

The Texas Natural Resource Conservation Commission (commission) adopts the repeal of Subchapter C, Water Rate Hearings, §§86.31 - 86.36; Subchapter E, Appeals of Rules of the Edwards Underground Water District, §§86.91 - 86.101; and Subchapter F, Variance Hearings, §§86.130 - 86.132.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The chapter was originally adopted to provide procedures for specialized types of contested case hearings that were created by statutes. Some of the specialized types of contested case hearings that were created by statute are either no longer authorized by statute, superceded by other procedural rules adopted by the commission, or rendered obsolete by other statutory provisions and therefore the corresponding rule provisions are no longer needed.

SECTION BY SECTION DISCUSSION

The commission conducted a review of the rules under Chapter 86 and determined that the reasons for the rules in Subchapter A, General; Subchapter B, Water Rights Adjudication; and Subchapter D, Appeals of City Actions Relating to Water Pollution Control and Abatement Outside the Corporate Limits of a City continue to exist. Subchapter B, Water Rights Adjudication, is needed to implement the provisions of Texas Water Code (TWC), §§11.301 - 11.341, regarding the adjudication of water rights. While most water rights in Texas have been adjudicated under the Water Rights Adjudication Act, the adjudication of the Upper Rio Grande River Basin remains pending; therefore, the procedural rules in Subchapter B remain necessary. Subchapter D, Appeals of City Actions Relating to Water Pollution Control and Abatement Outside the Corporate Limits of a City, is needed to implement the provisions of TWC, §26.177(d), which provides that any person affected by any ruling, order, decision, ordinance, program, resolution, or other

act of a city relating to water pollution control and abatement outside the corporate limits of such city may appeal such action to the commission or district court.

The commission also determined that the reasons for the rules in Subchapter C, Water Rate Hearings; Subchapter E, Appeals of Rules of the Edwards Underground Water District; and Subchapter F, Variance Hearings no longer exist. The reasons for Subchapter C, Water Rate Hearings, no longer exist because the procedures for water rate hearings were put into Chapter 291, Subchapter I in 1996. The Chapter 291 procedures are now used instead of the Chapter 86 procedures. The reasons for Subchapter E, Appeals of Rules of the Edwards Underground Water District, no longer exist because the underlying statute establishing the Edwards Underground Water District was repealed in 1993 when the legislature created the Edwards Aquifer Authority. The statute creating the Edwards Aquifer Authority, unlike the repealed statute creating the Edwards Underground Water District, does not contain a provision providing for the appeal of rules of the Edwards Aquifer Authority to the commission. The reasons for Subchapter F, Variance Hearings, no longer exist because the commission no longer holds air quality rule variance hearings. The Texas Clean Air Act (TCAA), Texas Health and Safety Code, §382.028(b), states that a variance “is an exceptional remedy that may be granted only upon demonstration that compliance with a provision of the TCAA or commission rule or order results in an arbitrary and unreasonable taking of property.” If grounds exist for a variance from a rule, an entity complaining about the rule would directly challenge the rule in court rather than seek to obtain a variance from the rule.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the statute. “Major environmental rule” means 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. This rulemaking does not meet the definition of “major environmental rule” because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Instead, this rulemaking is intended to eliminate unnecessary procedural rules contained in Chapter 86 by repealing specific procedural rules in Chapter 86 applicable to various specialized types of contested case hearings that were created by statute, but which are either no longer authorized by statute, superceded by other procedural rules adopted by the commission, or rendered obsolete by other statutory provisions.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The specific purpose of this rulemaking is to eliminate unnecessary procedural rules contained in Chapter 86 applicable to various specialized types of contested case hearings that were created by statute but which are either no longer authorized by statute, superceded by other commission procedural rules, or rendered obsolete by other statutory provisions. The repeal of these procedural rules will not burden private real property because they are either no longer authorized by statute, superceded by other

procedural rules adopted by the commission, or rendered obsolete by other statutory provisions.

Therefore, these repeals will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rules are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP) nor do they affect any action or authorization identified in the Coastal Coordination Act Implementation Rules, §505.11. This rulemaking concerns only the procedural rules of the commission. Therefore, the rulemaking is not subject to the CMP.

HEARING AND COMMENTERS

A public hearing for the repeals was held on October 17, 2000. No one attended the hearing. The comment period for the repeals closed on October 23, 2000. No comments were received.

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.103(b), which provides the commission with the authority to adopt reasonable procedural rules to be followed in a commission hearing; Senate Bill 1477, 73rd Legislature, which abolished the Edwards Underground Water District and created the Edwards Underground Authority; and Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policies and purposes of the TCAA.

SUBCHAPTER C: WATER RATE HEARINGS

§§86.31 - 86.36

§86.31. General.

§86.32. Setting of Hearing.

§86.33. Additional Deposit.

§86.34. Notice of Preliminary Hearing.

§86.35. Preliminary Hearing and Order.

§86.36. Hearing and Order.

SUBCHAPTER E: APPEALS OF RULES OF THE EDWARDS UNDERGROUND

WATER DISTRICT

§§86.91 - 86.101

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.103(b), which provides the commission with the authority to adopt reasonable procedural rules to be followed in a commission hearing; Senate Bill 1477, 73rd Legislature, which abolished the Edwards Underground Water District and created the Edwards Underground Authority; and Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policies and purposes of the TCAA.

§86.91. General.

§86.92. Petition by an Affected Person.

§86.93. Issues on Appeal.

§86.94. Burden of Proof.

§86.95. Rule Remains Effective Pending Appeal Unless Stayed or Reformed.

§86.96. Prerequisites to Appeal.

§86.97. Contents of Petition for Appeal.

§86.98. Answer.

§86.99. Review by Commission.

§86.100. Consolidation.

§86.101. Finality of Commission Order.

SUBCHAPTER F: VARIANCE HEARINGS

§§86.130 - 86.132

STATUTORY AUTHORITY

The repeals are adopted under Texas Water Code, §5.103(b), which provides the commission with the authority to adopt reasonable procedural rules to be followed in a commission hearing; Senate Bill 1477, 73rd Legislature, which abolished the Edwards Underground Water District and created the Edwards Underground Authority; and Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policies and purposes of the TCAA.

§86.130. Variance Hearings Pursuant to the Texas Clean Air Act.

§86.131. Time for Filing Petition for Variance.

§86.132. Effect of Institution of Civil Suit on Petition for Variance.