

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§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 add new §80.276.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking is proposed 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 proposal, and published in this issue of the *Texas Register*, the commission is proposing 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 proposed in Chapters 39, 50, 55, and 80. Sections 4, 6, 7, and 9 of SB 1267 are implemented by rules proposed 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, 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 must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a CCH. 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 TCEQ adopts the rules implementing SB 709.

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 the State Office of Administrative Hearings (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 above.

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. The bill 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 directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments. For directly referred applications, 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 CCH and agency decisions, signature and timeliness of agency decisions, presumption of the date that notice 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 proposed amendments associated with this rulemaking, the proposed 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

Proposed §80.4(c)(17) and (18) implement new Texas Government Code, §2003.047(e-2) and (e-3) in SB 709, Section 1 and Section 5(a)(1) and (b). Subsection (c)(17) is proposed 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 proposed amendments allow the judge to extend the proceeding beyond the specified time if the judge determines that failure to grant an extension would unduly deprive a party of due process or another constitutional right, or by agreement of the parties with approval of the judge. Existing subsection (c)(18) is proposed to be re-designated as subsection(c)(19).

Subsection (d) is proposed to implement new Texas Government Code, §2003.047(e-4) in SB 709, Section 1 and Section 5(a)(1). It would 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 proposes to remove existing subsection (d) because it is no longer needed.

§80.6, Referral to SOAH

Section 80.6(b)(4) and (5) is proposed to implement new Texas Government Code, §2003.047(e-5) in SB 709, Section 1 and Section 5(a)(1). The proposed amendment to subsection (b)(4) would 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 proposed amendment to subsection (b)(5) would 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. Existing subsection (b)(5) would be re-designated as subsection (b)(6).

§80.17, Burden of Proof

Subsection (b) is proposed to be removed and subsection (c) is proposed 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) would be re-designated as subsections (b) and (c).

Subsection (d) is proposed to implement Texas Government Code, §2003.047(i-1), (i-2), and (i-3) in SB 709, Section 1 and Section 5(a)(1). Proposed subsection (d) applies to applications filed on or after September 1, 2015, and would provide that in a CCH regarding a permit application referred under Texas Water Code (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 legal 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 legal requirements by presenting evidence

regarding the referred issues demonstrating that the draft permit violates an applicable legal requirement. 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 proposed to implement SB 709, Sections 5(a)(1) and (b). Applications filed before September 1, 2015, for which the chief clerk has mailed the executive director's preliminary decision and Notice of Draft Permit that are 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, and the executive director determines the refiled application is substantially similar. Subsection (f)(1) - (7) lists the information in the withdrawn application and the refiled application that the executive director may consider in making this determination.

§80.105, Preliminary Hearings

Subsection (e) is proposed to implement Texas Government Code, §2003.047(e-5) in SB 709, Section 1 and Section 5(a)(1). This amendment would provide 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.

§80.108, Executive Director Party Status in Permit Hearings.

The amendment to §80.108 is proposed to implement the amendment to Texas Water Code, §5.228(c) in SB 709, Section 3 and Section 5(a)(1). This amendment provides that 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 proposed 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) would be amended 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 judge of the administrative record described in §80.118(c), concerning Administrative Record.

Proposed subsection (c) would provide 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) would provide 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 requirement. 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 proposed to be re-designated as subsection (d).

§80.118, Administrative Record

The amendment to §80.118 is proposed to implement Texas Government Code, §2003.047(i-1) in SB 709, Section 1 and Section 5(a)(1). Subsection (a) is proposed 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 proposed to be amended to reference proposed 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 proposed to replace "of" in subsection (a)(5).

Subsection (c) is proposed to establish 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 proposed 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.

Proposed subsection (d) would require an applicant to provide a duplicate 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 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.

Proposed subsection (e) would provide 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 proposed for repeal because it is no longer needed. This section 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 proposed to be re-designated as subsections (f) and (g).

Subsection (h) is proposed to implement Texas Government Code, §2003.047(i-1) in SB 709, Section 1 and 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 legal requirements, and, if issued, would protect human health and safety, the environment, and physical property.

