The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments §§80.4, 80.6, 80.17, 80.25, 80.105, 80.108, 80.117, 80.118, 80.127, 80.252, 80.267, 80.272, 80.273 and 80.274, and new §80.276.

Sections 80.4, 80.6, 80.17, 80.25, 80.117, 80.118, 80.127, 80.252, and 80.274 are adopted *with changes* to the proposed text as published in the August 21, 2015, issue of the *Texas Register* (40 TexReg 5254) and will be republished. Sections 80.105, 80.108, 80.267, 80.272, 80.273, and §80.276 are adopted *without changes* to the proposed text and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking is adopted to implement Senate Bills (SB) 709 and 1267, both adopted by the 84th Texas Legislature (2015) with an effective date of September 1, 2015.

Concurrently with this adoption, and published in this issue of the *Texas Register*, the commission is adopting amendments to 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 39, Public Notice; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; and Chapter 70, Enforcement. SB 709 is implemented by rules adopted in Chapters 39, 50, 55, and 80. SB 1267, Sections 4, 6, 7, and 9, is implemented by rules adopted in Chapters 1, 50, 55, 70, and 80.

SB 709

SB 709 makes several changes to the current contested case hearing (CCH) process for applications for air quality; water quality; municipal solid waste; , industrial and hazardous waste; and underground injection control permits. Most of the changes apply to applications filed and judicial proceedings regarding a permit initiated on or after September 1, 2015. The specific changes to the CCH process are discussed further.

First, members of the public, or interested groups or associations, who request a CCH must make timely comments on the application to be considered as an affected person. For issues to be eligible for a CCH referred to the State Office of Administrative Hearings (SOAH), the issues must have been raised by the affected person in a comment made by that affected person. A group or association seeking to be considered as an affected person must specifically identify, by name and physical address in its timely hearing request, a member who would be an affected person in the person's own right.

Second, the executive director must notify the state senator and state representative for the area in which the facility is located or is proposed to be located at least 30 days prior to issuance of a draft permit. SB 709 also requires TCEQ to provide sufficient notice to applicants and others involved in permit proceedings that the changes in the law from SB 709 apply to all applications filed on or after September 1, 2015; this is required until the rules implementing SB 709 become effective December 31, 2015.

Third, SB 709 identifies specific information that the commission may consider when determining if hearing requestors are affected persons. SB 709 also prohibits the commission from finding a group or association is affected unless their CCH request has timely and specifically identified, by name and physical address, a member who would be affected in the member's own right. The issues submitted by the commission to SOAH for the CCH must be detailed and complete and contain only factual issues or mixed questions of fact and law.

Fourth, when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and the permit, if issued, would protect human health and safety, the environment, and physical property. The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the draft permit violates a specifically applicable state or federal requirement. If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.

Fifth, the executive director's role as a party in a CCH is to complete the administrative record and support his position developed in the draft permit; however, SB 709 provides that his position can be changed if he has revised or reversed his position on the draft permit that is part of the CCH administrative record; this change is applicable to all permit application

hearings, not only the types of applications named previously.

Finally, SB 709 limits the time for the issuance of the administrative law judge's (ALJ's) proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by an earlier date specified by the commission. SB 709 allows for extensions beyond 180 days based upon agreement of the parties with the ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For applications directly referred under §55.210, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267 amends the Texas Administrative Procedure Act (APA), codified in Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of CCHs and agency decisions, signature and timeliness of agency decisions, presumption of the date notice that of an agency decision is received, motions for rehearing regarding agency decisions, and the procedures for judicial review of agency decisions.

The changes to the APA for which TCEQ rulemaking is necessary are as follows.
First, SB 1267 removes the presumption that notice is received on the third day after mailing.
Second, SB 1267 creates a process through which a party that alleges that notice of the

commission's decision or order was not received can seek to alter the timelines for filing a motion for rehearing. Third, the time period for filing a motion for rehearing will now begin on the date that the commission's decision or order is signed, unless the beginning date is altered for a party that does not receive notice of the commission's decision or order, until at least 15 days after the commission's decision or order is signed, but no later than 90 days after the commission's decision or order is signed. Finally, SB 1267 provides that adversely affected parties have certain opportunities to file a motion for rehearing in response to a commission decision or order that modifies, corrects, or reforms a commission decision or order in response to a previously issued motion for rehearing.

Section by Section Discussion

In addition to the adopted amendments and new section associated with this rulemaking, the adopted rulemaking also includes various stylistic, non-substantive changes to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

§80.4, Judges

The amendment to §80.4(c)(17) and (18) is adopted to implement SB 709, Section 1, Texas Government Code, §2003.047(e-2) and (e-3) and SB 709, Section 5(a)(1) and (b). Subsection

(c)(17) is adopted to be amended by adding that it applies to permit applications filed before September 1, 2015. Subsection (c)(18) implements the new requirement that SOAH complete the portion of a CCH between the preliminary hearing and submittal of the ALJ's proposal for decision to the commission in 180 days, or an earlier date specified by the commission. For applications filed on or after September 1, 2015, the adopted amendment allows the ALJ to extend the proceeding beyond the specified time if the ALJ 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 ALJ. At adoption, to ensure that the rules do not apply to radioactive materials licenses, the commission adds language to subsection (c)(17) and (18) to ensure the applicability does not include applications not referred under Texas Water Code (TWC), §5.556 or §5.557.

Existing subsection (c)(18) is adopted to be re-designated as subsection(c)(19).
Subsection (d) is adopted to implement new Texas Government Code, §2003.047(e-4) in SB 709, Section 1 and Section 5(a)(1). It will provide that, for purposes of making a determination to extend the length of a hearing based on a constitutional right, a political subdivision has the same constitutional rights as an individual.

The commission also adopts the removal of subsection (d) because it is no longer needed.

§80.6, Referral to SOAH

The amendment to §80.6(b)(4) and (5) is adopted to implement SB 709, Section 1,Texas Government Code, §2003.047(e-5) and SB 709, Section 5(a)(1). The adopted amendment to subsection (b)(4) will provide that, for applications filed before September 1, 2015, the chief clerk shall send a copy of the chief clerk's case file to SOAH. The adopted amendment to subsection (b)(5) will provide, for applications filed on or after September 1, 2015, which are referred for hearing, that the chief clerk file the administrative record described in §80.118.

At adoption, to ensure that the rules do not apply to radioactive materials licenses, the commission adds language to subsection (b)(4) and (5) to ensure the applicability does not include applications that are not referred under TWC, §5.556 or §5.557. Existing subsection (b)(5) will be re-designated as subsection (b)(6).

Subsection (e) is added at adoption to provide that a group or association may not participate as a party to a hearing unless at least one member, named and relied upon in a hearing request, qualifies as an affected person in their own right. In addition, a group or association may not rely on new or different members to maintain party status if all members named and relied upon in a hearing request by the group or association withdraw their membership from the group or association, request to withdraw from the hearing, or circumstances have changed and all named or relied upon member no longer qualify as affected persons in their own right.

§80.17, Burden of Proof

Subsection (b) is adopted to be removed and subsection (c) is adopted to be amended because the TCEQ no longer has jurisdiction over proceedings involving a proposed change of water and sewer rates. Existing subsections (c) and (d) were re-designated as subsections (b) and (c).

Subsection (d) is adopted to implement SB 709, Section 1, Texas Government Code, §2003.047(i-1), (i-2), and (i-3) and SB 709, Section 5(a)(1). Adopted subsection (d) applies to applications filed on or after September 1, 2015, and at adoption the commission corrects the rule to specify that subsection (d) applies to applications filed with the commission. In addition, subsection (d) provides that in a CCH regarding a permit application referred under TWC, §5.556 or §5.557 the filing of the administrative record as described in §80.118(c) establishes a prima facie demonstration that the executive director's draft permit meets all state and federal legal and technical requirements, and, if issued, would protect human health and safety, the environment, and physical property. Subsection (d)(2) provides that in a CCH, a party may rebut the presumption that the draft permit meets all state and federal legal and technical requirements by presenting evidence regarding the referred issues demonstrating that the draft permit violates an applicable state or federal legal or technical requirement. At adoption, the commission revises subsection (d)(1) and (2) to match the language of Texas Government Code, §2003.047(i-1) and (i-2). Subsection (d)(3) provides that if a rebuttal case

is presented by a party under subsection (d)(2), the applicant and executive director may present additional evidence to support the executive director's draft permit.

§80.25, Withdrawing the Application

Subsection (f) is adopted to implement SB 709, Section 5(a)(1) and (b). Applications filed before September 1, 2015, for which the chief clerk mailed the executive director's preliminary decision and notice of a draft permit that are withdrawn by the applicant, are governed by the commission's rules as they existed immediately before September 1, 2015, and those rules are continued in effect for that purpose if the application is refiled with the commission and the executive director determines the refiled application is substantially similar. At adoption, the commission removes the phrase "before September 1, 2015" and adds text to clarify that the determination of substantially similar is based on the comparison of the refiled application to the withdrawn application in subsection (f).

The information that the executive director may consider in making a determination of a substantially similar application is listed in subsection (f)(1) - (8). In response to comment, subsection (f)(7) adds the criteria "changes in method of treatment or disposal of waste," and proposed subsection (f)(7) is re-designated as subsection (f)(8).

§80.105, Preliminary Hearings

Subsection (e) is adopted to implement SB 709, Section 1, Texas Government Code,

§2003.047(e-5) and SB 709, Section 5(a)(1). This amendment provides that, for applications directly referred to a CCH at SOAH, a preliminary hearing may not be held until the executive director's response to public comment has been filed by the executive director and provided by the Office of the Chief Clerk (OCC).

§80.108, Executive Director Party Status in Permit Hearings.

The amendment to §80.108 is adopted to implement the amendment to TWC, §5.228(c) in SB 709, Section 3 and Section 5(a)(1). This amendment provides that the executive director may revise or reverse his position based on the evidence presented in a CCH.

§80.117, Order of Presentation

The amendment to §80.117 is adopted to implement the Texas Government Code, §2003.047(i-1), (i-2), and (i-3) in SB 709, Section 1 and Section 5(a)(1). Subsection (b) isamended to provide that for applications subject to subsection (c), the applicant's presentation of evidence to meet its burden of proof may consist solely of filing with SOAH and admittance by the ALJ of the administrative record described in §80.118(c), concerning Administrative Record.

Adopted subsection (c) provides that for contested cases regarding a permit application filed on or after September 1, 2015, and referred to SOAH under TWC, §5.556 or §5.557, the filing of the administrative record establishes a prima facie demonstration that the draft permit

meets all applicable legal requirements; and a permit issued by the commission that is consistent with the draft permit in the administrative record would protect human health and safety, the environment, and physical property. Further, subsection (c) provides that the applicant, protesting parties, the public interest counsel, and the executive director may present evidence after admittance of the administrative record by the ALJ. Any party may present evidence to rebut the prima facie demonstration to demonstrate that one or more provisions in the draft permit violate a specifically applicable state or federal legal or technical requirement that relates to a matter directly referred to SOAH or referred by the commission. If the prima facie demonstration is rebutted, the applicant or the executive director may present evidence to support the executive director's draft permit. Existing subsection (c) is adopted to be re-designated as subsection (d).

At adoption, the commission revises subsection (c)(1)(A) to match the language of Texas Government Code, §2003.047(i-1) and (i-2). In subsection (c)(3) the commission clarifies that rebuttal evidence must relate to a matter directly referred to SOAH or referred by the commission.

§80.118, Administrative Record

The amendment to §80.118 is adopted to implement Texas Government Code, §2003.047(i-1) in SB 709, Section 1 and Section 5(a)(1). Subsection (a) is adopted to be amended to clarify

that certain documents must be included in the administrative record for all permit hearings, except as provided for in subsection (c).

Subsection (a) is adopted to be amended to reference adopted subsection (c), and to clarify in subsection (a)(1) that the final draft permit is the one prepared by the executive director. In addition, the word "regarding" is adopted to replace "of" in subsection (a)(5).

At adoption, to ensure that the rule amendments do not apply to radioactive materials licenses, the commission adds language to subsection (b) to ensure the applicability does not include applications that are not referred under TWC, §5.556 or §5.557.

Adopted subsection (c) establishes the contents of the administrative record for applications filed on or after September 1, 2015 which are referred under TWC, §5.556 or §5.557 that will be filed by the chief clerk. The record will contain the items listed in subsection (a)(1) - (6), as well as the permit application provided by the applicant as required by adopted subsection (d), and any agency documents in the record that demonstrate that the draft permit meets all applicable requirements and, if issued, would protect human health and safety, the environment, and physical property. At adoption in subsection (c) the phrase "at a minimum" was removed.

