Judges)

may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues. This subsection does not apply to a case referred under §55.210 of this title.

§80.17. Burden of Proof.

(a) The burden of proof is on the moving party by a preponderance of the evidence, except as provided in subsections (b) - (d) of this section.

~~(b)~~ Section 291.12 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding involving a proposed change of water and sewer rates not governed by Chapter 291, Subchapter I of this title (relating to Wholesale Water or Sewer Service).]

~~(b)~~ [(c)] Section 291.136 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding related to a petition to review rates charged [changed] pursuant to a written contract for the sale of water for resale filed under Texas Water Code, Chapter 11 [or 12, and in an appeal under Texas Water Code, §13.043(f)].

~~(c)~~ [(d)] In an enforcement case, the executive director has the burden of proving by a preponderance of the evidence the occurrence of any violation and the

appropriateness of any proposed technical ordering provisions. The respondent has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. Any party submitting facts relevant to the factors prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty has the burden of proving those facts by a preponderance of the evidence.

(d) In contested cases regarding a permit application filed by the commission on or after September 1, 2015, and referred under Texas Water Code, §5.556 or §5.557:

(1) the filing of the administrative record as described in §80.118(c) of this title (relating to Administrative Record) establishes a prima facie demonstration that the executive director's draft permit meets all legal requirements, and, if issued, would protect human health and safety, the environment, and physical property;

(2) a party may rebut the presumption in paragraph (1) of this subsection by presenting evidence regarding the referred issues demonstrating that the draft permit violates an applicable legal requirement; and

(3) if a rebuttal case is presented by a party under paragraph (2) of this subsection, the applicant and executive director may present additional evidence to support the executive director's draft permit.

§80.25. Withdrawing the Application.

(a) An applicant may file a request to withdraw its application at any time before the proposal for decision is issued.

(b) If the request is to withdraw the application with prejudice, the judge shall remand the application and request to the executive director, who shall enter an order dismissing the application with prejudice.

(c) If the parties agree in writing to the withdrawal of the application without prejudice or if the request to withdraw is filed before parties are named, the judge shall remand the application and request to the executive director, who shall enter an order dismissing the application without prejudice, on the terms agreed to by the parties, or by the applicant, executive director, and public interest counsel if no parties have been named.

(d) If neither subsection (b) nor (c) of this section apply, the judge will forward the application, the request, and a recommendation on the request to the commission.

(e) An applicant is entitled to an order dismissing an application without prejudice if:

(1) the parties, or the applicant, executive director, and public interest counsel if no parties have been named, agree in writing;

(2) the applicant reimburses the other parties all expenses, not including attorney's [attorneys] fees, that the other parties have incurred in the permitting process for the subject application; or

(3) the commission authorizes the dismissal of the application without prejudice.

(f) An application filed before September 1, 2015, for which chief clerk has mailed the executive director's notice of preliminary decision and Notice of a Draft Permit under §39.419 of this title (relating to Notice of Application and Preliminary Decision) that is subsequently withdrawn by the applicant on or after September 1, 2015, are governed by the commission's rules as they existed immediately before September 1, 2015, and those rules are continued in effect for that purpose if the application is refiled with the commission and the executive director determines the refiled application is substantially similar. For purposes of making this determination, the executive director

may consider the following information contained in the withdrawn application and the refiled application:

(1) the name of the applicant;

(2) the location or proposed location of the construction, activity, or discharge, to be authorized by the application;

(3) the air contaminants to be emitted;

(4) the area to be served by a wastewater treatment facility;

(5) the volume and nature of the wastewater to be treated by a wastewater treatment facility;

(6) the volume and type of waste to be disposed; or

(7) any other factor the executive director determines is relevant to this determination.

SUBCHAPTER C: HEARING PROCEDURES

§§80.105, 80.108, 80.117, 80.118, 80.127

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings (SOAH); Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation; Texas Government Code, §2001.142, which prescribes requirements for the notification of decisions and orders of a state agency; and Texas Government Code,

§2003.047, which provides the authority for SOAH to conduct hearings on behalf of the commission.

