The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the repeal of §§80.3, 80.5, and 80.251.

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

Sections 80.3, 80.5, and 80.251 were initially adopted to be effective June 6, 1996 (May 28, 1996, issue of the *Texas Register* (21 TexReg 4763)). In 1999, the 76th Texas Legislature enacted House Bill (HB) 801, which revised public participation in environmental permitting for certain permit applications declared administratively complete on or after September 1, 1999. The rulemaking to implement HB 801 (and other bills) consolidated the public participation rules across the agency and have subsequently been amended to implement legislation and policy decisions of the commission. The commission necessarily retained procedural rules applicable to certain permit applications declared administratively complete before September 1, 1999, including §§80.3, 80.5, and 80.251.

On June 12, 2019, the commission determined that the rules in 30 TAC Chapter 39, Subchapters A – E; Chapter 50, Subchapters A – C; Chapter 55, Subchapters A and B; and Chapter 80, §§80.3, 80.5, and 80.251 were obsolete and no longer needed because no applications that were declared administratively complete before September 1, 1999, and thus subject to these rules, remain pending with the commission (June 28, 2019, issue of the *Texas Register* (44 TexReg 3304)). This rulemaking would repeal obsolete rules to eliminate any possible confusion as to what the applicable public
participation requirements are and remove unnecessary sections from the commission’s rules.

Concurrently with this rulemaking, the commission is proposing amendments to 30 TAC Chapters 33, 35, 39, 50, 55, 60, 70, 80, 90, 205, 285, 294, 305, 321, 330 - 332, 334, 335, and 350, and new sections in Chapter 39, to make necessary changes due to the proposed repeals (Rule Project Number 2019-121-033-LS). In addition, this rulemaking addresses public notice requirements for certain applications that are not subject to contested case hearing, but are currently subject to rules in Chapter 39, Subchapters A and B, without regard to the applicability date. The public notice requirements for those applications would be relocated to proposed new Chapter 39, Subchapter P.

The commission is also concurrently proposing amendments to 30 TAC Chapters 39, 55, 101, and 116 to make necessary changes due to the proposed repeals for which revisions to the State Implementation Plan are also necessary (Rule Project Number 2019-120-039-LS).

The public’s opportunity to participate in the permitting process will not change nor be affected in any way as a result of these rulemaking projects.

Section by Section Discussion

Subchapter A: General Rules
§80.3, Judges

The commission proposes the repeal of §80.3. This rule applies to permitting applications that were administratively complete before September 1, 1999. No pending applications meet that criterion.

§80.5, Referral to SOAH

The commission proposes the repeal of §80.5. This rule applies to permitting applications that were administratively complete before September 1, 1999. No pending applications meet that criterion.

Subchapter F: Post Hearing Procedures

§80.251, Judge's Proposal for Decision

The commission proposes the repeal of §80.251. This rule applies to permitting applications that were administratively complete before September 1, 1999. No pending applications meet that criterion.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed repeals are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed repeals.
The proposed rulemaking would repeal §§80.3, 80.5, and 80.251 regarding contested case hearings because these rules are obsolete. The obsolete rules apply to certain permit applications that were administratively complete before September 1, 1999. HB 801 superseded the requirements in §§80.3, 80.5, and 80.251 for certain permit applications declared administratively complete on or after September 1, 1999. The rules that implemented HB 801 and subsequent rulemakings to implement legislation and commission policy nullified the rules that are proposed for repeal.

The rules are proposed for repeal because the reviews of applications declared administratively complete prior to September 1, 1999 have been completed. The current requirements for public notice and participation in Chapter 80 and other chapters are not affected by this proposed rulemaking. No fiscal implications are anticipated for the state or units of local government.

**Public Benefits and Costs**

Ms. Bearse also determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from the repeals will be to eliminate obsolete rules regarding the public participation requirements for certain permit applications.

The proposed repeals are not anticipated to result in fiscal implications for businesses or individuals. The rules are proposed for repeal because they have been obsolete since the commission completed its reviews of all of the applications declared
administratively complete before September 1, 1999. The current requirements for contested case hearings in Chapter 80 and other chapters are not affected by this proposed rulemaking. The proposed rulemaking does not remove or add fees and does not affect requirements for any regulated entities.

**Local Employment Impact Statement**

The commission 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 repeals are in effect.

**Rural Community Impact Statement**

The commission reviewed this proposed rulemaking and determined that the proposed repeals do not adversely affect a rural community in a material way for the first five years that the proposed repeals are in effect.

**Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rulemaking for the first five-year period the proposed repeals are in effect.

**Small Business Regulatory Flexibility Analysis**
The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years the proposed repeals are in effect.

**Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does it increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rulemaking should not impact positively or negatively the state's economy.

**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 §§80.3, 80.5, and 80.251 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it 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. Rather, this rulemaking would repeal obsolete rules to ensure there is no confusion regarding the applicable rules for public participation for certain permit applications.

Texas Government Code, §2001.0225, 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 authority of the commission. The proposed repeal of §§80.3, 80.5, and 80.251 does not exceed an express requirement of state law or a requirement of a delegation agreement, and the rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the Statutory Authority section of this
preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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 repeal of §§80.3, 80.5, and 80.251 is procedural in nature and will not burden private real property. The proposed rulemaking 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). The proposed rulemaking does 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 rulemaking and found that the rules proposed for repeal are neither identified in Coastal Coordination Act implementation rules, 31
TAC §505.11(b)(2) or (4), nor will the repeals affect any action or authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking 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.

