

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §80.4 and §80.252 *without changes* to the proposed text as published in the February 23, 2018, issue of the *Texas Register* (43 TexReg 1007) and, therefore, the sections will not be republished.

### **Background and Summary of the Factual Basis for the Adopted Rules**

In 2013, the 83rd Texas Legislature passed House Bill (HB) 1600 and Senate Bill (SB) 567, which became effective September 1, 2013. HB 1600 and SB 567 transferred from the TCEQ to the Public Utility Commission of Texas (PUC) the functions relating to the economic regulation of water and sewer utilities. HB 1600 and SB 567 amended Texas Water Code (TWC), §5.311(a), as it relates to the commission's authority to delegate to an administrative law judge (ALJ) of the State Office of Administrative Hearings (SOAH) the responsibility to issue interlocutory orders related to interim rates under TWC, Chapter 13. Amended TWC, §5.311(a), removes the commission's authority to delegate the issuance of interlocutory orders related to interim rates under TWC, Chapter 13. Because the commission adopts changes to §80.4 to implement HB 3735 and SB 1430 (85th Texas Legislature, 2017), the commission adopts in this same rulemaking to remove §80.4(c)(15), which implements HB 1600 and SB 567 (83rd Texas Legislature, 2013), to avoid open section conflicts under *Texas Register* publication requirements. The remainder of HB 1600 and SB 567 will be implemented in a separate rulemaking project (Rule Project Number 2013-057-291-OW).

In 2017, the 85th Texas Legislature passed HB 3735 and SB 1430, which became effective on September 1, 2017. SB 1430 amended the TWC as it relates to a requirement that the TCEQ

provide an expedited procedure for acting on certain applications for an amendment to a water right by applicants that begin to use desalinated seawater. New TWC, §11.122(b-1), provides that an applicant has a right, under specified circumstances, to expedited consideration of an application to change the diversion point for their existing non-saline surface water right when the applicant begins using desalinated seawater. New TWC, §11.122(b-2), further requires the executive director or the commission to prioritize the technical review of such an application over the technical review of other applications that are not subject to TWC, §11.122(b-1). Finally, for a contested case hearing relating to an application under new TWC, §11.122(b-1), amended Texas Government Code, §2003.047(e-3) and (e-6), require the SOAH ALJ to complete a proceeding and provide a proposal for decision (PFD) to the commission not later than the 270th day after the date the matter was referred for a hearing. Amended Texas Government Code, §2003.047(e-3), allows the ALJ to extend a TWC, §11.122(b-1) proceeding by agreement of the parties with the approval of the ALJ; or by the ALJ if the judge determines that failure to extend the deadline would unduly deprive a party of due process or another constitutional right. Under existing Texas Government Code, §2003.047(e-4), for the purposes of Texas Government Code, §2003.047(e-3), a political subdivision has the same constitutional rights as an individual.

HB 3735 includes the same provisions described in SB 1430, which were added to HB 3735 in a Senate Committee Substitute. Other changes in HB 3735 are included in corresponding rulemakings under 30 TAC Chapters 295 and 297, published in this issue of the *Texas Register*.

The commission removes §80.4(c)(15) to implement the transfer of functions from the TCEQ to the PUC required by HB 1600 and SB 567 (83rd Texas Legislature, 2013). Further, the commission adopts amendments to Chapter 80, to implement the changes to the TCEQ contested case hearing process required by HB 3735 and SB 1430 (85th Texas Legislature, 2017).

In September 2017, the commission held an informal stakeholder meeting to solicit comments regarding the implementation of HB 3735 and SB 1430. While staff intends to strictly implement the legislation as the legislature intended, staff did ask for input from stakeholders on the following issues: How to implement SB 1430 and HB 3735, which require the TCEQ to provide an expedited procedure for certain amendments to water rights and also requires the executive director to prioritize the technical review of those applications over applications that are not subject to the expedited process? What should the "expedited process" look like? Is the expedited process for desalination permits in 30 TAC Chapter 295, Subchapter G, an appropriate model? What does "prioritize" mean? How does it harmonize (or not) with the priority system? Does prioritize mean to skip the line of priority? If yes, how should the commission consider/model the impacts that would not occur to water rights applications, but for the expedited applications jumping to the front of the priority line?