The proposed amendments implement Texas Government Code, §2001.142 and §2003.047; and Senate Bills 709 and 267 (84th Texas Legislature, 2015).

§80.105. Preliminary Hearings.

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required in an enforcement matter, except in those under federally authorized underground injection control [(UIC)] or Texas Pollutant Discharge Elimination System [(TPDES)] programs. A preliminary hearing is required for applications referred to the State Office of Administrative Hearings [SOAH] under §55.210 of this title (relating to Direct Referrals).

(b) If jurisdiction is established, the judge shall:

(1) name the parties;

(2) accept public comment in the following matters:

(A) enforcement hearings; and

(B) applications under Texas Water Code (TWC), Chapter 13 and TWC, §§11.036, 11.041, or 12.013;

(3) establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes; and

(4) allow the parties an opportunity for settlement negotiations.

(c) When agreed to by all parties in attendance at the preliminary hearing, the judge may proceed with the evidentiary hearing on the same date of the first preliminary hearing.

(d) One or more preliminary hearings may be held to discuss:

(1) formulating and simplifying issues;

(2) evaluating the necessity or desirability of amending pleadings;

(3) all pending motions;

(4) stipulations;

(5) the procedure at the hearing;

(6) specifying the number and identity of witnesses;

(7) filing and exchanging prepared testimony and exhibits;

(8) scheduling discovery;

(9) setting a schedule for filing, responding to, and hearing of dispositive motions; and

(10) other matters that may expedite or facilitate the hearing process.

(e) For applications directly referred under §55.210 of this title, a preliminary hearing may not be held until the executive director's response to public comment has

been provided.

§80.108. Executive Director Party Status in Permit Hearings.

The executive director is a party in all contested case hearings concerning permitting matters. The executive director's participation shall be to complete the administrative record and support the executive director's position developed in the underlying proceeding. The executive director may revise or reverse his position based on the evidence presented in the hearing.

§80.117. Order of Presentation.

(a) In all proceedings, the moving party has the right to open and close. Where several matters have been consolidated, the judge will designate who will open and close. The judge will determine at what stage other parties will be permitted to offer evidence and argument. After all parties have completed the presentation of their evidence, the judge may call upon any party for further material or relevant evidence upon any issue.

(b) The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and the

executive director. In all cases, the applicant shall be allowed a rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated. For applications subject to subsection (c) of this section, the applicant's presentation of evidence to meet its burden of proof may consist solely of the filing with the State Office of Administrative Hearings (SOAH), and admittance by the judge, of the administrative record as described in subsection (c) of this section.

(c) For contested cases regarding a permit application filed on or after September 1, 2015, and referred to SOAH under Texas Water Code, §5.556 or §5.557:

(1) The filing of the administrative record as described in §80.118(c) of this title (relating to Administrative Record) establishes a prima facie demonstration that:

(A) the draft permit meets all applicable legal requirements; and

(B) the permit issued by the commission is consistent with the draft permit in the administrative record would protect human health and safety, the environment, and physical property.

(2) The applicant, protesting parties, the public interest counsel, and the executive director may present evidence after admittance of the administrative record by the administrative law judge.

(3) Any party may present evidence to rebut the prima facie demonstration by demonstrating that one or more provisions in the draft permit violate a specifically applicable state or federal requirement. If the prima facie demonstration is rebutted, the applicant or the executive director may present additional evidence to support the executive director's draft permit.

(d) [c] In all contested enforcement case hearings, the executive director has the right to open and close. In all such cases, the executive director shall be allowed to close with his rebuttal.

§80.118. Administrative Record.

(a) Except as provided in subsection (c) of this section, in [In] all permit hearings, the record in a contested case includes at a minimum the following certified copies of documents:

(1) the executive director's final draft permit, including any special provisions or conditions;

(2) the executive director's preliminary decision, or the executive director's decision on the permit application, if applicable;

(3) the summary of the technical review of the permit application;

(4) the compliance summary of the applicant;

(5) copies of the public notices relating to the permit application, as well as affidavits regarding [of] public notices; and

(6) any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

(b) For purposes of referral to the State Office of Administrative Hearings (SOAH) [SOAH] under §80.5 and §80.6 of this title (Referral to SOAH), of applications filed before September 1, 2015, the chief clerk's case file shall contain the administrative record as described in subsection (a) of this section.