**Effect on Sites Subject to the Federal Operating Permits Program**

None of the sections proposed for repeal are applicable requirements under 30 TAC Chapter 122 (Federal Operating Permits Program) and therefore, no effect on sites subject to the Federal Operating Permits Program is expected if the commission repeals these rules.

**Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on December 10, 2019, at 10:00 a.m., in Building E, Room 201S, at the commission’s central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss
the proposal 30 minutes prior to the hearing.

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

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: https://www6.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 2019-119-039-LS. The comment period closes on December 16, 2019. Copies of the proposed rulemaking can be obtained from the commission’s website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Amy Browning, Environmental Law Division, at (512) 239-0891.
SUBCHAPTER A: GENERAL RULES

[§80.3, §80.5]

Statutory Authority

The repeals are proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §26.011, which authorizes the commission to maintain the quality of water in the state of Texas; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. The repeals are also proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission's authority to manage solid waste; THSC, §361.017, which provides the commission's authority to manage industrial solid waste and hazardous municipal waste; THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste; THSC, §382.011, which authorizes the commission to control the quality of the state's air; and THSC, §382.017, which authorizes the commission to adopt any rules necessary to carry out its powers and duties to control the quality of the state's air.

The rulemaking implements TWC, §§5.013, 5.102, 5.103, 26.011, and 27.019; and
THSC, §361.024 and §382.017.

[§80.3. Judges.]

[(a) Applicability and delegation.]

[(1) Any application that is declared administratively complete before September 1, 1999 is subject to this section.]

[(2) The commission delegates to the State Office of Administrative Hearings the authority to conduct hearings designated by the commission.]

[(b) The chief administrative law judge will assign judges to hearings. When more than one judge is assigned to a hearing, one of the judges will be designated as the presiding judge and shall resolve all procedural questions. Evidentiary questions will ordinarily be resolved by the judge sitting in that phase of the case, but may be referred by that judge to the presiding judge.]

[(c) Judges shall have authority to:]

[(1) set hearing dates;]
[(2) convene the hearing at the time and place specified in the notice for the hearing;]

[(3) establish the jurisdiction of the commission;]

[(4) rule on motions and on the admissibility of evidence and amendments to pleadings;]

[(5) designate and align parties and establish the order for presentation of evidence, except that the executive director and the public interest counsel shall not be aligned with any other party;]

[(6) examine and administer oaths to witnesses;]

[(7) issue subpoenas to compel the attendance of witnesses, or the production of papers and documents;]

[(8) authorize the taking of depositions and compel other forms of discovery;]

[(9) set prehearing conferences and issue prehearing orders;]
[(10) ensure that information and testimony are introduced as conveniently and expeditiously as possible, including limiting the time of argument and presentation of evidence and examination of witnesses without unfairly prejudicing any rights of parties to the proceeding;]

[(11) limit testimony to matters under the commission’s jurisdiction;]

[(12) continue any hearing from time to time and from place to place;]

[(13) reopen the record of a hearing, before a proposal for decision is issued, for additional evidence where necessary to make the record more complete;]

[(14) impose appropriate sanctions; and]

[(15) exercise any other appropriate powers necessary or convenient to carry out his responsibilities.]
[(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; and]

[(4) send a copy of the chief clerk’s case file to SOAH.]

[(b) The commission shall provide to the judge a list of issues or areas that must be addressed. In addition, the commission may identify and provide additional issues or areas that must be addressed to the judge, or may limit issues or areas to be addressed, at any time. In an enforcement case, the executive director’s petition or EDPR shall serve as the list of issues or areas that must be addressed.]
SUBCHAPTER F: POST HEARING PROCEDURES

[§80.251]

Statutory Authority

The repeal is proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §26.011, which authorizes the commission to maintain the quality of water in the state of Texas; and TWC, §27.019, which authorizes the commission to adopt rules to implement the statutes regarding injection wells. The repeal is also proposed under Texas Health and Safety Code (THSC), §361.011, which provides the commission’s authority to manage solid waste; THSC, §361.017, which provides the commission’s authority to manage industrial solid waste and hazardous municipal waste; THSC, §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste; THSC, §382.011, which authorizes the commission to control the quality of the state’s air; and THSC, §382.017, which authorizes the commission to adopt any rules necessary to carry out its powers and duties to control the quality of the state’s air.

The rulemaking implements TWC, §§5.013, 5.102, 5.103, 26.011, and 27.019; and
THSC, §361.024 and §382.017.

[§80.251. Judge's Proposal for Decision.]

[(a) Any application that is declared administratively complete before September 1, 1999 is subject to this section. Any application that is declared administratively complete on or after September 1, 1999 is subject to §80.252 of this title (relating to Judge's Proposal for Decision).]

[(b) Judge's proposal for decision. After closing the hearing record, the judge will file a written proposal for decision with the chief clerk within 30 working days and will send a copy by certified mail to the executive director and to each party. If the judge is unable to file the proposal within the 30 days, the judge shall request an extension from the commission by filing a request with the chief clerk. Neither the judge’s failure to request an extension, the commission’s failure to grant the requested extension, nor the judge’s failure to file the proposal within the 30 day or extended period shall in any way affect the validity of the judge’s proposal for decision or the commission’s jurisdiction, consideration, or action relative to the proposal for decision.]

[(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 and, in underground injection control, Texas Pollutant Discharge Elimination System, and Resource Conservation and Recovery Act permitting cases for which the commission's permitting authority is authorized by the federal government, proposed changes to the draft permit recommended by the judge in response to public comment, as well as findings of fact and conclusions of law which support the proposal. 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.]

[(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.]