The executive director based these rules on consideration of the legislation and consideration of comments received from the stakeholders.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also adopts to implement HB 1648 (85th Texas Legislature, 2017) in amended sections in 30 TAC Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements; and HB 3735, SB 864, and SB 1430 (85th Texas Legislature, 2017) in Chapter 295, Water Rights, Procedural; and Chapter 297, Water Rights, Substantive.

### **Section by Section Discussion**

Chapter 80 sets forth the procedures for contested case hearings conducted on behalf of the TCEQ.

#### *§80.4, Judges*

Section 80.4, defines the authority and responsibilities of an ALJ that oversees a contested case hearing referred to SOAH by the TCEQ. The commission removes §80.4(c)(15), which pertains to the functions that transferred from the commission to the PUC in HB 1600 and SB 567 (83rd Texas Legislature, 2013). The subsequent paragraphs are renumbered accordingly. The commission adopts nonsubstantive amendments to renumbered §80.4(c)(16) and (17) to comply with Texas Register formatting requirements. The commission adopts §80.4(c)(18) which states that for applications subject to TWC, §11.122(b-1), an ALJ may extend the proceeding beyond 270 days after the first day of the preliminary hearing or on an earlier date specified by the commission 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. The commission also amends §80.4(d) by adding the reference to renumbered subsection

(c)(16), which was previously referenced as subsection (c)(17). The commission leaves in the reference to subsection (c)(18) in order to include the adopted paragraph in the list of paragraphs for which a political subdivision has the same constitutional rights as an individual. The commission adopts these amendments to implement Texas Government Code, §2003.047, as amended by HB 3735 and SB 1430 (85th Texas Legislature, 2017).

*§80.252, Judge's Proposal for Decision*

Section 80.252 sets forth the amount of time by which an ALJ must complete a contested case hearing referred to SOAH by the TCEQ and to submit a PFD to the commission. The commission amends §80.252(b) to add that applications not subject to TWC, §11.122(b-1) as well as applications filed before September 1, 2015, or applications not referred under TWC, §5.556 or §5.557 are governed by that subsection. The commission also adopts nonsubstantive changes to §80.252(b) and (c) to comply with Texas Register formatting requirements. The commission adopts §80.252(d) which sets forth the timeline for conducting a contested case hearing and submitting a PFD for an application filed on or after September 1, 2017, and subject to TWC, §11.122(b-1). For these applications, adopted §80.252(d) directs the ALJ to file a written PFD with the chief clerk no later than 270 days after the first day 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, adopted §80.252(d) directs the ALJ to send a copy of the PFD by certified mail to the executive director and to each party. The subsequent subsections are re-lettered accordingly. The commission adopts these amendments to implement Texas Government Code, §2003.047, as amended by HB 3735 and SB 1430.

### **Final Regulatory Impact Analysis Determination**

The commission reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and determined that this rulemaking is not a "Major environmental rule." The legislature in 2013 enacted HB 1600 and SB 567, both of which amended TWC, §5.311(a). HB 1600 and SB 567 transferred from the TCEQ to the PUC the functions relating to the economic regulation of water and sewer utilities. HB 1600 and SB 567 amended TWC, §5.311(a) as it relates to the commission's authority to delegate to an ALJ of SOAH the responsibility to issue interlocutory orders related to interim rates under TWC, Chapter 13. This rulemaking implements the change in TWC, §5.311(a).

The legislature in 2017 enacted HB 3735 and SB 1430, both of which amend Texas Government Code, §2003.047. HB 3735 and SB 1430 require the TCEQ to provide an expedited procedure for acting on certain applications for an amendment to a water right by certain applicants that use desalinated seawater. HB 3735, Section 6, and SB 1430, Section 2, amend Texas Government Code, §2003.047 to add that for amendments governed by TWC, §11.122(b-1), the PFD must be prepared no more than 270 days after the date the application is referred to SOAH. This rulemaking implements that statute.

In 2015, the legislature enacted HB 2031 (84th Texas Legislature), creating TWC, Chapter 18, which relates to marine seawater desalination, and HB 4097, creating TWC, §11.1405, relating to seawater desalination projects for industrial purposes. HB 2031 stated that the purpose of the new law was to remain economically competitive in order to secure and

develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The legislature also stated that in this state, marine seawater is a potential new source of water for drinking and other beneficial uses, and that this state has access to vast quantities of marine seawater from the Gulf of Mexico. The legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater."

The purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way 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" (*see* Texas Government Code, §2001.0225(g)(3)). The specific intent of the rulemaking is to expedite the contested case hearing process for amendments to change diversion points when the holder of the water right begins using desalinated seawater and remove obsolete §80.4(c)(15), relating to the economic regulation of water and sewer utilities. Expediting the contested case hearing process is intended to encourage the use of desalinated water. The rulemaking expedites the contested case hearing process by placing a time limit on the preparation of a PFD at SOAH in contested cases of these amendments. As stated in HB 2031 (84th Texas Legislature, 2015), expediting the use of desalinated seawater supports development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits.

Even if this rulemaking was a "Major environmental rule," this rulemaking meets none of the

criteria in Texas Government Code, §2001.0225, for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not adopted solely under the TCEQ's general rulemaking authority. This rulemaking is adopted to implement specific state statutes enacted in HB 1600 and SB 567 (83rd Texas Legislature, 2013) and HB 3735 and SB 1430 (85th Texas Legislature, 2017).

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

### **Takings Impact Assessment**

The commission evaluated these adopted rules and performed analysis of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007 (*see* Texas Government Code, §2001.0225(g)(3)).

The specific purpose of these adopted rules is to encourage the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water by expediting the contested case hearing process for amendments to change diversion points when the holder of the water right begins using desalinated seawater and remove obsolete §80.4(c)(15), relating to the economic regulation of water and sewer utilities as those functions have transferred from the TCEQ to the PUC. In 2015, the legislature enacted requirements for expedited permitting for the diversion or transport of marine seawater

under TWC, Chapter 18, and the diversion of seawater for industrial purposes under TWC, §11.1405.

These adopted rules would substantially advance this stated purpose by providing time limits on the preparation of PFDs in contested cases for amendments to change diversion points when the holder of the water right begins using desalinated seawater.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property. This rulemaking removes §80.4(c)(15) and adds an expedited contested case hearing for amendments to change diversion points when the holder of the water right begins using desalinated seawater. The removal of §80.4(c)(15) is required due to the transfer of functions relating to the economic regulation of water and sewer utilities from the TCEQ to the PUC pursuant to HB 1600 and SB 567 (83rd Texas Legislature, 2013). The intent is to remove obsolete §80.4(c)(15), relating to the economic regulation of water and sewer utilities. Further, the changes to Chapter 80 provide that for these types of amendments, if there is a contested case, the ALJ must prepare a PFD no more than 270 days after the application is referred to SOAH and implement Texas Government Code, §2003.047. These amended rules are procedural in nature. The removal of §80.4(c)(15) and this expedited contested case hearing process for these amendments does not impact private real property rights.

Even if the rules were to impact real property rights, the commission's analysis indicates

that Texas Government Code, Chapter 2007, does not apply to these adopted rules or the prior rules relating to the use of desalinated seawater, because these are actions taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). Lack of water for drinking and other essential purposes would be a health and safety crisis. This rulemaking could help to provide more drinking water and water for other essential purposes. There will be no or very minimal burden on private real property rights because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. For marine seawater, there are no permanent water rights, real property rights, that have been granted for use of the water in the Gulf of Mexico. For seawater in a bay or arm of the Gulf of Mexico, very few water rights have been granted for this water. Diversions of seawater in a bay or arm of the Gulf of Mexico are also limited to industrial water. Water for municipal and domestic needs will not be taken from this part of the Gulf of Mexico.

In addition, the commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to the removal of §80.4(c)(15) based upon an exception to applicability in Texas Government Code, §2007.003(b)(5). The removal of §80.4(c)(15) is a discontinuance of the economic regulation of water and sewer utilities within the TCEQ, which provides a unilateral expectation that does not rise to the level of a recognized interest in private real property. Because the removal of §80.4(c)(15) falls within an exception under Texas Government Code, §2007.003(b)(5), Texas Government Code, Chapter 2007 does not apply

to the removal of §80.4(c)(15).

Thus, Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property, there is a public health and safety need for the rules, and the removal of §80.4(c)(15) falls within an exception under Texas Government Code, §2007.003(b)(5).

