

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](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.