§80.252, Judge's Proposal for Decision

Proposed §80.252(b) and (c) would implement Texas Government Code, §2003.047(e-2) in SB 709, Section 1 and 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) would be 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. Current subsections (c) and (d) are re-designated as subsection (d) and (e), respectively.

§80.267, Decision

The amendment to §80.267 is proposed to implement SB 1267, Section 6, which amends the APA in Texas Government Code, §2001.143. Subsection (b) would be 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 proposed 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 proposed 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) would also provide that the deadline for filing a motion for rehearing may be extended under prescribed sections of the APA. The amendment would remove 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 proposed to be amended to include similar changes.

Additionally, subsection (b) would allow 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 proposed to be re-designated as subsection (c) and proposed subsection (c)(4) would be 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) will be 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 proposed 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) would allow 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 proposed 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 proposed 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 would remove the reference to calculation of the date based on notification to the party.

Existing subsection (f) is proposed 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 overrule 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 would remove the reference to calculation of the date based on notification to the party.

Consistent with Texas Government Code, §2001.146(g), subsection (h) is proposed 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 would change the outcome of the contested case or vacate the commission's decision or order that is the subject of the motion and provides for a new decision or order.

Finally, proposed subsection (i) would provide 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 proposed to implement SB 1267, Section 9, which amends the APA in Texas Government Code, §2001.146. The amendment would specify 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 proposed §80.272(h).

§80.274, Motion for Rehearing Not Required in Certain Cases

The amendment to subsection (b) is proposed to implement SB 1267, Section 9, which amends the APA in Texas Government Code, §2001.146. The amendment would remove 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.

§80.276. Request for Extension to File Motion for Rehearing

New §80.276 is proposed to implement SB 1267, Section 4, which amends the APA in Texas Government Code, §2001.142. This new section would provide, 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) would provide 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.

Proposed subsection (c) would provide 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.

Proposed subsection (d) would provide 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, proposed new subsection (e) would provide 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.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government. The proposed rules are procedural in nature and do not directly impact the cost of CCHs. The proposed rules would implement SBs 709 and 1267, both adopted by the 84th Texas Legislature (2015).

SB 709

SB 709 was passed by the 84th Texas Legislature (2015) with an effective date of September 1, 2015. SB 709 makes several changes to the current CCH process for applications for air quality; water quality; municipal, 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 must make timely comments on the application to be considered as an affected person, thus removing the ability for hearing requestors to adopt comments made by others as their own issues for a hearing. A group or association seeking to be considered as an affected person must specifically identify in its comments 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 received on or after September 1, 2015; this is required until the TCEQ adopts the rules implementing SB 709.

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 comments have timely and specifically identified 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 above.

Finally, SB 709 limits the time for the issuance of the ALJ's proposal for decision in a CCH to no longer than 180 days from the date of the preliminary hearing or by the date specified by the commission. SB 709 allows for continuances based upon agreement of

the parties with ALJ's approval, or by the ALJ for issues related to a party's deprivation of due process or another constitutional right. For directly referred applications, the preliminary hearing may not be held until the executive director has issued his response to public comments.

SB 1267

SB 1267, also passed by the 84th Texas Legislature, amends the 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 an agency decision is received, motions for rehearing of agency decisions, and the procedures for judicial review of agency decisions. Rulemaking is needed to implement SB 1267, Sections 4, 6, 7, and 9.

The changes to the APA for which TCEQ rulemaking is necessary are as follows. First, the presumption that notice is received on the third day after mailing is removed. Second, SB 1267 creates a process through which a party that alleges that notice of the commission's decision was not received can seek to alter the timelines for filing a motion for rehearing. Third, the date from which the time period for filing a motion for rehearing will now begin on the date the order is signed, unless altered for a party that does not receive notice of the commission's 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 order that modifies, corrects, or reforms a commission order in response to a previously issued motion for rehearing.