Adopted subsection (d) requires an applicant to provide duplicates of the original application to the chief clerk for inclusion in the administrative record, for hearings that are for applications filed on or after September 1, 2015, no later than 10 days after the chief clerk mails the commission order for applications referred by the commission, and no later than 10 days after the chief clerk mails the executive director's response to comments for applications directly referred by the applicant or the executive director. The application must include all revisions to the application and be organized in a format prescribed by agency guidance. At adoption, the commission revises the rule to provide that an applicant shall provide two duplicate original applications. This will allow one to be used in the administrative record provided to SOAH and one retained in the OCC for inspection and copying by the public.

Adopted subsection (e) provides that, for hearings referred to SOAH under TWC, §5.556 or §5.557 regarding applications filed on or after September 1, 2015, the chief clerk shall file the administrative record with SOAH at least 30 days prior to the hearing.

§80.127, Evidence

Subsection (f) is adopted for removal because it is no longer needed. This subsection pre-dates the statutory and regulatory requirements for the executive director to prepare a response to comments, which was not a requirement in state law at the time subsection (f) was adopted to implement federal requirements for program approvals. Further, §80.111 was repealed in the rulemaking that implemented HB 801 (76th Texas Legislature, 1999), which

made extensive changes in the agency's public participation requirements. An update is made to the citation from the Texas Rules of Evidence. Existing subsections (g) and (h) are adopted to be re-designated as subsections (f) and (g).

Subsection (h) is adopted to implement SB 709, Section 1, Texas Government Code, §2003.047(i-1) and SB 709, Section 5(a)(1). In contested cases regarding a permit application filed on or after September 1, 2015, and referred under TWC, §5.556 or §5.557, the filing of the administrative record establishes a prima facie demonstration that the executive director's draft permit meets all state and federal legal and technical requirements, and, if issued, would protect human health and safety, the environment, and physical property. At adoption, the commission revises subsection (h) to match the language of Texas Government Code, §2003.047(i-1) (1), and also clarifies that the ALJ shall admit the administrative record into evidence for all purposes.

§80.252, Judge's Proposal for Decision

The amendment to §80.252(b) and (c) is adopted to implement SB 709, Section 1, Texas Government Code, §2003.047(e-2) and SB 709, Sections 5(a)(1) and (b). Specifically, §80.252 is amended to specify the new deadline for the ALJ to file a proposal for decision within 180 days or a specific earlier date set by the commission, unless extended by the ALJ pursuant to Texas Government Code, §2003.047(e-2). Subsection (b) is amended to clarify that it applies to proposals for decisions on applications filed before September 1, 2015. Subsection (c) will

apply only to applications filed on or after September 1, 2015, and establishes a deadline for the ALJ to file a proposal for decision within 180 days after the preliminary hearing, an earlier date set by the commission, or the date to which the deadline was extended pursuant to Texas Government Code, §2003.047(e-3), whichever occurs last. At adoption, the commission clarifies that the 180-day period is calculated from the first day of the preliminary hearing. This change is consistent with rule text added in this rulemaking in §50.115(d)(2) and §80.4(c)(18).

At adoption, to ensure that the rules do not apply to radioactive materials licenses, the commission adds language to subsections (b) and (c) to ensure the applicability does not include applications that are not referred under TWC, §5.556 or §5.557. Current subsections (c) and (d) are re-designated as subsections (d) and (e), respectively.

§80.267, Decision

The amendment to §80.267 is adopted to implement SB 1267, Section 6, which amends Texas Government Code, §2001.143. Subsection (b) is amended to replace the current language with the statutory language that the commission's decision or order should be signed not later than 60 days after the date on which the hearing is finally closed. Subsection (b) is also revised to allow the commission or an ALJ to extend the period in which the decision or order must be signed.

§80.272, Motion for Rehearing

The amendment to §80.272 is adopted to implement SB 1267, Section 9, which amends the APA in Texas Government Code, §2001.146. In subsection (b) the date for filing a motion for rehearing is adopted to be changed from within 20 days after notification to not later than 25 days after the commission's decision or order is signed, and provides the methods that may be used to provide notice to the parties. Subsection (b) also provides that the deadline for filing a motion for rehearing may be extended under prescribed sections of the APA. The amendment removes the text regarding the presumption that notification of the commission's decision or order is received on the third day after it is mailed. Concurrent with this rulemaking, §55.211(f) is adopted to be amended to include similar changes.

Additionally, subsection (b) allows copies of the motion to be sent to all parties by personal delivery; email or telecopier (if agreed to by the party or attorney to be notified); or by first class, certified, or registered mail. This revision was made to maintain consistency between the means of providing notice of the motion and notice of replies to the motion.

Consistent with Texas Government Code, §2001.146(g), part of existing subsection (b) is adopted to be re-designated as subsection (c) and adopted subsection (c)(4) is added to provide that the motion for rehearing shall contain findings of fact or conclusions of law, identified with particularity, that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. Existing subsection (c)(4) is re-designated as subsection

(c)(5) and amended to add that the motion must include a statement of the legal and factual basis for the claimed, rather than a concise statement of each allegation of error.

Consistent with Texas Government Code, §2001.146(b), existing subsection (c) is adopted to be re-designated as subsection (d) and amended to change the deadline for filing a reply to a motion for rehearing from within 30 days to no later than 40 days after the commission's decision or order is signed. Additionally, subsection (d) allows copies of the motion to be sent to all parties by personal delivery; email or telecopier (if agreed to by the party or attorney to be notified); or by first class, certified, or registered mail. This revision was made to maintain consistency between the means of providing notice of the motion and notice of replies to the motion. In addition, the re-designated subsection (d) specifies that copies of the reply shall be sent to all other parties by personal delivery; email or telecopier (if agreed to by the party or attorney to be notified); or by first class, certified, or registered mail.

Existing subsection (d) is adopted to be re-designated as subsection (e) and amended to change the time that a motion for rehearing is overruled by operation of law from within 45 days to not later than 55 days after the date of the commission's decision or order that is the subject of the motion is signed.

Existing subsection (e) is adopted to be re-designated as subsection (f) and amended to add that, on a motion of any party for cause shown, the commission or the general counsel may,

by written order, extend the period of time for filing motions for rehearing and replies and for taking action on the motions so long as the period for taking agency action provided that the agency extends the time or takes the action not later than 10 days after the date the period for filing a motion or reply or taking agency action expires. In addition, the maximum time period that the commission can extend the deadline to take action on a motion for rehearing is changed from 90 days to 100 days after the date that the commission's decision or order is signed. In addition, the amendment removes the reference to calculation of the date based on notification to the party.

Existing subsection (f) is adopted to be re-designated as subsection (g) and amended to provide that in the event of an extension granted pursuant to subsection (f), the motion for rehearing will be overruled by operation of law on the date fixed by the order extending the commission's time to act, or, in the absence of a fixed date, the deadline for the commission to act is extended to 100 days after the date that the commission's decision or order is signed. The amendment removes the reference to calculation of the date based on notification to the party.

Consistent with Texas Government Code, §2001.146(g), subsection (h) is adopted to provide that a subsequent motion for rehearing is not required after the commission rules on a motion for rehearing unless the order disposing of the original motion for rehearing makes changes to the commission's decision or order that changes the outcome of the contested case

or vacates the commission's decision or order that is the subject of the motion and provides for a new decision or order.

Finally, adopted subsection (i) provides that a subsequent motion for rehearing required by subsection (h) must be filed not later than 20 days after the date the order disposing of the original motion for rehearing is signed.

§80.273, Decision Final and Appealable

The amendment to §80.273 is adopted to implement SB 1267, Section 9, which amends Texas Government Code, §2001.146. The amendment specifies that a decision or order of the commission is final and appealable on the date of the order overruling the final motion for rehearing or on the date the motion is overruled by operation of law. This amendment is made to account for the potential of a second motion for rehearing under adopted §80.272(h).

§80.274, Motion for Rehearing Not Required in Certain Cases

The amendment to §80.274(b) is adopted to implement SB 1267, Section 9, which amends Texas Government Code, §2001.146. The amendment removes the text that allows for the order to be signed later than the 20th day after the date the order was rendered, and the text that provides that, for purposes of subsection (b), the order is rendered on the date the chief

clerk mails the decision or order by first class mail to the parties. At adoption, the commission restates the rule to ensure clarity.

§80.276. Request for Extension to File Motion for Rehearing

New §80.276 is adopted to implement SB 1267, Section 4, which amends Texas Government Code, §2001.142. This new section provides, in subsection (a) that if an adversely affected party or the party's attorney of record does not receive the notice or acquire actual knowledge of a signed commission decision or order before 15 days after the date that the decision or order is signed, a period specified by or agreed to under the APA relating to a decision or order or motion for rehearing, begins for that party on the date that the party receives the notice or acquires actual knowledge of the signed decision or order, whichever occurs first. The commission reads this language to mean that if the affected party or the party's attorney of record receives notice of the commission's signed decision or order, then sufficient notice has been achieved. Notice is not required to be achieved through the receipt of notice of the commission's signed decision or order by both the adversely affected party and the party's attorney of record.

The period provided for in subsection (a) may not begin earlier than 15 days or later than 90 days after the date that the decision or order was signed. Subsection (b) provides that in order to establish a revised period under subsection (a), the adversely affected party must prove that the date the party received notice from the commission or acquired actual knowledge of

the signing of the decision or order was more than 15 days after the date that the decision or order was signed.

New subsection (c) provides that the commission must grant or deny the sworn motion not later than the date of the next commission's agenda meeting for which proper notice can be provided.

New subsection (d) provides that if the commission fails to grant or deny the motion at the next meeting, the motion is considered granted.

The commission's language in subsections (c) and (d) varies from the statutory language in order to clarify that the "next meeting" provided in Texas Government Code, §2001.142(e) and (f) is intended to be the commission's next meeting for which proper notice can be provided.

Finally, new subsection (e) provides that if the sworn motion filed under subsection (b) is granted with respect to the party filing that motion, all the periods specified by or agreed to under the APA relating to a decision or order, or motion for rehearing, shall begin on the date specified in the sworn motion that the party first received the notice required by Texas Government Code, §2001.142(a) and (b) or acquired actual knowledge of the signed decision

or order. Thus, with respect to the party filing that motion, the date specified in the sworn motion shall be considered the date the decision or order was signed.

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted revisions to Chapter 80 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Rather, they are procedural in nature and implement changes made to Texas Government Code, §2001.047 and the TWC, in SB 709, and Texas Government Code, Chapter 2001 in SB 1267 regarding CCHs and related commission action.

The rulemaking is procedural in nature and does not 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.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the adopted revisions to Chapter 80 are procedural in nature and implement changes made to Texas Government Code, §2001.047 and the TWC, in SB 709, and Texas Government Code, Chapter 2001 in SB 1267 regarding CCHs and related commission action. This adopted rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement and was not developed solely under the general powers of the agency but was specifically developed to meet the requirements of the law described in the Statutory Authority section of this rulemaking.

The commission invited public comment on the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive any comments regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The adopted revisions to Chapter 80 are procedural in nature and implement requirements for CCHs and related commission action, ensuring that the rules are consistent with the APA and the requirements of SBs 709 and 1267. The change in procedure will not burden private real property. The adopted rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The adopted rules do not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the rules affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the CMP during the

public comment period. The commission did not receive any comments regarding the CMP.

Public Comment

The commission held a public hearing on September 15, 2015, at 2:00 p.m. in Austin, Texas, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on September 21, 2015. For the rulemaking project described earlier that amends six chapters of the commission's rules, the commission received comments from the United States Environmental Protection Agency (EPA); Harris County Pollution Control Services Department (HCPCSD); TCEQ Office of Public Interest Counsel (OPIC); Public Citizen; Sierra Club (individually); Sierra Club, Texas Campaign for the Environment, and Environmental Integrity Project (SC/TCE/EIP); Texas Association of Manufacturers (TAM); Texas Chemical Council (TCC); Texas Oil and Gas Association (TXOGA); Lone Star Chapter of the Solid Waste Association of North America (TXSWANA); and Water Environment Association of Texas (WEAT) and Texas Association of Clean Water Agencies (TACWA).

Response to Comments

General Comments

All commenters acknowledged that the rulemaking project was only to implement SB 709 and SB 1267 passed by the 84th Texas Legislature (2015). SC/TCE/EIP and Public Citizen stated that, in general, the proposed rules accurately reflect the legislation being implemented. TCC commends TCEQ's work on the proposed rules. TXOGA supports the implementation of SB

709 and SB 1267. Generally speaking, TAM commented the proposed rule tracks the legislation very closely and supports the rulemaking as proposed, with specific comments for review and consideration.

