

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].