

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §80.4 and §80.252.

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

In 2013, the 83rd Texas Legislature passed House Bill (HB) 1600 and Senate Bill (SB) 567, which became effective September 1, 2014. 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. New 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 is proposing changes to §80.4 to implement HB 3735 and SB 1430 from the 85th Texas Legislature, the commission is proposing in this same rulemaking to delete §80.4(c)(15), which implements HB 1600 and SB 567 from the 83rd Texas Legislature, 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 a 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 proposes to delete §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 proposes 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 proposed 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 proposes 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 proposes to delete §80.4(c)(15), which pertains to the functions that transferred from the commission to the PUC in HB 1600 and SB 567 from the 83rd Legislative Session. The subsequent paragraphs are proposed to be renumbered accordingly. The commission proposes nonsubstantive amendments to renumbered §80.4(c)(16) and (17) to comply with Texas Register formatting requirements. The commission proposes §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 proposes to amend §80.4(d) by adding the reference to renumbered subsection (c)(16), which was previously referenced as subsection (c)(17). The commission proposes to leave in the reference to subsection (c)(18) in order to include the proposed paragraph in the list of paragraphs for which a political subdivision has the same constitutional rights as an individual. The commission proposes these amendments to implement Texas Government Code, §2003.047, as amended by HB 3735 and SB 1430.

*§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 proposes to amend §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 not governed by that subsection. The commission also proposes nonsubstantive changes to §80.252(b) and (c) to comply with Texas Register formatting requirements. The commission proposes to amend §80.252 by adding subsection (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, proposed §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, the proposed amendment 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 proposed to be re-lettered accordingly. The commission proposes these amendments to implement Texas Government Code, §2003.047, as amended by HB 3735 and SB 1430.

**Fiscal Note: Costs to State and Local Government**

Jeffrey Horvath, analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are expected for the agency or for other units of state or local government.

The proposed rulemaking implements portions of HB 1600 and SB 567 from the 83rd Texas Legislature, 2013. These bills relate to the transfer of functions from the TCEQ to the PUC for the economic regulation of water and sewer utilities. The proposed rulemaking also implements SB 1430 and portions of HB 3735, from the 85th Texas Legislature, 2017, by providing an expedited contested case hearing process for certain applications for an amendment to a water right by applicants that begin to use desalinated seawater.

The proposed amendments to Chapter 80 implement changes to the TCEQ contested case hearing process required by HB 3735 and SB 1430. 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 that subsection. Finally, for a contested case hearing relating to an application under new TWC, §11.122(b-1), newly amended Texas Government Code, §2003.047(e-3) and (e-6), require the SOAH ALJ to complete a proceeding and provide a PFD to the commission not later than the 270th day after the date the matter was referred for a hearing.

The proposed rules add new requirements for applications referred under TWC, §11.122(b-1), that allow an ALJ to 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 proposes to add these proposed changes to the list of paragraphs for which a political subdivision has the same constitutional rights as an individual.

The commission further proposes to add §80.252(d) that 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 referred under TWC, §11.122(b-1). The proposed rules direct 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,

the proposed amendment directs the ALJ to send a copy of the PFD by certified mail to the executive director and to each party.

The rulemaking will require the TCEQ and SOAH to expedite the contested case hearing process for an amendment to a water right by applicants that begin to use desalinated seawater. This fiscal note assumes that both agencies would use existing resources to implement the proposed rules and that no significant savings would be realized by applicants due to any shortening of the timeframes of contested case hearings or limitation of issues considered.

The expedited contested case hearing process may streamline the regulatory process for a governmental entity that owns a surface water right and begins using desalinated seawater in lieu of using their surface water right. It is unknown how many entities will be affected because the TCEQ has no information regarding how many entities will begin using desalinated seawater in lieu of a surface water right. The expedited contested case hearing process will not impose any new responsibilities, instead it provides a streamlined process for an applicant to amend a surface water right.

The proposed rulemaking also amends §80.4 by deleting §80.4(c)(15), authorizing judges to issue interim rate orders under TWC, Chapter 13. This proposed amendment will eliminate a rule that is no longer applicable to the commission as a result of the transfer of the responsibility for the economic regulation of water and sewer utilities to the PUC on



September 1, 2014. There are no fiscal implications associated with this deletion.

### **Public Benefits and Costs**

Mr. Horvath 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 will be the potential for the encouragement of the development and use of desalinated seawater as a water management strategy through the implementation of an expedited water right permitting process and the removal of an obsolete rule provision.

No significant fiscal implications are anticipated for businesses or individuals as a result of the implementation or administration of the proposed rules.

The rulemaking will require the TCEQ and SOAH to expedite the contested case hearing process for certain amendments to a water right by applicants that begin to use desalinated seawater. The expedited contested case hearing process may streamline the regulatory process for businesses or individuals that own a surface water right and begins using desalinated seawater in lieu of using their surface water right. It is unknown how many entities will be affected because the TCEQ has no information regarding how many entities will begin using desalinated seawater in lieu of a surface water right. The expedited contested case hearing process will not impose any new responsibilities, instead it provides a streamlined process for an applicant to amend a surface water right. There may be cost savings to applicants who use the expedited permitting process due to the shortened period

of time needed for contested case hearings.