Response

The commission acknowledges these comments.

Comment

TCC requests TCEQ clarify that any delays in implementation of SB 709, including the rules, do not adversely impact permit applicants. For example, if online notice is not yet available on the commission website prior to finalization of the rules, this should not create any deficiencies to the applicant, as this is out of the applicant's control.

SB 709 implementation was planned and largely achieved by September 1, 2015, to ensure timely compliance. For example, additional text for both Notice of Receipt of Application and Intent to Obtain Permit (commonly referred to as NORI) and Notice of Application and Preliminary Decision (commonly referred to as NAPD) were drafted and ready for use. The additional legislator notification text was developed, and the accompanying procedures were implemented. Internal procedures were established to track applications subject to SB 709 and to ensure that administratively complete applications are

available on the commission's website. In addition, the TCEQ's *Public Participation in Environmental Permitting* webpage for applications filed prior to September 1, 2015, was updated, and a new version was created for applications filed on or after September 1, 2015. SB 709 requires the commission to adopt rules by January 1, 2016; these rules were adopted on December 9, 2015, and will become effective on December 31, 2015. Therefore, the implementation is complete, and no adverse impacts have been identified nor are any expected.

Comment

HCPCSD is concerned the rulemaking will lessen the public's ability to oppose permitting actions that may negatively impact public health and safety, and the environment. In contrast to the notice and comment process which provides few protections, HCPCSD's experience has shown that the CCH process can be an important and valuable tool in the environmental permitting process. In many instances, more protective permit provisions, in the form of operational improvements, are negotiated during a CCH, and these added provisions minimize the nuisance potential from operations that are either located in an unsuitable location or have a high potential to create particulate or odor nuisances. The result is fewer citizen complaints, notices of violation, and enforcement actions.

Response

No changes were made to the rules in response to this comment. The commission understands that there are benefits to the CCH process but does not agree that the rules compromise the public's ability to oppose permitting actions. The rules do not reduce the amount of public notice provided, nor the opportunity to comment on applications and draft permits for the permitting programs that are subject to the requirements of SB 709. Public comments are considered in each permitting action.

Comment

HCPCSD requests TCEQ, after evaluating the consequences of this rulemaking, reconsider these rules with the goal of determining and incorporating rules that allow for more public inclusion in the permitting process and actual guaranteed consideration of the public's concerns by the regulated community and TCEQ.

Response

No changes were made to the rules in response to this comment. The adopted rules implement SB 709 and SB 1267, neither of which amends the requirements for the commission to provide notice to the public. Further, the rules do not reduce the amount of public notice provided, nor the opportunity to comment on applications and draft permits for the permitting programs that are subject

to the requirements of SB 709. Submitted comments are considered in each permitting action.

Federal Program Approvability

Comment

EPA commented that it based its 1998 authorization of the Texas Pollution Discharge Elimination System (TPDES) program upon a finding that participation in a CCH was not a prerequisite to judicial review. Recent state court decisions, as well as statements made by the Texas Attorney General, indicate this may no longer be true. In a case currently pending at the Texas Court of Appeals, *Sierra Club and Public Citizen v. TCEQ*, No. 03-14-00130-CV, the Texas Attorney General filed a brief stating that participation in a CCH regarding a water quality permit is an essential component of the exhaustion of administrative remedies, and thus a prerequisite to judicial review. In light of this statement and recent State court holdings on the role of the CCH in determining a person's access to judicial review, EPA requests TCEQ explain how the TPDES program continues to meet the requirements of 40 Code of Federal Regulations (CFR) §123.30 and how the authorized air permitting programs continue to meet Federal Clean Air Act (FCAA) requirements, including FCAA, §502(b)(6).

Response

***TPDES:* Requesting or participating in a CCH is not a prerequisite to judicial review in Texas, provided the person exhausted their administrative remedies**

prior to requesting judicial review. In the 1998 "Statement of Legal Authority for the Texas National Pollutant Discharge Elimination System Program" (Statement of Legal Authority), the Texas Attorney General clearly explained that judicial review of TPDES permits is readily available. The APA provides that if a CCH was held (a) person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review (Texas Government Code, §2001.171). If a CCH was not held, judicial review is available under the provisions in TWC, §5.351. Neither statute has been amended since Texas received delegation of the TPDES program in 1998.

To place the Texas Attorney General's argument in *Sierra Club and Public Citizen v. TCEQ* within its proper context, one must be familiar with the facts of the case. In that case, Sierra Club and Public Citizen requested a CCH and a hearing was held; they then obtained judicial review but abandoned their claims on appeal. The hearing was to be conducted in two phases, one of which was to determine whether Sierra Club and Public Citizen were affected persons. If, and only if, SOAH found either entity to be an affected person, then SOAH was to hold a CCH on the issues referred. At the hearing, SOAH found that neither entity was an affected person; therefore, SOAH did not address the referred issues. The commission subsequently issued the permit, and both Sierra Club

and Public Citizen appealed raising nine points of error. Seven of the nine points of error challenged the commission's determination that they were not affected persons; the remaining two points of error challenged the commission's decision to issue the permit. Sierra Club and Public Citizen waived their challenge to the points of error regarding their affected person status, and instead, attempted to challenge the two points of error regarding the application.

In response to Sierra Club and Public Citizen's appeal, the Texas Attorney General argued that the court did not have jurisdiction to consider a direct challenge to the issuance of the permit when Sierra Club waived its originally pleaded points of error challenging the commission's denial of its hearing request This position is not in conflict with the language in the Texas Attorney General's Statement of Legal Authority because Sierra Club and Public Citizen had requested a CCH, which was denied. They sought and obtained judicial review of the commission's decision but abandoned their claims on appeal. If the court agreed with Sierra Club and Public Citizen that they were affected persons, it would have reversed the commission's decision and remanded the application back to the commission.

The State of Texas, acting through TCEQ, is required by 40 CFR §123.30 to

provide an opportunity for judicial review of the commission's final approval or denial of a TPDES permit. The opportunity for judicial review must be sufficient to "provide for, encourage, and assist public participation in the permitting process." In addition, 40 CFR §123.30 also provides that the opportunity for judicial review is sufficient if it allows the same opportunity for judicial review of a TPDES permit that would be available to obtain judicial review in federal court for a National Pollutant Discharge Elimination System (NPDES) permit. As discussed earlier, the opportunity for judicial review has not changed since Texas received delegation of the NPDES program, thus the TPDES program continues to meet the requirements of 40 CFR §123.30.

Finally, TCEQ rules have long provided that a person may seek judicial review even if they failed to file a timely public comment, failed to file a timely hearing request, failed to participate in the public meeting, and failed to participate in the CCH. To do so, such a person must first file a motion for rehearing or a motion to overturn the executive director's decision, to the extent of the changes from the draft permit to the final permit decision (*See* §55.201(h); and §55.25(b)(3), adopted November 5, 1997, and effective December 1, 1997, which were derived from predecessor rules of 30 TAC §263.22 and §263.23).

***FCAA, including Title V:* FCAA, §502(b)(6), applies only to federal operating**

permits under Title V, which are not subject to CCH opportunity, which is the primary subject of this rulemaking.

The following information was stated in the most recent public participation rulemaking for new source review (NSR) permit applications (35 *TexReg* 5198, 5201 (June 18, 2010)) which was submitted to EPA on July 2, 2010, and approved on January 6, 2014 (79 FedReg 551).

Access to judicial review for all air quality permits, both NSR and Title V, is governed by Texas Health and Safety Code (THSC), §382.032. Generally, a person must comply with the requirement to exhaust the available administrative remedies prior to filing suit in district court. In addition, EPA has approved the Texas Title V Operating Permit Program, which required the submission of a Texas Attorney General opinion regarding sufficient access to courts, in compliance with Article III of the United States Constitution. The Attorney General Opinion specifically states that "(a)ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirement of Article III of the United States Constitution." Section XIX, Supplement to 1993, 1996, and 1998, Statements of Legal Authority for Texas's Federal Clean Air Act Title V Operating Permit Program by the Attorney General of the State of Texas (October 29,

2001). The state statutory authority cited in support of the Texas Title V Operating Program includes THSC, §382.032, which is the underlying authority for the appeal of Texas' air quality permit actions. Therefore, the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with Article III of the United States Constitution, is also applicable for every action of the commission subject to the Texas Clean Air Act. In addition, §55.201(h), also applies to NSR applications. As discussed earlier, this §55.201(h) provides that a person who failed to file a timely public comment, failed to file a timely hearing request, failed to participate in the public meeting, and failed to participate in the CCH must first file a motion for rehearing or a motion to overturn the executive director's decision, to the extent of the changes from the draft permit to the final permit decision.

In addition, the commission notes that the requirement for a person to exhaust available administrative remedies is also present in federal law. Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed (*Reiter v. Cooper*, 507 U.S. 258, 269 (1993)).

Certified copies

Comment

TXOGA appreciates the straightforward proposed rule revisions relating to the filing of documents in the administrative record. TXOGA recommends that in the same way the CCO provides certified copies of the chief clerk's case file to SOAH, the rules regarding the administrative record should also provide that the chief clerk provide certified copies of the administrative record with SOAH so the administrative record has evidentiary value. TXOGA requests the commission modify the revisions to §§80.6(b)(5), 80.17(d)(1), 80.117(b) and (c)(1), and 80.127(h) to provide that the administrative record consists of certified copies, consistent with proposed revisions in §80.118(c).

Response

No changes were made to these rules. For applications referred to a hearing that are subject to the requirements of SB 709, adopted §80.118(c) provides that the administrative record consists of certified copies of the documents included. Because the administrative record consists of certified copies, there is no certified copy of the administrative record provided to SOAH, and, therefore, the suggested language is unnecessary.

The commission understands the commenter's reference to "case file" to mean part of the administrative record. Currently, the OCC certifies its portion of the

administrative record (copies of the public notices relating to the permit application, as well as affidavits of public notices, as listed in §80.118(a)(5)), and also the portion provided by the executive director's staff (the remainder of the items listed in §80.118(a)(1) - (4) and (6)). OCC then provides the entire record to SOAH under one cover memo. For applications filed on or after September 1, 2015, the items in §80.118(c) will also be part of the administrative record. Therefore, it appears that the commenter's request is a long-standing practice of the TCEQ and was proposed in §80.118(c).

Adopted §80.118(d) provides that applicants provide two duplicate original applications to the OCC for cases referred for a CCH. This will allow one to be used in the administrative record provided to SOAH and one retained in the OCC for inspection and copying by the public.

Certified copies generally are considered to meet the business records exception to the hearsay rule of evidence. The administrative record submitted to and admitted by SOAH for CCHs regarding applications subject to SB 709 will be in the record for all purposes, including for the truth of the matters asserted. However, the evidentiary value of any other documents admitted into evidence will be determined by the ALJ at the CCH.

§80.4, Judges

Comment

TAM supports §80.4(c)(18) allowing the ALJ to extend the hearing. TAM commented that there may be other places in the law that allow an ALJ to extend a hearing for purposes other than those outlined in SB 709. However, for the purpose of CCHs for the environmental permits to which SB 709 is applicable, the legislative intent was to allow an extension of time under only very limited circumstances. Sierra Club commented that ALJs currently have discretion to extend the length of CCHs for reasons other than those expressed in SB 709.

Response

No changes have been made to the rules in response to these comments. The commission agrees that the legislature intended the extensions of time for CCHs regarding applications subject to SB 709, Section 1, to be only those in new Texas Government Code, §2003.047(e-3).

Comment

OPIC commented that the 180-day limitation on the duration of a CCH appears in §§50.115(d)(2), 80.4(c)(18), and 80.252(c). OPIC's recommendation addresses the scenario where a preliminary hearing does not start and end on a single date. This occurs when a preliminary hearing must be continued and, therefore, the preliminary hearing occurs on multiple dates. In OPIC's experience, this continued/second preliminary hearing scenario can

happen for a variety of reasons including notice defect, severe weather, problems with the size or location of the hearing venue, or jurisdiction issues. When a preliminary hearing must be continued, the delay between the dates can be weeks or even months. To account for this possibility, OPIC believes the 180 days should be calculated from the last day of the preliminary hearing, not the first.