### **Consistency with the Coastal Management Program**

The commission reviewed the adopted rulemaking and found that the adopted amendment to Chapter 80 that implements changes to the TCEQ contested case hearing process required by HB 3735 and SB 1430 (85th Texas Legislature, 2017) may be subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. In reviewing the removal of §80.4(c)(15) required by HB 1600 and SB 567 (83rd Texas Legislature, 2013), the commission found that the removal is neither identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4) nor will the removal affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the removal of §80.4(c)(15) is not subject to the CMP. The commission conducted a consistency determination for the adopted amendment to Chapter 80 implementing changes to the TCEQ contested case hearing process required by HB 3735 and SB 1430 (85th Texas Legislature, 2017) in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals

and policies.

Although the adopted rulemaking to implement HB 3735 and SB 1430 (85th Texas Legislature, 2017) is procedural, the rulemaking relates to prior rules that expedite permitting for diverting desalinated seawater. CMP goals applicable to the adopted rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the adopted rules include those contained in 31 TAC §501.33(a). The adopted rules implement HB 3735 and SB 1430, which encourage diversions of desalinated seawater by placing a time limit on preparation of a PFD from SOAH in contested cases for amendments to add diversion points to a surface water right when the applicant begins using desalinated seawater. In 2015, in HB 2031, the legislature found, concerning the desalination rules, "...that it is necessary and appropriate to grant authority and provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water right protections, ..." Since one of the purposes of the desalination rules is to protect coastal natural resources, these adopted rules which provide an incentive for applicants to begin using desalinated seawater in lieu of their existing surface water, are consistent with the CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent

with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because one of the purposes of the adopted rules is to protect coastal and natural resources.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding consistency with the CMP.

#### **Public Comment**

The commission offered a public hearing on March 20, 2018. The comment period closed on March 26, 2018. The commission did not receive any comments for Chapter 80.

## SUBCHAPTER A: GENERAL RULES

### §80.4

#### **Statutory Authority**

This amendment is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), relating to the TCEQ's authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes; and TWC, §11.122, relating to water rights amendments. This amendment is also adopted under Texas Government Code, §2003.047(e-3) and (e-6), relating to hearings for TCEQ.

The adopted amendment implements House Bill (HB) 1600 and Senate Bill (SB) 567 (83rd Texas Legislature, 2013), concerning the transfer from the TCEQ to the Public Utility Commission of Texas the functions relating to the economic regulation of water and sewer utilities and HB 3735 and SB 1430 (85th Texas Legislature, 2017) and Texas Government Code, §2003.047(e-3) and (e-6), relating to referrals for contested case hearings to the State Office of Administrative Hearings.

#### **§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 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) 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;

(16) for permit applications filed before September 1, 2015, or applications not referred under Texas Water Code (TWC), §5.556 or §5.557, 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

(B) by agreement of the parties;

(17) for permit applications filed on or after September 1, 2015, and referred under TWC, §5.556 or §5.557, extend the proceeding beyond 180 days after the first day of 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;

(18) for permit applications filed on or after September 1, 2017, under TWC, §11.122(b-1), extend the proceeding beyond 270 days after the first day of 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 the approval of the judge; and

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

(d) For the purposes of subsection (c)(16), (17) and (18) of this section, a political subdivision has the same constitutional rights as an individual.

## **SUBCHAPTER F: POST HEARING PROCEDURES**

### **§80.252**

#### **Statutory Authority**

This amendment is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), relating to the commission's authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes; and TWC, §11.122, relating to water rights amendments. This amendment is also adopted under Texas Government Code, §2003.047(e-3) and (e-6), relating to hearings for TCEQ.

The adopted amendment implements House Bill 3735 and Senate Bill 1430 (85th Texas Legislature, 2017) and Texas Government Code, §2003.047(e-3) and (e-6), relating to referrals for contested case hearings to the State Office of Administrative Hearings.

#### **§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, applications not referred under Texas Water Code (TWC), §5.556 or §5.557, or applications not subject to TWC, §11.122(b-1). 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, and referred under TWC, §5.556 or §5.557. 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 first day 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) Judge's proposal for decision regarding an application filed on or after September 1, 2017, and subject to TWC, §11.122(b-1). After closing the hearing record, the judge shall file a written proposal for decision with the chief clerk no later than 270 days after the first day 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.

(e) 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.

(f) 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.