Additionally, the proposed rulemaking will remove §80.4(c)(15) which is no longer applicable to the commission as a result of the transfer of the responsibility for the economic regulation of water and sewer utilities to the PUC.

#### **Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

#### **Rural Communities Impact Assessment**

The commission reviewed this proposed rulemaking and determined that the proposed rules do not adversely affect any rural community in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities. The proposed rules are necessary in order to implement HB 1600 and SB 567 from the 83rd Texas Legislature, 2013 and HB 3735 and SB 1430 from the 85th Texas Legislature, 2017.

#### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the

implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect. The proposed rules are necessary in order to implement HB 1600 and SB 567 from the 83rd Texas Legislative Session, 2013 and HB 3735 and SB 1430 from the 85th Texas Legislative Session, 2017.

### **Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required for the first five-year period the proposed rules are in effect because the proposed rules are required by state law and do not adversely affect a small or micro-business for the first five years that the proposed rules are in effect.

### **Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, limit, or repeal existing regulations but it does streamline the contested case hearing process for certain amendments to a water right by applicants that begin to use desalinated seawater and delete an obsolete rule provision. The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability.

During the first five years that the proposed rules would be in effect it is not anticipated that there will be an adverse impact on the state's economy. The proposed amendments are expected to enhance the encouragement of the development and use of desalinated seawater as a water management strategy through the implementation of an expedited water right permitting process which has the potential to result in a positive impact on the state's economy.

#### **Draft 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 new 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, 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." 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 to delete 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 being proposed solely under the TCEQ's general rulemaking authority. This rulemaking is being proposed to implement specific state statutes enacted in HB 1600 and SB 567 from the 83rd Texas Legislature, 2013 and HB 3735 and SB 1430 from the 85th Texas Legislature, 2017.

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 these proposed rules and performed analysis of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007 (*See Texas Government Code, §2001.0225(g)(3)*).

The specific purpose of these proposed 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 delete 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 proposed 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 proposed rules because these rules do not impact private real property. This rulemaking deletes §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 deletion 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 from the 83rd Texas Legislature, 2013. The intent is to delete 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 deletion 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 proposed rules or the prior rules relating to the use of desalinated seawater 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 deletion of §80.4(c)(15) based upon an exception to applicability in Texas Government Code, §2007.003(b)(5). The proposed deletion 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 proposed deletion 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 proposed deletion of §80.4(c)(15).

Thus, Texas Government Code, Chapter 2007, does not apply to these proposed rules because these rules do not impact private real property, there is a public health and safety need for the rules, and the deletion 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 proposed rulemaking and found that the proposed amendment to Chapter 80 implements changes to the TCEQ contested case hearing process required by HB 3735 and SB 1430 from the 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 proposed deletion of §80.4(c)(15) required by HB 1600 and SB 567 from the 83rd Texas Legislature, 2013, the commission found that the proposed deletion is neither identified in the Coastal Coordination Act Implementation rules, 31 TAC §505.11(b)(2) or (4) nor will the deletion affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed deletion of §80.4(c)(15) is not subject to the CMP. The commission conducted a consistency determination for the proposed amendment to Chapter 80 implementing changes to the TCEQ contested case hearing process required by HB 3735 and SB 1430 from the 85th Texas Legislature, 2017 in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

Although the proposed rulemaking to implement HB 3735 and SB 1430 from the 85th Texas Legislature, 2017 is procedural, the rulemaking relates to prior rules that expedite permitting for diverting desalinated seawater. CMP goals applicable to the proposed 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 proposed rules include those contained in 31 TAC §501.33(a). The proposed 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 proposed 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 proposed 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 proposed rules is to protect coastal and natural resources.

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 March 20, 2018, at 10:00 a.m. 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 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Ms. Kris Hogan, 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 2017-034-295-OW. The comment period closes on March 26, 2018. 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

Ross Henderson, Water Availability Division, at (512) 239-4735.

## SUBCHAPTER A: GENERAL RULES

### §80.4

#### **Statutory Authority**

This amendment to the rule is proposed 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), concerning 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 proposed under Texas Government Code, §2003.047(e-3) and (e-6), relating to hearings for TCEQ.

The amendment to the rule 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), concerning 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 [(SOAH)] 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) issue interim rate orders under Texas Water Code, Chapter 13;]

(15) [(16)] 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) [(17)] 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) [(18)] for permit applications filed on or after September 1, 2015, and referred under TWC [Texas Water Code], §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; [and]

(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 to the rule is proposed 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) concerning 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 proposed under Texas Government Code, §2003.047(e-3) and (e-6), relating to hearings for TCEQ.

The amendment to the rule implements House Bill 3735 and Senate Bill 1430 (85th Texas Legislature, 2017) and Texas Government Code, §2003.047(e-3) and (e-6), concerning 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, [or] 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 [Texas Water Code], §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) [(d)] 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) [(e)] 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.