OPIC comments that if a party is not admitted until a continued/second preliminary hearing is held, but the calculation of the 180 days begins at the first day of the preliminary hearing, that new party is subject to a shorter procedural schedule than other parties. OPIC notes that the consequences of calculating the 180-day period from the first day of the preliminary hearing may include less time for parties to conduct and respond to discovery and less time to prepare pre-filed evidence. Also, all parties to a CCH should be treated consistently and equally, and no party should be prejudiced by receiving less time to participate. OPIC recommends counting the 180 days from the last day of the preliminary hearing to ensure that the procedural schedule grants all parties equal amounts of time to participate in the important steps of a CCH. Therefore, the phrase "last day of the" should be inserted before "preliminary hearing" in §80.4(c)(18).

TCC commented that it recognizes that in some instances, an ALJ will hold multiple preliminary hearings, and urges TCEQ to interpret the rules to trigger the 180-day timeline from the date of the first preliminary hearing, unless agreed to by the parties, which falls

under a proper extension. TCC notes that this is consistent with the legislative intent that there is certainty in the process for all parties by maintaining a consistent timeline trigger, and ensuring the expeditious resolution of the hearing.

Response

No changes were made to the rule in response to this comment. Most preliminary hearings are conducted on one day. The types of events included in the comments occur infrequently. In addition, it is very rare for the period between the first and last days of a preliminary hearing to be months in length. The ALJ has the authority to extend the length of the hearing if necessary to ensure due process and thus there is no need for the rule to specify any beginning date for calculating the length of the hearing other than the first day, which is also consistent for hearings regarding applications filed before September 1, 2015.

§80.6, Referral to SOAH

Comment

TXOGA commented that the legislative intent of SB 709 is to allow participation in a CCH only by an affected person who participated in the permitting process by offering comments and requesting a CCH based on that affected person's comments, and therefore, requests adoption of a new subsection in §80.6 that would establish that limit on parties.

Response

No changes were made to the rule in response to this comment. For applications submitted on or after September 1, 2015, the commission agrees that for a person to be considered as an affected person, they must submit comments and a hearing request. Section 55.211(e) and (f) address the commenter's concerns raised. A person whose hearing request is denied by the commission has two options for subsequent action. First, under subsection (e), they may seek to be a party if any other hearing request is granted. Or, under subsection (f), they may file a motion for rehearing under §80.272 if all hearing requests are denied. Except for revisions to specifically implement portions of SB 1267, §55.211(f) was not proposed for amendment, and the commission declines to make this change without the opportunity for comment on proposed amendments to §55.211(e) and (f).

Comment

TCC and TXOGA commented that the commission should not allow individuals within the group or association upon which an affected party determination is made to be substituted or changed after the comments are submitted and the hearing request made. The legislative intent is clearly to only allow participation in a CCH by an association or group who names a

specific member who is an affected party in their own right, which means the group or association forfeits the right to participate in a CCH if the specific, named member is changed, wants to withdraw, or circumstances have changed such that the person would no longer qualify as an affected party (e.g., the person sells property that was the basis of the hearing request and moves). Thus, the commission should implement legislative intent by adding a subsection in §80.6 that would specifically add this limitation.

Response

The commission adopts new §80.6(e) in response to these comments. The commission agrees that the legislative intent of SB 709 is to only allow participation in a CCH by an association or group who timely identifies at least one member who is an affected person in their own right. Groups or associations may not rely on new or different members to maintain party status if all timely identified members, who were relied upon in a hearing request, withdraw their membership from the group or association, withdraw as a party, or circumstances have changed such that the persons would no longer qualify as affected persons. Groups or associations may timely identify more than one member who is an affected person in their own right in their hearing requests.

Prima Facie Case and Burden of Proof

Comment

SC/TCE/EIP and Public Citizen commented that during the legislative consideration of SB 709, significant concerns were raised that the prima facie case provision would result in an effective shift in the burden of proof onto the protestants during the CCH. The commenters contend that proponents of SB 709 repeatedly asserted that this provision was not intended to shift the burden of proof during the CCH. The commenters maintain that in floor debate in the House, Chairman Morrison stressed that in the permit hearing, the permit applicant bears the burden by the preponderance of the evidence. Commenters maintain their concern that SB 709 should not be implemented in a fashion that effectively shifts the burden of proof during a CCH. The commenters note that within the proposed rules, the commission has maintained regulatory language in §80.117(b) providing that the applicant shall present evidence to meet its burden of proof, and in §80.17(a)that the burden of proof is on the moving party; this language is helpful, but the commenters are concerned that such language will ring hollow.

In particular, the commenters note that the standard for rebuttal of the applicant's prima facie evidence must not be set in a way that reverses the burden of proof. The commenters maintain that new Texas Government Code, §2003.047(i-2)(2), provides that a party "may present evidence to rebut the prima facie demonstration by demonstrating that one or more provisions in the draft permit violate a specifically applicable state or federal requirement." The commenters also note that neither the statute nor the proposed changes to §80.117 specify the degree of proof that is necessary to make the "demonstration." The commenters

stated that if the protestants, to rebut what is characterized as a presumption, must demonstrate a violation by a preponderance of the credible evidence, then the burden of proof has been shifted from the applicant to the protestants; this would be in direct opposition to the claimed intent of sponsors of the legislation that created this new scheme and of the customary allocation of the burden of persuasion to the person seeking a state authorization. The commenters recommend that to avoid this outcome, the rules should provide that the demonstration required by protestants should be a "reasonable suspicion" standard, rather than be subject to a "preponderance of the evidence" standard. A "reasonable suspicion" standard would be consistent with sound policy. Commenters note that text of this nature would be consistent with sound policy, too. Finally, commenters contend that if there is a reasonable suspicion that less than a preponderance of the credible evidence supports a proposition, the proposition should be better defended.

Response

No change has been made to the rules in response to the comments. SB 709 doesn't shift the burden of proof to the protestants, nor, as commenters have stated, has the commission proposed amendment of the rule, §80.17(a) that provides that the burden of proof is on the moving party. In a CCH regarding a permit application, the moving party is the applicant. New Texas Government Code, §2003.047(i-1) provides that the burden of proof for an applicant's direct case in a CCH regarding a permit application subject to SB 709 has been met by

the submittal of the administrative record to and its admittance into the evidentiary record by SOAH, subject to rebuttal as provided for in new Texas Government Code, §2003.047(i-2).

In addition, SB 709 does not establish the evidentiary standard for any party in a CCH, nor does it provide any direction to SOAH or the commission to establish a new standard for the rebuttal demonstration in new Texas Government Code, §2003.047(i-2). Because CCHs are similar to non-jury civil trials in district court, the evidentiary standard in CCHs for permit applications is "preponderance of the evidence."

Comment

TCC commented that the legal effect of the *prima facie* demonstration is that the applicant meets its burden of proof based on the work that has already been done at TCEQ during the permitting process. The commenter noted that the burden of proof at the CCH as outlined in the proposed rules remains with the applicant, as §80.117(a) places the burden of proof "on the moving party by a preponderance of the evidence," and the applicant may supplement the record by presenting additional evidence at the outset of the hearing but is not required to do so.

TCC commented specifically, the proposed changes to §80.117(b) make clear that the

applicant's presentation of evidence to meet its burden of proof may consist solely of the filing with SOAH and admittance by the ALJ of the administrative record. The commenter stated that after all evidence is presented, if the preponderance of the evidence shows that a draft permit would meet the applicable legal requirements, then TCEQ must issue the permit.

Response

The commission agrees that the burden of proof remains with the applicant since it is the moving party, and that the evidentiary standard is by a preponderance of the evidence. Section 80.17(a) provides that the burden of proof is on the moving party. In a CCH regarding a permit application, the moving party is the applicant. New Texas Government Code, §2003.047(i-1) provides that, for applications subject to SB 709, the burden of proof for an applicant's direct case in a CCH has been met by the submittal of the administrative record to and its admittance into the evidentiary record by SOAH, subject to rebuttal as provided for in new Texas Government Code, §2003.047(i-2).

Comment

EPA commented that the proposed revisions to §§80.17(d), 80.117(c), and 80.127(h) shift the burden of proof during a CCH away from the party seeking the permit to those

potentially impacted by the permittee's operations, thereby affecting Texas' public participation process. EPA noted that, although a CCH process is not required as part of a federally-approved program, the state processes must not impede or conflict with federal law, including the federal Clean Water Act §101(e). Further, 40 CFR §123.3 mandates that states "shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process." States' federally enforceable Title V and Prevention of Significant Deterioration permitting programs must provide an adequate opportunity for judicial review as well.

EPA is concerned that the requirement for hearing requestors to rebut the presumption that the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements is overly burdensome and may result in a de facto bar to the courts. EPA commented that the revisions to §§80.17(d), 80.117(c), and 80.127(h) may narrow the opportunity for interested citizens to challenge final permit decisions in State court that adequate and effective public participation in the permitting process is compromised. EPA requested the commission explain how the proposed revisions would continue to provide an adequate opportunity for judicial review and would not create an overly burdensome process for interested citizens seeking to challenge final permit decisions in State court.

Response

As discussed earlier, the burden of proof remains with the moving party, the applicant, by a preponderance of the evidence as stated in §80.17(a), with exceptions not relevant here. With regard to the rule revisions regarding the prima facie case established by the Texas Legislature in SB 709, the commission disagrees that the changes to the CCH process is a de facto bar to the courts. Specifically, the standard for consideration of evidence by an ALJ remains as a preponderance of the evidence. Even if that were not the case, interested citizens' opportunities to comment are not changed by this rulemaking, and their options to challenge permit decisions in State court are not limited to the CCH process. Because there are no changes to EPA-approved public participation rules and judicial review statutes and rules meet, and in some cases exceed, federal requirements, the commission does not agree with EPA's comments.

With regard to public participation generally, and to judicial review more specifically, the following is provided to explain judicial review for some possible scenarios with regard to degree of participation in the administrative process.

Standing is a question of law decided by a court. *Cleaver v. George Staton Co. Inc.*, 908 S.W.2d 468 (Tex. App - Tyler 1995, writ denied). In 1993, the Texas Supreme Court held that standing is a component of subject matter jurisdiction and can be raised for the first time on appeal (*Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (1993)). The Supreme Court has restated its holding many times, most recently in June 2015 (*State v. Naylor*, 466 S.W.3d 783 (Tex. 2015)).

If a CCH was held, a party to the hearing is entitled to judicial review under the authority and procedures of the APA. If a CCH is not available, a person affected by a final ruling, order, or decision of the commission may file a petition for judicial review under TWC, §5.351 or THSC, §382.032 within 30 days after the decision is final and appealable. A person seeking judicial review under any authority must have exhausted the available administrative remedies, including complying with applicable commission rules regarding motions for rehearing or reconsideration, e.g., §§50.119, 55.211, and 80.272. Requesting or participating in a CCH is not among the exhaustion requirements for judicial review of permit actions under TWC, §5.351 or THSC, §382.032.

Even a person who failed to file timely public comment, failed to file a timely hearing request, failed to participate in a public meeting held under the rules,

and failed to participate in any CCH held under Chapter 80 may file a motion for rehearing as provided for in §§50.119, 55.211 or 80.272, or a motion to overturn the executive director's decision under §50.139, as long as the motion addresses only the changes from the draft permit to the final permit decision, and thus, may exhaust administrative remedies for purposes of seeking judicial review regarding those changes (*See* §55.201(h)).

A finding by an ALJ or the commission concerning a person's status as an affected person would not bind a Texas district court judge in considering that person's standing to seek judicial review of the commission's action on a permit application under TWC, §5.351 or THSC, §382.032. The "affected person" standard set out in TWC, §5.115(a) and §55.203 comes into play only in a decision on entitlement to a CCH, whereas the statutory availability of judicial review does not depend on requesting or participating in a CCH.

For TPDES discharge and Underground Injection Control permits, the Office of the Attorney General (OAG) agreed, in its "Statement of Legal Authority for the Texas National Pollutant Discharge Elimination System (TPDES) Program" in 1998 and "State of Texas Office of the Attorney General Statement for Class I, III, IV and V Underground Injection Wells" in 2003, that it will not rely on or refer to the conclusion of an ALJ or the commission that a person is

not an affected person as a basis to oppose participation by that person in subsequent judicial proceedings brought under TWC, §5.351. Although the OAG has not issued an opinion regarding what its position would be in judicial proceedings for the Resource Conservation and Recovery Act permitting program, TWC, §5.351 also applies and presumably the position of the OAG would be no different for that program. Similarly, although the OAG has not issued an opinion regarding what its position would be in judicial proceedings for the air quality NSR program, the requirements of THSC, §382.032 are similar to those of TWC, §5.351, and presumably the position of the OAG would be no different for NSR cases. The OAG may, however, rely on the facts underlying the conclusion in opposing a person's standing in court. Also, when an ALJ or the commission conclusion about affected person status is challenged in the judicial proceeding, the Attorney General may defend that conclusion.