(c) In all hearings on permit applications filed on or after September 1, 2015, which are referred for hearing under Texas Water Code, §5.556 or §5.557, the administrative record in a contested case filed by the chief clerk with SOAH includes at a minimum the following certified copies of documents:

(1) the items in subsection (a)(1) - (6) of this section, including technical memoranda, that demonstrate the draft permit meets all applicable requirements and, if issued, would protect human health and safety, the environment, and physical property; and

(2) the application submitted by the applicant, including revisions to the original submittal.

(d) For purposes of referral to SOAH under §80.6 of this title for hearings regarding permit applications filed on or after September 1, 2015, that are referred under Texas Water Code, §5.556 and §5.557, the applicant shall provide a duplicate of the original application, including all revisions to the application, to the chief clerk for inclusion in the administrative record in the format and time required by the procedures of the commission, no later than:

(1) for applications referred by the commission, 10 days after the chief clerk mails the commission order; or

(2) for applications referred by the applicant or executive director, 10 days after the chief clerk mails the executive director's response to comments.

(e) For purposes of referral to SOAH under §80.6 of this title for hearings regarding permit applications filed on or after September 1, 2015, that are referred under Texas Water Code, §5.556 and §5.557, the chief clerk shall file the administrative record with SOAH at least 30 days prior to the hearing.

§80.127. Evidence.

(a) General admissibility of evidence.

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Texas Rules of Civil Evidence, as applied in nonjury civil cases in the district courts of this state, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be admitted, except where precluded by statute, if it is of a type commonly

relied upon by reasonably prudent people in the conduct of their affairs. The judge shall give effect to the rules of privilege recognized by law.

(2) Testimony will be received only from witnesses called by a party or the judge. The judge may allow or request testimony from any person whose position is not adequately represented by any party, subject to cross-examination by all parties. Such testimony shall only be allowed at the judge's discretion. All parties shall have an opportunity to conduct discovery of such person.

(3) Testimony offered by any witness shall be under oath.

(4) In a contested case hearing concerning a permit application [permitting matter], the executive director shall not rehabilitate the testimony of a witness unless the witness is an agency employee testifying for the sole purpose of providing information to complete the administrative record.

(b) Stipulation. Evidence may be stipulated by agreement of all parties. The judge and commission will determine the weight, if any, to be accorded stipulated evidence.

(c) Prefiled testimony and exhibits. The judge may require or allow parties to prepare their direct testimony in written form if the judge determines that a proceeding

will be expedited and that the interests of the parties will not be prejudiced substantially. The judge may require the parties to file and serve their direct testimony and exhibits before the beginning of the hearing. The prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be admitted into evidence as if read or presented orally, upon the witness [witness'] being sworn and identifying the same as a true and accurate record of what the testimony would be if given orally. The witness shall be subject to cross-examination, and the prepared testimony shall be subject to objection.

(d) Exhibits.

(1) Exhibits of a documentary character shall not exceed 8 1/2 by 11 inches unless they are folded to the required size. Maps and drawings which are offered as exhibits shall be rolled or folded so as not to unduly encumber the record. Exhibits not conforming to this rule may be excluded.

(2) Each exhibit offered shall be tendered for identification and placed in the record. Copies shall be furnished to the judge, each of the parties, and the hearings reporter, unless the judge rules otherwise.

(3) If an exhibit has been identified, objected to, and excluded, it may be withdrawn by the offering party. If withdrawn, the exhibit will be returned and the offering party waives all objections to the exclusion of the exhibit. If not withdrawn, the exhibit shall be included in the record for the purpose of preserving the objection to the exclusion of the exhibit.

(e) Official notice.