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Local governments that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

The number of units of local governments is a small percentage of the number of applicants for and who comment on air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications. While it is possible that a unit of state government can be a permit applicant, it is rare. If one is, it

would be affected in the same way as other governmental entities who are applicants. State agencies are generally prohibited from contesting TCEQ permit applications, so they would not be affected the same as other governmental entities who protest applications and participate in CCHs.

There are fiscal implications for the agency due to the need to revise the Commissioners' Integrated Database to adequately implement SB 709. However, costs to upgrade the database are not expected to be significant and would be absorbed using current resources.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rule would be compliance with state law and greater clarity for the public and also for applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications.

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

The proposed rules are procedural in nature and do not directly impact the cost of CCHs. There may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

The rules will apply to applicants for certain air quality; water quality; municipal, industrial and hazardous waste; and underground injection control permit applications that are subject to the opportunity for public comment and requests for a CCH on those applications. The number of applicants who are subject to CCH requests has historically been a small number, on the order of approximately 1%.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small

business as it does on a large business. The proposed amendments are procedural in nature and do not directly impact the cost of CCHs. It is not known how many applicants would be small or micro-businesses, but for those that are, there may be a savings in the cost of hearings for applicants due to the new statutory provision that provides that the application and executive director's draft permit establish a prima facie case that the draft permit meets the applicable legal requirements, but the amount cannot be estimated due to the variability in complexity of applications and the number of contested issues. Businesses that are permit applicants and are subject to CCH requests will be required to furnish a copy of their application to the agency if the application is subject to a CCH. There may be additional costs to them to furnish a copy of their application, though these costs are not expected to be significant.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking is necessary to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rulemaking is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local

employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is in effect.

Draft 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 proposed amendments 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 the TWC, in SB 709, and to the APA 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 proposed amendments to Chapter 80 are procedural in nature and implement changes made to the TWC, in SB 709, and to the APA in SB 1267 regarding CCHs and related commission action. This proposed 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.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The proposed amendments 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 SB 709 and SB 1267. The change in procedure will not burden private real property. The proposed amendments 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 proposed amendments 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 proposed 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 amendments affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule amendments are not subject to the Texas Coastal Management Program.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 15, 2015, at 2:00 in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-

3087, or faxed to (512) 239-4808. Electronic comments may be submitted at:
<http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to
comments being submitted via the eComments system. All comments should reference
Rule Project Number 2015-018-080-LS. The comment period closes on September 21,
2015. Copies of the proposed rulemaking can be obtained from the commission's
website at *http://www.tceq.texas.gov/rules/propose_adopt.html*. For further
information, please contact Janis Hudson, Environmental Law Division, at (512) 239-
0466.

SUBCHAPTER A: GENERAL RULES

§§80.4, 80.6, 80.17, 80.25

Statutory Authority

The amendments are proposed 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 (SOAH), 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; Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; Texas Government Code, §2001.006, 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, which prescribes requirements for the notification of decisions and orders of a state agency; and Texas Government Code,

§2003.047, which provides the authority for SOAH to conduct hearings on behalf of the commission.

The proposed 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, 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, extend the proceeding beyond 180 days after 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, 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, 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.

§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 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 legal 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 legal 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. 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) 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 proposed 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); Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; Texas Government Code, §2001.006, 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, which prescribes requirements for the notification of decisions and orders of a state agency; and Texas Government Code,

§2003.047, which provides the authority for SOAH to conduct hearings on behalf of the commission.

The proposed 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 legal 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. 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, 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 a duplicate 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 establishes a prima facie demonstration that the executive director's draft permit meets all legal requirements, and, if issued, would protect human health and safety, the environment, and physical property.

SUBCHAPTER F: POST HEARING PROCEDURES

§80.252, 80.267, 80.272 - 80.274, §80.276

Statutory Authority

The amendments and new section are proposed 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); Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice; Texas Government Code, §2001.006, 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, which prescribes requirements for the notification of decisions and orders of a state agency; and Texas

Government Code, §2003.047, which provides the authority for SOAH to conduct hearings on behalf of the commission.

The proposed 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. 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. 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 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) 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.

(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.