§80.17, Burden of Proof

Comment

TXSWANA and WEAT/TACWA suggest deleting "by the commission" in §80.17(d) as the commission does not file applications. TXOGA submitted a similar comment.

Response

The commission has corrected the rule to say "with the commission."

Comment

TXOGA appreciates the straightforward proposed rule revisions relating to establishing a prima facie demonstration that an application meets all requirements and is protective. The commenter recommends the proposed rule revisions to §80.17(d) be modified to more accurately reflect and clarify the statutory language, and the commission should modify its revisions to §80.17(d) to more accurately reflect the language in SB 709. Specifically, subsection (d)(1) should include text that references a permit issued consistent with the draft permit, and subsection (d)(2) should reflect that the rebuttal is a demonstration made by a party regarding a draft permit violating a specifically applicable legal requirement, rather than rebutting a presumption.

In addition, TXOGA recommends the phrase "which may include evidence regarding changes which are consistent with the draft permit that could be made to address issues raised in a rebuttal case" be added to the end of subsection (d)(3). The commenter stated evidence should be allowed regarding changes consistent with the draft permit in the presentation of additional evidence by the applicant and executive director in response to rebuttal evidence comports with changes that SB 709 made to TWC, §5.228(c)(2) which expressly allows the executive director to revise the his position on a draft permit.

Response

Changes were made to §80.17 in response to this comment. The commission agrees that the proposed changes to subsection (d)(1) and (2) will more closely track the language of SB 709, Section 3, TWC, §5.228(c)(2) and has made the suggested changes. With regard to the suggested changes to subsection (d)(3), the commission declines to add the additional language because the language permitting the applicant and the executive director to put on a rebuttal case is broad enough to encompass changes to the draft permit that are necessary to address issues raised in a party's direct case.

Comment

TAM commented that there are several places in the proposed changes to Chapter 80 that state that filing the draft permit is simply a demonstration that it meets "all legal requirements." TAM requests the commission's adoption of §80.17(d)(1) and (2) be revised to match the exact language as specified in SB 709 "meets all state and federal legal and technical requirements."

Response

The commission agrees that the rule should mirror new Texas Government Code, §2003.047(i-1)(1) and has amended the rule accordingly.

§80.25, Withdrawing the Application

Comment

Public Citizen commented that the proposed amendment to §80.25 does not reflect the plain language of the statute nor the legislative intent of SB 709, Section 5(1)(b), for applications filed before September 1, 2015, the rules in existence at that time apply, nor the intent of SB 709, Section 5(1)(c) for applications filed before September 1, 2015, which are subsequently withdrawn and for which a substantially similar application is filed after September 1, 2015, the rules in effect prior to September 1, 2015. SB 709, Sections 5(1)(b) and (c) is designed to minimize the potential for abuse by an applicant seeking to benefit from the permitting process more advantageous to the applicant. To reflect this intent, the text "on or after September 1, 2015," in connection to when an application is withdrawn should not be included.

Response

The commission agrees that there is no date restriction in SB 709, Section 5(1)(c)(1)(B)(ii) regarding the withdrawal date of an application that meets the other criteria of SB 709 and is not adopting this language.

Comment

TXSWANA and WEAT/TACWA suggest adding criteria which the executive director may consider in §80.25, specifically: 1) changes in methods of treatment or disposal; 2) significant

changes in design; and 3) whether the resubmitted application is more protective of human health and the environment than the withdrawn application. In addition, they suggest, for clarity, that the text "determines the resubmitted application is substantially similar" be revised to "determines the resubmitted application is substantially similar to the withdrawn application."

Response

The commission has amended §80.25 in response to part of these comments by adding the phrase "to the withdrawn application." In addition, the criterion "changes in methods of treatment or disposal of waste" is added as subsection (b)(7).

The commission declines to include the other suggested criteria. The evaluation of whether an application is "significantly similar" will also depend on its complexity. Rather than adopt a more subjective criteria of "significant changes in design," the determination will need to be based, as it is for every application, on how the application meets permitting requirements. Each permit application is reviewed to ensure it complies with various rules that range from basic administrative requirements to complex technical requirements. The executive director will review each resubmitted application in light of the applicable regulatory requirements to determine if the new application is "significantly

similar."

§80.105, Preliminary Hearings

Comment

TAM commented that proposed §80.105(e) implements new Texas Government Code, §2003.047(e-5) in SB 709, Section 1, stipulates that for direct referrals, the ALJ may not hold a preliminary hearing until after issuance of the executive director's response to comment. TAM wants to ensure that the commission is not extending any of the timeframes in the current process and the rules do not inadvertently create potential delays or add time to the current process. TAM requests that §80.105 clarify that the scheduling of a preliminary hearing can run concurrently with the executive director's preparation and issuance of the response to comments.

Similarly, TXOGA commented that in order to avoid potential delays in cases in which a direct referral to a CCH is requested, the rules should provide the scheduling of a preliminary hearing will run concurrently with the executive director's 60-day timeframe in §55.156 to prepare executive director's response to comment. TXOGA stated that providing concurrent scheduling of a preliminary hearing with preparation of the executive director's response to comment will provide more certainty in scheduling for permit applicants, hearing requestors, TCEQ staff, ALJs, and the public. TXOGA suggests §80.105(e) be amended to specify that the preliminary hearing for directly referred applications be scheduled no later than the 60-day

response to comments deadline.

Response

No changes were made to the rule in response to these comments. At the time the Office of Chief Clerk (OCC) is working with SOAH to schedule a preliminary hearing for directly referred applications, the protesting parties have not yet been determined since SOAH does not yet have jurisdiction over the application and, therefore, complete coordination could not necessarily be achieved.

The current permitting timeframes and deadline for filing of the executive director's response to comments are not extended by SB 709 or the rule amendments implementing SB 709 prohibits holding a preliminary hearing for directly referred applications until after the executive director's response to comments has been issued. TCEQ can, and does, work with SOAH to schedule the preliminary hearing prior to the filing of the response to comments or concurrently with the preparation and filing of the response to comments for these applications. The OCC works as expeditiously as possible, given the circumstances of each case, to schedule the preliminary hearing.

§80.108, Executive Director Party Status in Permit Hearings

Comment

TCC commented that SB 709 authorizes the TCEQ executive director to revise or reverse his or her position in a CCH. TCC noted that the executive director plays an integral role during a CCH, as that office has developed the draft permit at issue in the underlying proceeding, and has made the preliminary determination on whether to issue such a permit. TCC also commented that the executive director is, therefore, familiar with the administrative record and may appropriately support the position already developed with regard to the permit. The commenter stated that once the permit is subject to a CCH, the administrative record and additional evidence presented during the hearing can provide the only basis for evaluating the draft permit and decision on issuing the permit.

TCC supports the language in §80.108 that the executive director "may revise or reverse his position based on the evidence presented in the hearing." TCC stated that the proposed language properly limits the legitimate reasons why the executive director can reverse or revise his or her position relative to the draft permit solely to the evidence presented in the hearing. The commenter noted that the administrative record has already been established at this time and provides a basis for the initial position at the outset of the hearing. Further, information provided outside of the hearing would be improperly considered. TCC stated that the rule confines the authorized purpose of a change of position by the executive director to the hearing itself and precludes consideration of information outside the bounds of the hearing.

Response

The commission acknowledges this comment.

Comment

TXOGA commented that statutory language regarding the protectiveness of a permit, which is issued consistent with the draft permit, should be given effect by allowing evidence from the TCEQ executive director regarding changes to a draft permit, which would be consistent with the draft permit, but make the draft permit more protective. Thus, TXOGA urges the commission to modify proposed §80.108 to add language that provides that the executive director may present evidence regarding changes which are consistent with the draft permit that could be made to address issues raised in a rebuttal case.

Response

No changes were made to the rule in response to this comment. The language permitting the executive director to reverse or revise his position in the hearing encompasses changes to the draft permit that are necessary and is broad enough to address issues raised in a rebuttal case.

§80.117, Order of Presentation

Comment

HCPCSD commented that §80.117 will not allow for the presumption of protectiveness to be challenged based on factual disputes, as opposed to applicable legal requirements, specifically suggesting that an application may contain erroneous representations such as incorrect distance measurements to neighbors, incorrect emission factors, mathematical errors, or other matters of fact that could dispute the protectiveness of a draft permit.

Response

No change has been made to the rule in response to this comment. The commission disagrees that factual disputes cannot be raised by parties at the CCH, including those that concern the protectiveness of a draft permit.

Comment

TAM commented that there are several places in the proposed changes to Chapter 80 that state that filing the draft permit is simply a demonstration that it meets "all legal requirements." TAM requests the §80.117(c)(1)(A) and the accompanying preamble be revised to match the exact language as specified in Texas Government Code, §2001.047(i-1)(1) "meets all state and federal legal and technical requirements."

Response

The commission agrees that the rule should mirror Texas Government Code, §2001.047(i-1)(1) and has amended the rule accordingly.

Comment

TAM recommends that proposed §80.117(c)(3) be modified to include the language in Texas Government Code, §2003.047(i-2)(1) that clarifies that any party may rebut a demonstration by presenting evidence that "relates to a matter" referred or submitted in a list by the commission to SOAH.

Response

The commission agrees and has made this change so the rule tracks the quoted language of Texas Government Code, §2001.047(i-2)(1).

Comment

SC/TCE/EIP and Public Citizen commented that the proposed rules do not sufficiently preserve the protestant's right to cross-examination. The commenters noted that the APA provides that in a contested case, a party may conduct cross-examination required for a full and true disclosure of the facts. Furthermore, the Texas Supreme Court has stated that, "in administrative proceedings, due process requires that parties be accorded a full and fair hearing on disputed fact issues. This requirement includes the right to cross-examine adverse witnesses and to present and rebut evidence," quoting *City of Corpus Christi et al. v. Public Utility Commission of Texas*, 51 S.W.3d 231, 262 (Tex. 2001).

SC/TCE/EIP and Public Citizen commented that SB 709 did not repeal the APA, nor did SB 709 repeal the applicable rules of evidence. The commenters noted cross-examination in a TCEQ permit proceeding is necessary for a full and fair hearing on the permit. The commenters noted that in many cases, the problem with an application is a matter of what the applicant has *omitted information* rather than the inclusion of false or incorrect information. The commenters noted that exploring the consequences of such omissions, or fully identifying omissions in the applicant's analysis, requires the opportunity to conduct cross-examination regarding the application. Furthermore, the applicant's own experts generally are the most knowledgeable regarding an application, and denying protestants the opportunity to cross-examine any of the applicant's experts prevents protestants from having a full and fair hearing on the facts. Commenters also noted that occasionally, a protestant may have the resources to conduct depositions of the applicant's experts and obtain trial subpoenas to force the applicant’s experts to appear at the hearing on the merits, but such measures are expensive and complicated under the best of circumstances. Furthermore, according to the commenters, if the applicant does not present a sponsor for the application, even a sophisticated protestant with significant resources may need to depose numerous persons and acquire trial subpoenas to compel the attendance of numerous persons at the hearing on the merits. Commenters also noted that it is also not unusual for an application to contain information developed by prior consultants that are no longer associated with the applicant or who may be located in another state. Commenters also noted that if the application is treated as prima facie evidence of compliance, and the applicant is able to deny any

opportunity to examine the basis of an application, then, in many cases, the applicant may prevail based on its ability to hide the relevant facts, rather than on the development of the facts that a hearing is intended to involve.

The commenters propose that this problem can be significantly mitigated by the simple step of requiring that the applicant designate a sponsoring witness for the material filed and make those witnesses available for cross examination at the time when the applicant presents its case at the hearing on the merits. The commenters noted that such a requirement need not impose a responsibility for the applicant to develop pre-filed testimony from such a witness. For these reasons, the commenters propose that subsection (c)(4) - (6) be added to §80.117 that would require applicants to designate a qualified sponsoring witness for each item of evidence relied upon by an applicant to meet its burden of proof; to make each of an applicant's sponsoring witnesses used to present its initial evidence to meet its burden of proof available for cross-examination by the other parties in the hearing unless all other parties have waived their right of cross-examination; and to provide that the ALJ may establish a deadline by which the applicant must designate sponsoring witnesses.

