

The Texas Natural Resource Conservation Commission (commission) proposes to repeal 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 PROPOSED 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specialized types of contested case hearings that were created by statute are either no longer authorized by statute, superceded by other procedural rules adopted by the commission, or rendered obsolete by other statutory provisions and therefore the corresponding rule provisions are no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 preliminary review of the rules under Chapter 86 and has determined that the reason 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 has 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed repeals are in effect there will be no significant fiscal impacts for units of state and local government as a result of administration or enforcement of the proposed repeals. The proposal would repeal Subchapters C, E, and F from Chapter 86.

The commission has reviewed the continued need for provisions within Chapter 86, Special Provisions for Contested Case Hearings in accordance with the requirements of Texas Government Code, §2001.039; and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, which requires state agencies to review and consider for re adoption each of their rules every four years. Based on the review, it has been determined that provisions within Subchapters C, E, and F are no longer needed. These provisions were originally adopted to provide procedures for specialized types of contested case hearings that were created by statutes.

Subchapter C, Water Rate Hearings, is no longer needed because the procedures for water rate hearings were put into Chapter 291 by a previous rulemaking. The Chapter 291 procedures are now used instead of the Chapter 86 procedures.

Subchapter E, Appeals of Rules of the Edwards Underground Water District, is no longer needed 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 the Edwards Aquifer Authority actions to the commission.

Subchapter F, Variance Hearings, is no longer needed because the commission no longer holds air quality rule variance hearings.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from enforcement of and compliance with the proposed repeals will be the elimination of unnecessary procedural rules contained in Chapter 86.

There will be no fiscal implications to persons and businesses as a result of administration and enforcement of the proposal because the elimination of unnecessary procedural rules is an administrative action that has no fiscal impact to any individual or business.

The proposal would repeal Subchapters C, E, and F from Chapter 86, Special Provisions for Contested Case Hearings. Provisions in Subchapter C have been superseded by other procedural rules adopted by the commission, Subchapter E is no longer authorized by statute, and Subchapter F has been rendered obsolete by other statutory provisions.

SMALL AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed repeals because the elimination of unnecessary procedural rules is an administrative action

that has no fiscal impact to any small or micro-businesses. There are no known small or micro-businesses that would be adversely affected by the proposed repeals.

The proposal would repeal Subchapters C, E, and F from Chapter 86, Special Provisions for Contested Case Hearings. Provisions in Subchapter C have been superceded by other procedural rules adopted by the commission, Subchapter E is no longer authorized by statute, and Subchapter F has been rendered obsolete by other statutory provisions.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has 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. The proposal does not meet the definition of “major environmental rule” because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Instead, the 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 has prepared a takings impact assessment for these proposed rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. 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 which is the subject of the rules because these procedural rules are obsolete and are not being used by the commission because the proceedings governed by these procedural rules are either no longer authorized by statute or are governed by other commission procedural rules that have superceded the repealed rules.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and found that the rules proposed for repeal 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 proposed rulemaking concerns only the procedural rules of the commission. Therefore, the rulemaking is not subject to the CMP.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposed repeal on October 17, 2000 at 2:00 p.m. in Bldg F, Room 3202A, Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas. The hearings are 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 hearings; however, agency staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2000-005-086-AD. Comments must be received in writing by 5:00 p.m., October 23, 2000. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

STATUTORY AUTHORITY

The repeals are proposed 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 proposed 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.

§§86.130 - 86.132

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§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.