(1) The judge may take official notice of all facts judicially cognizable. In addition, the judge may take official notice of any generally recognized facts within the specialized knowledge of the commission.

(2) The judge shall notify all parties of any material officially noticed, including any memoranda or data prepared by the executive director and relied upon by the commission in prior proceedings. All parties shall be afforded an opportunity to contest any material so noticed.

[(f) Public comment. In Resource Conservation and Recovery Act, underground injection control, and Texas Pollutant Discharge Elimination System permit cases for which the commission has permitting authority by authorization from the federal government, all public comment on the application received by the commission during

the public comment period and the executive director's responses shall be admitted into the evidentiary record. The parties shall be allowed to respond and to present evidence on each issue raised in public comment or the executive director's responses. This subsection supersedes and controls any conflict between this subsection and §80.111 of this title (relating to Persons Not Parties) concerning the admission of public comment into the evidentiary record.]

(f) [(g)] Invoking the "rule." At the request of the party, and subject to the discretion of the judge, witnesses may be placed under "the rule" as provided by, and subject to the conditions of, Texas Rule of Civil Procedure 267 and Texas Rule of Evidence 614 [613].

(g) [(h)] Staff testimony and evidence. Testimony or evidence given in a contested case permit hearing by agency staff regardless of which party called the staff witness or introduced the evidence relating to the documents listed in §80.118 of this title (relating to Administrative Record) or any analysis, study, or review that the executive director is required by statute or rule to perform shall not constitute assistance to the permit applicant in meeting its burden of proof.

(h) In contested cases regarding a permit application filed with the commission on or after September 1, 2015, and referred under Texas Water Code, §5.556 or §5.557,

the filing of the administrative record as described in §80.118 of this title establishes a prima facie demonstration that the executive director's draft permit meets all legal requirements, and, if issued, would protect human health and safety, the environment, and physical property.

SUBCHAPTER F: POST HEARING PROCEDURES

§80.252, 80.267, 80.272 - 80.274, §80.276

Statutory Authority

The amendments and new section are proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings (SOAH); Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; Texas Government Code, §2001.006, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation; Texas Government Code, §2001.142, which prescribes requirements for the notification of decisions and orders of a state agency; and Texas

Government Code, §2003.047, which provides the authority for SOAH to conduct hearings on behalf of the commission.

The proposed amendments and new section implement Texas Government Code, §2001.142 and §2003.047; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§80.252. Judge's Proposal for Decision.

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) Judge's proposal for decision regarding an application filed before September 1, 2015. After closing the hearing record, the judge shall file a written proposal for decision with the chief clerk no later than the end of the maximum expected duration set by the commission and shall send a copy by certified mail to the executive director and to each party.

(c) Judge's proposal for decision regarding an application filed on or after September 1, 2015. After closing the hearing record, the judge shall file a written proposal for decision with the chief clerk no later than 180 days after the date of the

preliminary hearing, the date specified by the commission, or the date to which the deadline was extended pursuant to Texas Government Code, §2003.047(e-3).

Additionally, the judge shall send a copy by certified mail to the executive director and to each party.

(d) [(c)] Proposal for decision: adverse to a party. A proposal for decision shall be filed by the judge who conducted the hearing or by a substitute judge who has read the record. If the proposal for decision is adverse to a party to the proceeding, it shall contain a statement of the reasons for the proposal as well as findings of fact and conclusions of law which support the proposal on any issue referred by the commission or added by the judge. If any party has filed proposed findings of fact upon the judge's request, the judge shall include with the proposal for decision recommended rulings on all findings of fact so proposed. Where more than one judge has been assigned to hear a particular proceeding, the presiding judge will issue the proposal for decision and the other assigned judge or judges may file comments.

(e) [(d)] Proposal for decision: not adverse to any party. If the proposal for decision is not adverse to any party to the proceeding, the judge may informally dispose of the matter by proposing to the commission an order which need not contain findings of fact, conclusions of law, or reasons for the proposal. If the proposal for decision is not

adverse to any party and a permit is to be issued, the judge need not propose an order to the commission.

§80.267. Decision.