Response

The commission has made no change to the rule in response to these comments. The commission has delegated to SOAH the responsibility to conduct the hearings in a fair and impartial manner in accordance with all applicable law,

including but not limited to the APA, the statutes under the jurisdiction of the commission, the commission's rules, and the Texas Rules of Evidence. The parties to the hearing make their own choices as to presentation of their cases in compliance with the applicable law and the ALJ's orders for a timely and orderly CCH. Therefore, the suggested rule amendments are not necessary for the ALJ to fairly and legally conduct CCHs.

§80.118, Administrative Record

Comment

SC/TCE/EIP and Public Citizen commented that the compressed time period for conducting of the hearing necessitates that parties be provided an opportunity to commence examination of the permit application as soon as possible. The commenters noted that the proposed rules require that the applicant provide the chief clerk with copies of the original application, including all revisions to the application, prior to the preliminary hearing. The commenters also noted that in practice, procedural schedules for TCEQ CCHs generally require that the applicant provide a copy of the application to all parties to the hearing. The commenters stated that in order to facilitate the examination of the application by other parties, and the expedited development of discovery, the applicable rules should specify that a copy of the application must be provided to the other parties within one day of the preliminary hearing. Commenters proposed that §80.118 be amended to provide that that, not later than one business day after the initial preliminary hearing, the applicant must provide a copy of the

original application, including all revisions to the application, to each other party to the CCH.

Response

The change requested by the commenters was not made. However, §80.118(d) requires applicants to provide two duplicate original applications to the OCC for cases referred for a CCH. This will allow one to be used in the administrative record provided to SOAH and one retained in the OCC for inspection and copying by the public. As discussed earlier, the the administrative record, which will be the prima facie demonstration, will be available for review at SOAH and the OCC at least 30 days prior to the first day of the preliminary hearing, the same length of time that notice of the CCH is provided to the public. Statutory parties (the applicant, OPIC, and the executive director) and persons who submitted comments and hearing requests regarding applications that are directly referred to SOAH and who expect to seek party status, or who are determined by the commission to be affected persons, can access the application prior to the hearing if they prefer not to wait until they are named as parties at the preliminary hearing. Adopted §80.118(d) provides that applicants provide two duplicate original applications to the OCC for cases referred for a CCH. This will allow one to be used in the administrative record provided to SOAH and one retained in the OCC for inspection and copying by the public.

Comment

TXOGA commented that it appreciates the proposed approach to clearly define the documents which constitute the administrative record. TXOGA recommends deletion of the phrase "at a minimum" in §80.118(c)(1) because it leaves the bounds of the administrative record in question.

In addition, TXOGA noted the proposed approach that the applicants furnish the application for the administrative record is entirely appropriate. However, the proposed requirement that the administrative record be filed 30 days prior to the preliminary hearing is not a requirement imposed by the Texas Legislature in SB 709 and would create a built-in 30-day delay which may or may not run concurrently with other timelines (e.g., preparation of the TCEQ executive director's response to comment in direct referrals, notice of the preliminary hearing, etc.). The commenter noted that regardless of whether the administrative record has been filed, the parties will have had access upon request to the publically available documents in the agency's permit application file, will have had ample opportunity to review the application documents and formulate an opinion about it, and can begin preparing for the hearing. The commenter also noted that there is no reason for the parties to wait until the administrative record is filed and the preliminary hearing is convened to begin reviewing application documents, technical memoranda, consulting with experts, preparing written testimony, preparing discovery requests, and undertaking other actions in preparation for the CCH.

TXOGA recommends to implement SB 709, the commission should modify its revisions so §80.118(c), (d), and (e). Specifically, subsection (c)(1) should include the text "which includes any document determined by the executive director to be necessary to reflect the administrative and technical review of the application," and should exclude the word "including." The last phrase of subsection (d) and all of subsection (d)(1) and (2) should be removed. Finally, in subsection (e), the phrase "at least 30 days prior to the hearing" should be replaced with "as soon as practicable."

Response

One change was made to the rules in response to this comment. In §80.118(c), the commission agrees that the administrative record includes the list of documents listed in subsection (c)(1) and (2) and agrees that the words "at a minimum" are unnecessary. However, the commission makes clear that the record for its deliberation upon the submittal of the ALJ's Proposal for Decision will include other information that is admitted by the ALJ into evidence at the CCH.

With regard to the proposed change to subsection (c)(1), the text is basically repetitive of the text of subsection (a)(6), which is referenced within subsection (c)(1) and, therefore, is unnecessary. With regard to the proposed change to

subsection (d), the commission is requiring two duplicate originals of the application to efficiently implement the new prima facie demonstration requirements of SB 709, and no changes are being made.

With regard to the proposed change to subsection (e), the commission understands that the requirement that the administrative record be filed 30 days prior to the preliminary hearing is not a requirement imposed by the Texas Legislature in SB 709 but disagrees that it will create a built-in 30-day delay. Rather, it is designed to run concurrently with the notice of the hearing. It also provides the opportunity for parties and prospective parties to obtain a copy of the administrative record.

§80.127, Evidence

Comment

SC/TCE/EIP and Public Citizen ask whether the filing of the administrative record can be relied on by an applicant to meet its burden of proof and can be considered to be the applicant's prefiled testimony.

Response

SB 709, Section 1, specifically provides, in new Texas Government Code, §2001.047(i-1) that the filing of the application, the executive director's draft

permit and preliminary decision, and other supporting documentation in the administrative record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and therefore, by statute, an applicant has met its burden of proof on its direct case, but is subject to rebuttal as provided by SB 709 and the commission's rules. The administrative record, which consists of certified copies of documents, is provided to SOAH and shall be admitted as evidence for all purposes as provided by §80.127. Decisions regarding how applicants will present their case in the CCH will be governed by the ALJ's orders at the hearing based on applicable law.

Comment

TAM requested the text of §80.127(h) be amended to match the exact text of new Texas Government Code, §2003.047(i-1)(1), which stipulates that the filing of the draft permit and supporting documentation establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements.

Response

The commission agrees that the rule should mirror Texas Government Code, §2001.047(i-1)(1) and has amended the rule accordingly.

§80.252, Judge's Proposal for Decision

Comment

OPIC commented that the 180-day limitation on the duration of a CCH appears in §§50.115(d)(2), 80.4(c)(18), and 80.252(c). OPIC's recommendation addresses the scenario where a preliminary hearing does not start and end on a single date. In other words, this occurs when a preliminary hearing must be continued, and therefore, it occurs on multiple dates. In OPIC's experience, this continued/second preliminary hearing scenario can happen for a variety of reasons including notice defect, severe weather, problems with the size or location of the hearing venue, or jurisdiction issues. When a preliminary hearing must be continued, the delay between the dates can be weeks or even months. To account for this possibility, OPIC believes the 180 days should be calculated from the last day of the preliminary hearing, not the first.

If a party is not admitted until a continued/second preliminary hearing, but the 180 days started running after the first day of the preliminary hearing, that party is subject to a shorter procedural schedule than other parties. The consequences may include less time to conduct and respond to discovery and less time to prepare pre-filed evidence. All parties to a CCH should be treated consistently and equally, and no party should be prejudiced by receiving less time to participate. Counting the 180 days from the last day of the preliminary hearing ensures that the procedural schedule grants all parties equal amounts of time to participate in the important steps of a CCH. Therefore, the word "last" should be inserted before "date of the preliminary hearing" in §80.252(c).

TCC recognizes that in some instances, an ALJ will hold multiple preliminary hearings, and urges TCEQ to interpret the rules to trigger the 180-day timeline from the date of the first preliminary hearing, unless agreed to by the parties, which falls under a proper extension. This is consistent with the legislative intent that there is certainty in the process for all parties by maintaining a consistent timeline trigger, and ensuring the expeditious resolution of the hearing.

Response

No changes were made to the rule in response to this comment. Most preliminary hearings are conducted on one day. The types of events included in the comments occur infrequently. In addition, it is very rare for the period between the first and last days of a preliminary hearing to be months in length. The ALJ has the authority to extend the length of the hearing if necessary to ensure due process, and thus, there is no need for the rule to specify any beginning date for calculating the length of the hearing other than the first day, which is also consistent for hearings regarding applications filed before September 1, 2015.

SUBCHAPTER A: GENERAL RULES

§§80.4, 80.6, 80.17, 80.25

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings (SOAH); TWC, §26.021, concerning Delegation of Hearing Powers, which authorizes the commission to authorize the chief administrative law judge of SOAH to call and hold hearings and report to the commission; Texas Government Code, §2001.004, concerning the Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt rules of practice; Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of State Rules, which authorizes state agencies to adopt rules or take other administrative action that the agency

deems necessary to prepare to implement legislation; Texas Government Code, §2001.142, concerning Notification of Decisions and Orders, which prescribes requirements for the notification of decisions and orders of a state agency; Texas Government Code, §2003.047, concerning Natural Resource Conservation Division, which provides the authority for SOAH to conduct hearings on behalf of the commission; and Texas Health and Safety Code (THSC), §382.029, concerning Hearing Powers, which authorizes the commission to call and hold hearings; THSC, §382.030, concerning Delegation of Hearing Powers, which authorizes the commission to delegate the authority to hold hearings; THSC, §401.011, concerning Radiation Control Agency, which provides the commission authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, the recovery and processing of source material, and the processing of by-product material; THSC, §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; THSC, §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; THSC, §401.104, concerning Licensing and Registration Rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; and THSC, §401.412, concerning Commission Licensing Authority, which provides the commission authority to adopt rules for the recovery and processing of source material and the disposal of radioactive substances.

The adopted amendments implement Texas Government Code, §2001.142 and §2003.047; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§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) [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;

(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;

(17) for permit applications filed before September 1, 2015, or applications not referred under Texas Water Code, §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 [and]

(B) by agreement of the parties;

(18) for permit applications filed on or after September 1, 2015, and referred under 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

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

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

[(d) For applications declared administratively complete on or after September 1, 1999, notwithstanding §80.127(f) of this title (relating to Evidence), the judge is not required to accept public comment into the evidentiary record. This subsection supercedes §80.127(f) of this title.]

§80.6. Referral to SOAH.

(a) Any application that is declared administratively complete on or after September 1, 1999 is subject to this section.

(b) When a case is referred to the State Office of Administrative Hearings (SOAH) [SOAH], the chief clerk shall:

(1) file with SOAH a Request for Setting of Hearing form, or Request for Assignment of Administrative Law Judge form, whichever is appropriate;

(2) coordinate with SOAH to determine a time and place for hearing;

(3) issue public notice of the hearing as required by law and commission rules;

(4) for applications filed before September 1, 2015, or applications not referred under Texas Water Code, §5.556 or §5.557, send a copy of the chief clerk's case file to SOAH which, in permitting matters, shall include certified copies of the following [certified copies of] documents:

(A) the documents described in §80.118 of this title (relating to Administrative Record); and

(B) for cases referred under §55.210 of this title (relating to Direct Referrals) any public comment and the executive director's response to comments to be

included in the administrative record, except that these documents may be sent to SOAH after referral of the case, if they are filed subsequent to referral; [and]

(5) for applications filed on or after September 1, 2015, and referred under Texas Water Code, §5.556 or §5.557, which are referred for hearing by the commission, file with SOAH the administrative record described in §80.118 of this title; and

(6) [(5)] send the commission's list of disputed issues and maximum expected duration of the hearing to SOAH unless the case is referred under §55.210 of this title.

(c) In an enforcement case, the executive director's petition or Executive Director Preliminary Report shall serve as the list of issues or areas that must be addressed.

(d) When a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title (relating to Judges) may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues. This subsection does not apply to a case referred under §55.210 of this title.

(e) A group or association may not participate as a party to a hearing unless at least one member, named and relied upon in a hearing request, qualifies as an affected person in their own right. A group or association may not rely on new or different

members to maintain party status if all members named and relied upon in a hearing request by the group or association withdraw their membership from the group or association, request to withdraw from the hearing, or circumstances have changed and all named and relied upon members no longer qualify as affected persons in their own right.

§80.17. Burden of Proof.

(a) The burden of proof is on the moving party by a preponderance of the evidence, except as provided in subsections (b) - (d) of this section.

[(b) Section 291.12 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding involving a proposed change of water and sewer rates not governed by Chapter 291, Subchapter I of this title (relating to Wholesale Water or Sewer Service).]

(b) [(c)] Section 291.136 of this title (relating to Burden of Proof) governs the burden of proof in a proceeding related to a petition to review rates charged [changed] pursuant to a written contract for the sale of water for resale filed under Texas Water Code, Chapter 11 [or 12, and in an appeal under Texas Water Code, §13.043(f)].

