

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to repeal §80.271.

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

This rulemaking is proposed to implement Senate Bill (SB) 1267 adopted by the 84th Texas Legislature (2015), with an effective date of September 1, 2015. 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 contested case hearings (CCHs) 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. Rulemaking implementing SB 1267, Sections 4, 6, 7, and 9 was adopted by the commission on December 9, 2015, in 30 Texas Administrative Code (TAC) Chapter 1, Purpose of Rules, General Provisions; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 70, Enforcement; and Chapter 80, Contested Case Hearings (Rule Project No. 2015-018-080-LS). The applicable rule, §80.272, was amended by the commission on December 9, 2015, and applies to motions for rehearing for CCHs regarding permit applications.

In corresponding rulemaking published in this issue of the *Texas Register*, the commission proposes to amend §35.29 and §55.255, which will complete the rulemaking necessary to implement SB 1267.

### **Section Discussion**

Section 80.271 is proposed for repeal because the changes adopted by the commission on December 9, 2015, to §80.272 make §80.271 obsolete.

### **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Analyst in the Chief Financial Officer Division, has determined that for the first five-year period after rule is repealed, no fiscal implications are anticipated for the agency or for other units of state or local government. The existing rule, and the rule that now applies, §80.272, are procedural in nature and do not directly impact the cost of CCHs.

The proposed repeal would implement SB 1267 adopted by the 84th Texas Legislature (2015). SB 1267 amends the APA, codified in the Texas Government Code, Chapter 2001, which is applicable to all state agencies. SB 1267 revises and creates numerous requirements related to notice of a 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. Rulemaking implementing SB 1267, Sections 4, 6, 7, and 9 was adopted by the commission on December 9, 2015, in 30 TAC Chapters 1, 50, 55, 70, and 80. The proposed repeal of §80.271 is necessary to complete the implementation of SB 1267 by removing an obsolete rule. The repeal of §80.271 is procedural in nature and does not directly impact the cost of CCHs.

The applicable rule, §80.272, was amended by the commission on December 9, 2015, and applies to motions for rehearing for CCHs regarding permit applications. As stated in the fiscal note for that rulemaking, 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, and while it is possible that a unit of state government can be a permit applicant, it is rare. A unit of state government can be a permit applicant, and, if one is, the unit of state government would be affected in the same way as non-governmental entities who are applicants. However, 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.

### **Public Benefits and Costs**

Mr. Horvath has also determined that for each year of the first five years that §80.271 is no longer in effect, the public benefit anticipated from the changes seen would be

compliance with state law and provide greater clarity for the public and also for applicants for emergency or temporary orders and for which a CCH is held on those applications.

No fiscal implications are anticipated for businesses or individuals as a result of the repeal of §80.271.

Section 80.271, proposed for repeal, is procedural in nature and does not directly impact the cost of CCHs.

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

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed repeal of §80.271. Repeal of this rule would have the same effect on a small business as it does on a large business. Section 80.271 is procedural in nature and does not directly impact the cost of CCHs. It is not known how many applicants would be small or micro-businesses.

#### **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 repeal of §80.271 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 rule 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 repeal of §80.271 does not adversely affect a local economy in a material way for the first five years after §80.271 is repealed.

### **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 repeal of §80.271 is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Rather, §80.271 is obsolete.

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 repeal of §80.271 is necessary to complete the implementation of SB 1267 by removing an obsolete rule. The rule that would be repealed, §80.271, is procedural in nature and does not directly impact the cost of CCHs. 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 assessment of whether Texas Government Code, Chapter 2007, is applicable. The primary purpose of the proposed rulemaking to repeal of §80.271 is necessary to complete the implementation of SB 1267 by removing an obsolete rule. Section 80.271 is procedural in nature and does not directly impact the cost of CCHs. Promulgation and enforcement of the proposed rulemaking will not burden private real property. The proposed repeal of §80.271 does 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).

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

The commission reviewed the proposed repeal of §80.271 and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will the repeal affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule repeal is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on January 26, 2016, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to 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 No. 2016-008-055-LS. The comment period closes on January 29, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at [http://www.tceq.texas.gov/rules/propose\\_adopt.html](http://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Janis Hudson, Environmental Law Division, (512) 239-0466.

**SUBCHAPTER F: POST HEARING PROCEDURES**  
**§80.271**

**Statutory Authority**

The repeal is 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; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. Additional relevant sections are Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules; and Texas Government Code, §2001.006, concerning Actions Preparatory to Implementation of Statute or Rule, which authorizes state agencies to adopt rules or take other administrative action that the agency deems necessary 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; and Texas Government Code, §2001.146, concerning Motions for Rehearing: Procedures, which authorizes the procedures for motions for rehearing filed with state agencies.

The proposed repeal implements Texas Government Code, §2001.004, and SB 1267 (84th Texas Legislature, 2015).

**[§80.271. Motion for Rehearing.]**

[(a) Any decision in an administrative hearing before the commission that occurs before 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 within 20 days after the date the party or his attorney of record is notified of the decision or order. 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. 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) a concise statement of each allegation of error.]

[(c) Reply to motion for rehearing. A reply to a motion for rehearing must be filed with the chief clerk within 30 days after the date a party or his attorney of record is notified of the decision or order.]

[(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 within 45 days after the date the party or his attorney of record is notified of the decision or order, 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.]

[(e) Extension of time limits. With the agreement of the parties 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 is not extended beyond 90 days after the date the party is notified of the decision or order.]

[(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, 90 days after the date the party is notified of the decision or order.]