(a) Decision. The commission shall make its decision upon the expiration of 30 days or later following service of the judge's proposal for decision, unless the parties have waived review. The decision, if adverse to any party, shall include findings of fact and conclusions of law separately stated. If any party has filed proposed findings of fact at the request of the judge, the commission will include in its decision a ruling on the proposed findings of fact, unless waived by the party.

(b) Prompt decision. The commission's decision or order should [will] be signed not later than [rendered within] 60 days after the date that the hearing is finally closed. In a contested case heard by an administrative law judge, the agency or the administrative law judge who conducts the contested case hearing may extend the period in which the decision or order may be signed. [In a case heard by a judge, a longer period of time may be necessary in order to present the matter to the commission for decision. If additional time is likely to be required, that fact shall be announced by the judge at the conclusion of the hearing.]

§80.272. Motion for Rehearing.

(a) Any decision in an administrative hearing before the commission that occurs on or after September 1, 1999 is subject to this section.

(b) Filing motion. A motion for rehearing is a prerequisite to appeal. The motion shall be filed with the chief clerk not later than 25 [within 20] days after the date that [the party or his attorney of record is notified of] the decision or order is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, §2001.142, and §80.276 of this title (relating to Request for Extension to File Motion for Rehearing), by agreement under Texas Government Code, §2001.147, or by the commission's written order issued pursuant to Texas Government Code, §2001.146(e). [For purposes of this section, a party or attorney of record is presumed to have been notified on the third day after the date that the decision or order is mailed by first-class mail.] On or before the date of filing of a motion for rehearing, a copy of the motion shall be mailed or delivered to all parties with certification of service furnished to the commission. Copies of the motion shall be sent to all other parties using the following notification procedures:

(1) personally:

(2) if agreed to by the party or attorney to be notified, by electronic means sent to the current email address or telecopier number of the party's attorney of record or of the party if the party is not represented by counsel; or

(3) by first class, certified, or registered mail sent to the last known address of the party's attorney of record or of the party if the party is not represented by counsel.

(c) The motion shall contain:

(1) the name and representative capacity of the person filing the motion;

(2) the style and official docket number assigned by SOAH, and official docket number assigned by the commission;

(3) the date of the decision or order; [and]

(4) the findings of fact or conclusions of law, identified with particularity, that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous; and

(5) [4] a statement of the legal and factual basis for the claimed [a concise statement of each allegation of] error.

(d) [(c)] Reply to motion for rehearing. A reply to a motion for rehearing must be filed with the chief clerk not later than 40 [within 30] days after the date that [a party or his attorney of record is notified of] the decision or order is signed, or not later than 10 days after the date that a motion for rehearing is filed if the time for filing the motion for rehearing has been extended by an agreement under Texas Government Code, §2001.147 or by a written order issued by the commission pursuant to Texas Government Code, §2001.146(e). Copies of the reply shall be sent to all other parties using the following notification procedures: [.]

(1) personally;

(2) if agreed to by the party or attorney to be notified, by electronic means sent to the current email address or telecopier number of the party's attorney of record or of the party if the party is not represented by counsel; or

(3) by first class, certified, or registered mail sent to the last known address of the party's attorney of record or of the party if the party is not represented by counsel.

(e) [(d)] Ruling on motion for rehearing.

(1) Upon the request of the general counsel or a commissioner, the motion for rehearing will be scheduled for consideration during a commission meeting. Unless the commission extends time or rules on the motion for rehearing not later than 55 [within 45] days after the date that [the party or his attorney of record is notified of] the decision or order is signed, the motion is overruled by operation of law.

(2) A motion for rehearing may be granted in whole or in part. When a motion for rehearing is granted, the decision or order is nullified. The commission may reopen the hearing to the extent it deems necessary. Thereafter, the commission shall render a decision or order as required by this subchapter.