(c) [(d)] In an enforcement case, the executive director has the burden of proving by a preponderance of the evidence the occurrence of any violation and the appropriateness of any proposed technical ordering provisions. The respondent has the burden of proving by a preponderance of the evidence all elements of any affirmative defense asserted. Any party submitting facts relevant to the factors prescribed by the applicable statute to be considered by the commission in determining the amount of the penalty has the burden of proving those facts by a preponderance of the evidence.

(d) In contested cases regarding a permit application filed with ~~by~~ the commission on or after September 1, 2015, and referred under Texas Water Code, §5.556 or §5.557:

(1) the filing of the administrative record as described in §80.118(c) of this title (relating to Administrative Record) establishes a prima facie demonstration that the executive director's draft permit meets all state and federal legal and technical requirements, and, if issued, would protect human health and safety, the environment, and physical property;

(2) a party may rebut the presumption in paragraph (1) of this subsection by presenting evidence regarding the referred issues demonstrating that the draft permit violates an applicable state or federal legal or technical requirement; and

(3) if a rebuttal case is presented by a party under paragraph (2) of this subsection, the applicant and executive director may present additional evidence to support the executive director's draft permit.

§80.25. Withdrawing the Application.

(a) An applicant may file a request to withdraw its application at any time before the proposal for decision is issued.

(b) If the request is to withdraw the application with prejudice, the judge shall remand the application and request to the executive director, who shall enter an order dismissing the application with prejudice.

(c) If the parties agree in writing to the withdrawal of the application without prejudice or if the request to withdraw is filed before parties are named, the judge shall remand the application and request to the executive director, who shall enter an order dismissing the application without prejudice, on the terms agreed to by the parties, or by the applicant, executive director, and public interest counsel if no parties have been named.

(d) If neither subsection (b) nor (c) of this section apply, the judge will forward the application, the request, and a recommendation on the request to the commission.

(e) An applicant is entitled to an order dismissing an application without prejudice if:

(1) the parties, or the applicant, executive director, and public interest counsel if no parties have been named, agree in writing;

(2) the applicant reimburses the other parties all expenses, not including attorney's [attorneys] fees, that the other parties have incurred in the permitting process for the subject application; or

(3) the commission authorizes the dismissal of the application without prejudice.

(f) An application filed before September 1, 2015, for which chief clerk has mailed the executive director's notice of preliminary decision and Notice of a Draft Permit under §39.419 of this title (relating to Notice of Application and Preliminary Decision) that is subsequently withdrawn by the applicant ~~on or after September 1, 2015~~, are governed by the commission's rules as they existed immediately before September 1, 2015, and those rules are continued in effect for that purpose if the application is refiled with the commission and the executive director determines the refiled application is substantially similar to the withdrawn

application. For purposes of making this determination, the executive director may consider the following information contained in the withdrawn application and the refiled application:

(1) the name of the applicant;

(2) the location or proposed location of the construction, activity, or discharge, to be authorized by the application;

(3) the air contaminants to be emitted;

(4) the area to be served by a wastewater treatment facility;

(5) the volume and nature of the wastewater to be treated by a wastewater treatment facility;

(6) the volume and type of waste to be disposed; ~~or~~

(7) changes in methods of treatment or disposal of waste; or

(8) ~~(7)~~ any other factor the executive director determines is relevant to this determination.

SUBCHAPTER C: HEARING PROCEDURES

§§80.105, 80.108, 80.117, 80.118, 80.127

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings (SOAH); TWC, §26.021, which provides that the commission may delegate hearings to SOAH; Texas Government Code, §2001.004, concerning the Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt rules of practice; Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of State Rules, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation; Texas Government Code, §2001.142, concerning Notification of Decisions and Orders, which

prescribes requirements for the notification of decisions and orders of a state agency; Texas Government Code, §2003.047, concerning Natural Resource Conservation Division, which provides the authority for SOAH to conduct hearings on behalf of the commission; and Texas Health and Safety Code (THSC), §401.011, concerning Radiation Control Agency, which provides the commission authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, the recovery and processing of source material, and the processing of by-product material; THSC, §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; THSC, §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; THSC, §401.104, concerning Licensing and Registration Rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; and THSC, §401.412, concerning Commission Licensing Authority, which provides the commission authority to adopt rules for the recovery and processing of source material and the disposal of radioactive substances.

The adopted amendments implement Texas Government Code, §2001.142 and §2003.047; and Senate Bills 709 and 267 (84th Texas Legislature, 2015).

§80.105. Preliminary Hearings.

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required in an enforcement matter, except in those under federally authorized underground injection control [(UIC)] or Texas Pollutant Discharge Elimination System [(TPDES)] programs. A preliminary hearing is required for applications referred to the State Office of Administrative Hearings [SOAH] under §55.210 of this title (relating to Direct Referrals).

(b) If jurisdiction is established, the judge shall:

(1) name the parties;

(2) accept public comment in the following matters:

(A) enforcement hearings; and

(B) applications under Texas Water Code (TWC), Chapter 13 and TWC, §§11.036, 11.041, or 12.013;

(3) establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes; and

(4) allow the parties an opportunity for settlement negotiations.

(c) When agreed to by all parties in attendance at the preliminary hearing, the judge may proceed with the evidentiary hearing on the same date of the first preliminary hearing.

(d) One or more preliminary hearings may be held to discuss:

(1) formulating and simplifying issues;

(2) evaluating the necessity or desirability of amending pleadings;

(3) all pending motions;

(4) stipulations;

(5) the procedure at the hearing;

(6) specifying the number and identity of witnesses;

(7) filing and exchanging prepared testimony and exhibits;

(8) scheduling discovery;

(9) setting a schedule for filing, responding to, and hearing of dispositive motions; and

(10) other matters that may expedite or facilitate the hearing process.

(e) For applications directly referred under §55.210 of this title, a preliminary hearing may not be held until the executive director's response to public comment has been provided.

§80.108. Executive Director Party Status in Permit Hearings.

The executive director is a party in all contested case hearings concerning permitting matters. The executive director's participation shall be to complete the administrative record and support the executive director's position developed in the underlying proceeding. The

executive director may revise or reverse his position based on the evidence presented in the hearing.

§80.117. Order of Presentation.

(a) In all proceedings, the moving party has the right to open and close. Where several matters have been consolidated, the judge will designate who will open and close. The judge will determine at what stage other parties will be permitted to offer evidence and argument. After all parties have completed the presentation of their evidence, the judge may call upon any party for further material or relevant evidence upon any issue.

(b) The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and the executive director. In all cases, the applicant shall be allowed a rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated. For applications subject to subsection (c) of this section, the applicant's presentation of evidence to meet its burden of proof may consist solely of the filing with the State Office of Administrative Hearings (SOAH), and admittance by the judge, of the administrative record as described in subsection (c) of this section.

(c) For contested cases regarding a permit application filed on or after September 1, 2015, and referred to SOAH under Texas Water Code, §5.556 or §5.557:

(1) The filing of the administrative record as described in §80.118(c) of this title (relating to Administrative Record) establishes a prima facie demonstration that:

(A) the draft permit meets all applicable state and federal legal and technical requirements; and

(B) the permit issued by the commission is consistent with the draft permit in the administrative record would protect human health and safety, the environment, and physical property.

(2) The applicant, protesting parties, the public interest counsel, and the executive director may present evidence after admittance of the administrative record by the ~~administrative law~~ judge.

(3) Any party may present evidence to rebut the prima facie demonstration by demonstrating that one or more provisions in the draft permit violate a specifically applicable state or federal requirement that relates to a matter directly referred to SOAH or referred by

the commission. If the prima facie demonstration is rebutted, the applicant or the executive director may present additional evidence to support the executive director's draft permit.

(d) [c] In all contested enforcement case hearings, the executive director has the right to open and close. In all such cases, the executive director shall be allowed to close with his rebuttal.

§80.118. Administrative Record.

(a) Except as provided in subsection (c) of this section, in [In] all permit hearings, the record in a contested case includes at a minimum the following certified copies of documents:

(1) the executive director's final draft permit, including any special provisions or conditions;

(2) the executive director's preliminary decision, or the executive director's decision on the permit application, if applicable;

(3) the summary of the technical review of the permit application;

(4) the compliance summary of the applicant;

(5) copies of the public notices relating to the permit application, as well as affidavits regarding [of] public notices; and

(6) any agency document determined by the executive director to be necessary to reflect the administrative and technical review of the application.

(b) For purposes of referral to the State Office of Administrative Hearings (SOAH) [SOAH] under §80.5 and §80.6 of this title (Referral to SOAH), of applications filed before September 1, 2015, or applications not referred under Texas Water Code, §5.556 or §5.557, the chief clerk's case file shall contain the administrative record as described in subsection (a) of this section.

(c) In all hearings on permit applications filed on or after September 1, 2015, which are referred for hearing under Texas Water Code, §5.556 or §5.557, the administrative record in a contested case filed by the chief clerk with SOAH includes ~~at a minimum~~ the following certified copies of documents:

(1) the items in subsection (a)(1) - (6) of this section, including technical memoranda, that demonstrate the draft permit meets all applicable requirements and, if issued, would protect human health and safety, the environment, and physical property; and

(2) the application submitted by the applicant, including revisions to the original submittal.

(d) For purposes of referral to SOAH under §80.6 of this title for hearings regarding permit applications filed on or after September 1, 2015, that are referred under Texas Water Code, §5.556 and §5.557, the applicant shall provide two duplicates ~~a duplicates~~ of the original application, including all revisions to the application, to the chief clerk for inclusion in the administrative record in the format and time required by the procedures of the commission, no later than:

(1) for applications referred by the commission, 10 days after the chief clerk mails the commission order; or

(2) for applications referred by the applicant or executive director, 10 days after the chief clerk mails the executive director's response to comments.

(e) For purposes of referral to SOAH under §80.6 of this title for hearings regarding permit applications filed on or after September 1, 2015, that are referred under Texas Water Code, §5.556 and §5.557, the chief clerk shall file the administrative record with SOAH at least 30 days prior to the hearing.

§80.127. Evidence.

(a) General admissibility of evidence.

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Texas Rules of Civil Evidence, as applied in nonjury civil cases in the district courts of this state, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs. The judge shall give effect to the rules of privilege recognized by law.

(2) Testimony will be received only from witnesses called by a party or the judge. The judge may allow or request testimony from any person whose position is not adequately represented by any party, subject to cross-examination by all parties. Such testimony shall only be allowed at the judge's discretion. All parties shall have an opportunity to conduct discovery of such person.

(3) Testimony offered by any witness shall be under oath.

(4) In a contested case hearing concerning a permit application [permitting matter], the executive director shall not rehabilitate the testimony of a witness unless the witness is an agency employee testifying for the sole purpose of providing information to complete the administrative record.

(b) Stipulation. Evidence may be stipulated by agreement of all parties. The judge and commission will determine the weight, if any, to be accorded stipulated evidence.

(c) Prefiled testimony and exhibits. The judge may require or allow parties to prepare their direct testimony in written form if the judge determines that a proceeding will be expedited and that the interests of the parties will not be prejudiced substantially. The judge may require the parties to file and serve their direct testimony and exhibits before the beginning of the hearing. The prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be admitted into evidence as if read or presented orally, upon the witness [witness'] being sworn and identifying the same as a true and accurate record of what the testimony would be if given orally. The witness shall be subject to cross-examination, and the prepared testimony shall be subject to objection.

(d) Exhibits.

(1) Exhibits of a documentary character shall not exceed 8 1/2 by 11 inches unless they are folded to the required size. Maps and drawings which are offered as exhibits shall be rolled or folded so as not to unduly encumber the record. Exhibits not conforming to this rule may be excluded.

(2) Each exhibit offered shall be tendered for identification and placed in the record. Copies shall be furnished to the judge, each of the parties, and the hearings reporter, unless the judge rules otherwise.

(3) If an exhibit has been identified, objected to, and excluded, it may be withdrawn by the offering party. If withdrawn, the exhibit will be returned and the offering party waives all objections to the exclusion of the exhibit. If not withdrawn, the exhibit shall be included in the record for the purpose of preserving the objection to the exclusion of the exhibit.

(e) Official notice.

(1) The judge may take official notice of all facts judicially cognizable. In addition, the judge may take official notice of any generally recognized facts within the specialized knowledge of the commission.

(2) The judge shall notify all parties of any material officially noticed, including any memoranda or data prepared by the executive director and relied upon by the commission in prior proceedings. All parties shall be afforded an opportunity to contest any material so noticed.

[(f) Public comment. In Resource Conservation and Recovery Act, underground injection control, and Texas Pollutant Discharge Elimination System permit cases for which the commission has permitting authority by authorization from the federal government, all public comment on the application received by the commission during the public comment period and the executive director's responses shall be admitted into the evidentiary record. The parties shall be allowed to respond and to present evidence on each issue raised in public comment or the executive director's responses. This subsection supersedes and controls any conflict between this subsection and §80.111 of this title (relating to Persons Not Parties) concerning the admission of public comment into the evidentiary record.]

(f) [(g)] Invoking the "rule." At the request of the party, and subject to the discretion of the judge, witnesses may be placed under "the rule" as provided by, and subject to the conditions of, Texas Rule of Civil Procedure 267 and Texas Rule of Evidence 614 [613].

(g) [(h)] Staff testimony and evidence. Testimony or evidence given in a contested case permit hearing by agency staff regardless of which party called the staff witness or introduced

the evidence relating to the documents listed in §80.118 of this title (relating to Administrative Record) or any analysis, study, or review that the executive director is required by statute or rule to perform shall not constitute assistance to the permit applicant in meeting its burden of proof.

(h) In contested cases regarding a permit application filed with the commission on or after September 1, 2015, and referred under Texas Water Code, §5.556 or §5.557, the filing of the administrative record as described in §80.118 of this title (relating to Administrative Record) establishes a prima facie demonstration that the executive director's draft permit meets all state and federal legal and technical requirements, and, if issued, would protect human health and safety, the environment, and physical property. The ALJ shall admit the administrative record into evidence for all purposes.

SUBCHAPTER F: POST HEARING PROCEDURES

§80.252, 80.267, 80.272 - 80.274, 80.276

Statutory Authority

The amendments and new section are adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission; TWC, §5.228, concerning Appearances at Hearings, which establishes the executive director's authority to participate in contested case hearings; TWC, §5.311, concerning Delegation of Responsibility, which provides that the commission may delegate hearings to the State Office of Administrative Hearings (SOAH); TWC, §26.021, concerning Delegation of Hearing Powers, which provides that the commission may delegate hearings to SOAH; Texas Government Code, §2001.004, concerning the Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt rules of practice; Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of State Rules, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary to prepare to implement legislation; Texas Government

Code, §2001.142, concerning Notification of Decisions and Orders, which prescribes requirements for the notification of decisions and orders of a state agency; Texas Government Code, §2001.143, concerning Time of Rendering Decision, which concerns when a decision in a contested case becomes final; Texas Government Code, §2001.144, concerning Decisions; When Final, which provides the time at which decisions in contested cases are final; Texas Government Code, §2001.146, concerning Motions for Rehearing: Procedures, which authorizes the procedures for motions for rehearing filed with state agencies; Texas Government Code, §2001.147, concerning Agreement to Modify Time Limits, which provides that parties to a contested case, with state agency approval, may agree to modify the times prescribed by statute; Texas Government Code, §2001.174, concerning Review Under Substantial Evidence Rule or Undefined Scope of Review, which provides the requirements for a court's review of a contested case; Texas Government Code, §2001.176, concerning Petition Initiating Judicial Review, which provides the requirements for judicial review of a contested case; Texas Government Code, §2003.047, concerning Natural Resource Conservation Division, which provides the authority for SOAH to conduct hearings on behalf of the commission; and Texas Health and Safety Code (THSC), §382.029, concerning Hearing Powers, which authorizes the commission to call and hold hearings; THSC, §382.030, concerning Delegation of Hearing Powers, which authorizes the commission to delegate the authority to hold hearings; THSC, §401.011, concerning Radiation Control Agency, which provides the commission authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, the recovery

and processing of source material, and the processing of by-product material; THSC, §401.051, concerning Adoption of Rules and Guidelines, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; THSC, §401.103, concerning Rules and Guidelines for Licensing and Registration, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; THSC, §401.104, concerning Licensing and Registration Rules, which requires the commission to provide rules for licensing for the disposal of radioactive substances; and THSC, §401.412, concerning Commission Licensing Authority, which provides the commission authority to adopt rules for the recovery and processing of source material and the disposal of radioactive substances.

The adopted amendments and new section implement Texas Government Code, §2001.142 and §2003.047; and Senate Bills 709 and 1267 (84th Texas Legislature, 2015).

§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, §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 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 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 ~~date~~ 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) [(c)] 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.

(e) [(d)] 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.

§80.267. Decision.

(a) Decision. The commission shall make its decision upon the expiration of 30 days or later following service of the judge's proposal for decision, unless the parties have waived review. The decision, if adverse to any party, shall include findings of fact and conclusions of law separately stated. If any party has filed proposed findings of fact at the request of the judge, the commission will include in its decision a ruling on the proposed findings of fact, unless waived by the party.

(b) Prompt decision. The commission's decision or order should [will] be signed not later than [rendered within] 60 days after the date that the hearing is finally closed. In a contested case heard by an administrative law judge, the agency or the administrative law judge who conducts the contested case hearing may extend the period in which the decision or order may be signed. [In a case heard by a judge, a longer period of time may be necessary

in order to present the matter to the commission for decision. If additional time is likely to be required, that fact shall be announced by the judge at the conclusion of the hearing.]

§80.272. Motion for Rehearing.

(a) Any decision in an administrative hearing before the commission that occurs on or after September 1, 1999 is subject to this section.

(b) Filing motion. A motion for rehearing is a prerequisite to appeal. The motion shall be filed with the chief clerk not later than 25 [within 20] days after the date that [the party or his attorney of record is notified of] the decision or order is signed, unless the time for filing the motion for rehearing has been extended under Texas Government Code, §2001.142, and §80.276 of this title (relating to Request for Extension to File Motion for Rehearing), by agreement under Texas Government Code, §2001.147, or by the commission's written order issued pursuant to Texas Government Code, §2001.146(e). [For purposes of this section, a party or attorney of record is presumed to have been notified on the third day after the date that the decision or order is mailed by first-class mail.] On or before the date of filing of a motion for rehearing, a copy of the motion shall be mailed or delivered to all parties with certification of service furnished to the commission. Copies of the motion shall be sent to all other parties using the following notification procedures:

(1) personally;

(2) if agreed to by the party or attorney to be notified, by electronic means sent to the current email address or telecopier number of the party's attorney of record or of the party if the party is not represented by counsel; or

(3) by first class, certified, or registered mail sent to the last known address of the party's attorney of record or of the party if the party is not represented by counsel.

(c) The motion shall contain:

(1) the name and representative capacity of the person filing the motion;

(2) the style and official docket number assigned by SOAH, and official docket number assigned by the commission;

(3) the date of the decision or order; [and]

(4) the findings of fact or conclusions of law, identified with particularity, that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous; and

(5) [4] a statement of the legal and factual basis for the claimed [a concise statement of each allegation of] error.

(d) [(c)] Reply to motion for rehearing. A reply to a motion for rehearing must be filed with the chief clerk not later than 40 [within 30] days after the date that [a party or his attorney of record is notified of] the decision or order is signed, or not later than 10 days after the date that a motion for rehearing is filed if the time for filing the motion for rehearing has been extended by an agreement under Texas Government Code, §2001.147 or by a written order issued by the commission pursuant to Texas Government Code, §2001.146(e). Copies of the reply shall be sent to all other parties using the following notification procedures: [.]

(1) personally;

(2) if agreed to by the party or attorney to be notified, by electronic means sent to the current email address or telecopier number of the party's attorney of record or of the party if the party is not represented by counsel; or

(3) by first class, certified, or registered mail sent to the last known address of the party's attorney of record or of the party if the party is not represented by counsel.

(e) [(d)] Ruling on motion for rehearing.

(1) Upon the request of the general counsel or a commissioner, the motion for rehearing will be scheduled for consideration during a commission meeting. Unless the commission extends time or rules on the motion for rehearing not later than 55 [within 45] days after the date that [the party or his attorney of record is notified of] the decision or order is signed, the motion is overruled by operation of law.

(2) A motion for rehearing may be granted in whole or in part. When a motion for rehearing is granted, the decision or order is nullified. The commission may reopen the hearing to the extent it deems necessary. Thereafter, the commission shall render a decision or order as required by this subchapter.

(f) [(e)] Extension of time limits. With the agreement of the parties, on a motion of any party for cause shown, or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions for rehearing and replies and for taking action on the motions so long as the period for taking agency action provided that the agency extends the time or takes the action not later than the 10th day after the date that the period for filing a motion or reply or taking agency action expires. The commission may [is] not extend the period for taking agency action [extended] beyond 100 [90] days after the date that [a party is notified of] the decision or order is signed.

(g) [(f)] Motion overruled. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 100 [90] days after the date that [the party is notified of] the decision or order is signed.

(h) Subsequent motion for rehearing. A subsequent motion for rehearing is not required after the commission rules on a motion for rehearing unless the order disposing of the original motion for rehearing:

(1) modifies, corrects, or reforms in any respect the decision or order that is the subject of the complaint, other than a typographical, grammatical, or other clerical change identified as such by the agency in the order, including any modification, correction, or reformation that does not change the outcome of the contested case; or

(2) vacates the decision or order that is the subject of the motion and provides for a new decision or order.

(i) A subsequent motion for rehearing required by subsection (h) of this subsection must be filed not later than 20 days after the date the decision or order disposing of the original motion for rehearing is signed.

§80.273. Decision Final and Appealable.

Except as provided in §80.274 of this title (relating to Motion for Rehearing Not Required in Certain Cases), in the absence of a timely motion for rehearing, a decision or order of the commission is final on the expiration of the period for filing a motion for rehearing. If a party files a motion for rehearing, a decision or order of the commission is final and appealable on the date of the order overruling the final motion for rehearing or on the date the motion is overruled by operation of law.

§80.274. Motion for Rehearing Not Required in Certain Cases.

(a) A ~~When Texas Government Code [APA], §2001.144(a)(3) or (4) applies, a commission order is final as specified in the APA, a~~ motion for rehearing is not required, and §80.271 and §80.273 of this title (relating to Motion for Rehearing and Decision Final and Appealable) do not apply when a final commission order is issued under Texas Government Code, §2001.144(a)(3) or (4).

(b) The commission may issue an order that is final under Texas Government Code [APA], §2001.144(a)(4) if all parties agree to the specified date in writing or on the record, and if the specified date is not before the date the order is signed [or later than the 20th day after the date the order was rendered. For purposes of this subsection, the order is rendered

on the date the chief clerk mails the decision or order by first-class mail to the parties]. The commission is not required to issue an order under Texas Government Code [APA], §2001.144(a)(4) even when requested by all parties. When the parties request, and the commission agrees, to issue a final order under Texas Government Code [APA], §2001.144(a)(4), each party shall thereby waive any allegations of error not in the party's exceptions to the proposal for decision, reply to exceptions, or discussed as an issue in the judge's proposal for decision.

§80.276. Request for Extension to File Motion for Rehearing.

(a) If an adversely affected party or the party's attorney of record does not receive the notice or acquire actual knowledge of a signed commission decision or order before the 15th day after the date that the decision or order is signed, a period specified by or agreed to under Texas Government Code, §§2001.144(a), 2001.146, 2001.147, 2001.176(a), or §80.272 of this title (relating to Motion for Rehearing) relating to a decision or order or motion for rehearing begins, with respect to that party, on the date the party receives the notice or acquires actual knowledge of the signed decision or order, whichever occurs first. The period may not begin earlier than 15 days or later than 90 days after the date that the decision or order was signed.

(b) To establish a revised period under subsection (a) of this section, the adversely affected party must prove, on sworn motion and notice, that the date the party received notice

from the commission or acquired actual knowledge of the signing of the decision or order was at least 15 days after the date that the decision or order was signed.

(c) The commission must grant or deny the sworn motion not later than the date of the commission's next agenda meeting for which proper notice can be provided.

(d) If the commission fails to grant or deny the motion at the commission's next agenda meeting for which proper notice can be provided, the motion is considered granted.

(e) If the sworn motion filed under subsection (b) of this section is granted with respect to the party filing that motion, all the periods specified by or agreed to under Texas Government Code, §§2001.144(a), 2001.146, 2001.147, 2001.176(a), or §80.272 of this title relating to a decision or order, or motion for rehearing, shall begin on the date specified in the sworn motion that the party first received the notice required by Texas Government Code, §2001.142(a) and (b) or acquired actual knowledge of the signed decision or order. The date specified in the sworn motion shall be considered the date the decision or order was signed.