(f) [(e)] Extension of time limits. With the agreement of the parties, on a motion of any party for cause shown, or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions for rehearing and replies and for taking action on the motions so long as the period for taking agency action provided that the agency extends the time or takes the action not later than the 10th day after the date that the period for filing a motion or reply or taking agency action expires. The commission may [is] not extend the period for taking agency action

[extended] beyond 100 [90] days after the date that [a party is notified of] the decision or order is signed.

(g) [(f)] Motion overruled. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 100 [90] days after the date that [the party is notified of] the decision or order is signed.

(h) Subsequent motion for rehearing. A subsequent motion for rehearing is not required after the commission rules on a motion for rehearing unless the order disposing of the original motion for rehearing:

(1) modifies, corrects, or reforms in any respect the decision or order that is the subject of the complaint, other than a typographical, grammatical, or other clerical change identified as such by the agency in the order, including any modification, correction, or reformation that does not change the outcome of the contested case; or

(2) vacates the decision or order that is the subject of the motion and provides for a new decision or order.

(i) A subsequent motion for rehearing required by subsection (h) of this subsection must be filed not later than 20 days after the date the decision or order disposing of the original motion for rehearing is signed.

§80.273. Decision Final and Appealable.

Except as provided in §80.274 of this title (relating to Motion for Rehearing Not Required in Certain Cases), in the absence of a timely motion for rehearing, a decision or order of the commission is final on the expiration of the period for filing a motion for rehearing. If a party files a motion for rehearing, a decision or order of the commission is final and appealable on the date of the order overruling the final motion for rehearing or on the date the motion is overruled by operation of law.

§80.274. Motion for Rehearing Not Required in Certain Cases.

(a) When Texas Government Code [APA], §2001.144(a)(3) or (4) applies, a commission order is final as specified in the APA, a motion for rehearing is not required, and §80.271 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) do not apply.

(b) The commission may issue an order that is final under Texas Government Code [APA], §2001.144(a)(4) if all parties agree to the specified date in writing or on the record, and if the specified date is not before the date the order is signed [or later than the 20th day after the date the order was rendered. For purposes of this subsection, the order is rendered on the date the chief clerk mails the decision or order by first-class mail to the parties]. The commission is not required to issue an order under Texas Government Code [APA], §2001.144(a)(4) even when requested by all parties. When the parties request, and the commission agrees, to issue a final order under Texas Government Code [APA], §2001.144(a)(4), each party shall thereby waive any allegations of error not in the party's exceptions to the proposal for decision, reply to exceptions, or discussed as an issue in the judge's proposal for decision.

§80.276. Request for Extension to File Motion for Rehearing.

(a) f an adversely affected party or the party's attorney of record does not receive the notice or acquire actual knowledge of a signed commission decision or order before the 15th day after the date that the decision or order is signed, a period specified by or agreed to under Texas Government Code, §§2001.144(a), 2001.146, 2001.147, 2001.176(a), or §80.272 of this title (relating to Motion for Rehearing) relating to a decision or order or motion for rehearing begins, with respect to that party, on the date the party receives the notice or acquires actual knowledge of the signed decision or

order, whichever occurs first. The period may not begin earlier than 15 days or later than 90 days after the date that the decision or order was signed.

(b) To establish a revised period under subsection (a) of this section, the adversely affected party must prove, on sworn motion and notice, that the date the party received notice from the commission or acquired actual knowledge of the signing of the decision or order was at least 15 days after the date that the decision or order was signed.

(c) The commission must grant or deny the sworn motion not later than the date of the commission's next agenda meeting for which proper notice can be provided.

(d) If the commission fails to grant or deny the motion at the commission's next agenda meeting for which proper notice can be provided, the motion is considered granted.

(e) If the sworn motion filed under subsection (b) of this section is granted with respect to the party filing that motion, all the periods specified by or agreed to under Texas Government Code, §§2001.144(a), 2001.146, 2001.147, 2001.176(a), or §80.272 of this title relating to a decision or order, or motion for rehearing, shall begin on the date specified in the sworn motion that the party first received the notice required by Texas

Government Code, §2001.142(a) and (b) or acquired actual knowledge of the signed decision or order. The date specified in the sworn motion shall be considered the date the decision or order was signed.