The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§80.109, 80.117, 80.118, and 80.151.

Background and Summary of the Factual Basis for the Proposed Rules

The proposed rulemaking is intended to update some of the commission's procedural rules and is not intended to impose any new procedural or substantive requirements.

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 which 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, and to other actions of the commission.

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 are 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)). As a result, the commission is...
proposing, in a concurrent rulemaking, to repeal obsolete rules in Chapters 39, 50, 55, and 80 (Rule Project Number 2019-119-039-LS) which then necessitates updating other rules, primarily to remove obsolete text and update cross-references.

As part of this rulemaking, the commission is concurrently proposing amendments in 30 TAC Chapters 33, 35, 39, 50, 55, 60, 70, 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. 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 specified date of administrative completeness. The public notice requirements for those applications would be relocated to proposed new Chapter 39, Subchapter P. Proposed amendments to Chapter 80 would remove obsolete text and update text to ensure statutory consistency.

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

§80.109, Designation of Parties
The commission proposes to amend §80.109(b)(5) by removing a cross-reference to §55.29 (Determination of Affected Person), which is concurrently proposed for repeal.

§80.117, Order of Presentation
The commission proposes to amend §80.117(c)(1)(B) to correct a drafting error to ensure the rule is consistent with the statute, Texas Government Code, §2003.047(i-1)(2), added by Senate Bill (SB) 709 (84th Texas Legislature, 2015). Rulemaking to implement SB 709, including the amendment to §80.117, was adopted by the commission on December 9, 2015 (40 Texas Register 9641, 9680).

§80.118, Administrative Record
The commission proposes to amend §80.118(b) by removing a cross-reference to §80.5 (Referral to SOAH), which is concurrently proposed for repeal.

§80.151, Discovery Generally
The commission proposes to amend §80.151 by removing §80.151(b)(1)(A) and re-lettering subsequent subparagraphs (B) and (C).

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 rulemaking is 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 rules.

This rulemaking, concurrently proposed with amendments in various other chapters, will update cross-references of rules related to public participation regarding certain types of permit applications.

**Public Benefits and Costs**

Ms. Bearse determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated will be improved readability and minimized confusion with regard to applicable rules. The rulemaking does not remove or add any current requirements regarding public participation regarding certain types of permit applications. The proposed amendments are not anticipated to result in fiscal implications for businesses or individuals.

**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 rules are in effect.
Rural Community Impact Statement

The commission reviewed this proposed rulemaking and determined that the proposed rules do not adversely affect rural communities in a material way for the first five years that the proposed rulemaking is in effect. The rulemaking applies state-wide to all applicants for certain types of permit applications and the public and communities interested in those applications. These changes will improve readability and minimize confusion with regard to applicable rules.

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 rulemaking is in effect. This rulemaking addresses necessary changes in order to update cross-references.

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 rulemaking is 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 rules 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 amendments of §§80.109, 80.118, and 80.151 are procedural in nature and are not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor do they 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 updates cross-references 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 amendments of §§80.109, 80.118, and 80.151 do not exceed an express requirement of state law or a requirement of a delegation agreement and were not developed solely under the general powers of the agency but are 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 amendments of §§80.109, 80.118, and 80.151 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 rulemaking and found that it is not a rulemaking 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 rulemaking is not subject to the Texas Coastal Management Program (CMP).

Written comments on the consistency of this rulemaking with the CMP goals and policies 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

Sections 80.109, 80.118, and 80.151 are not 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 amends these rules.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 10, 2019, 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 Paige Bond, 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 2019-121-033-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/proplyse_adopt.html. For further information, please contact Amy Browning, Environmental Law Division, at (512) 239-0891.
SUBCHAPTER C: HEARING PROCEDURES

§§80.109, 80.117, 80.118

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; 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, §5.115, which provides authority regarding persons affected in commission hearings; 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 amendments 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. In addition, the amendments are also
proposed under Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules and Texas Government Code, §2003.047, which authorizes the State Office of Administrative Hearings to conduct hearings for the commission.

The rulemaking implements TWC, Chapter 5, Subchapter M; TWC, §§5.013, 5.102, 5.103, 5.122, 26.011, and 27.019; and THSC, §361.024 and §382.011.


(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no person will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed.

(b) Parties.
(1) The executive director is a mandatory party to all commission proceedings concerning matters in which the executive director bears the burden of proof, and in the following commission proceedings:

(A) matters concerning Texas Water Code (TWC), §11.036 and §11.041; TWC, Chapters 13, 35, 36, and 49 - 66; and Texas Local Government Code, Chapters 375 and 395;

(B) matters arising under Texas Government Code, Chapter 2260 and Chapter 11, Subchapter D of this title (relating to Resolution of Contract Claims); and

(C) matters under TWC, Chapter 26, Subchapter I, and Chapter 334, Subchapters H and L of this title (relating to Reimbursement Program and Overpayment Prevention).

(2) In addition to paragraph (1) of this subsection, the executive director is always a party in contested case hearings concerning permitting matters, pursuant to, and in accordance with, the provisions of §80.108 of this title (relating to Executive Director Party Status in Permit Hearings).
(3) The public interest counsel of the commission is a party to all commission proceedings.

(4) The applicant is a party in a hearing on its application.

(5) Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 and §55.203 of this title (relating to Determination of Affected Person). Regardless of any other law, a state agency, except a river authority, may not be a party to a hearing on an application received by the commission on or after September 1, 2011 unless the state agency is the applicant.

(6) The parties to a contested enforcement case include:

(A) the respondent(s);

(B) any other parties authorized by statute; and

(C) in proceedings alleging a violation of or failure to obtain an underground injection control or Texas Pollutant Discharge Elimination System permit, or a state permit for the same discharge covered by a National Pollutant Discharge Elimination System (NPDES) permit that has been assumed by the state under NPDES authorization, any other party granted permissive intervention by the judge. In
exercising discretion whether to permit intervention, the judge shall consider whether
the intervention will unduly delay or prejudice the adjudication of the rights of the
original parties.

(7) The parties to a hearing upon a challenge to commission rules include
the person(s) challenging the rule and any other parties authorized by statute.

(8) The parties to a permit revocation action initiated by a person other
than the executive director shall include the respondent and the petitioner.

(9) The parties to a post-closure order contested case are limited to:

(A) the executive director;

(b) the applicant(s); and

(C) the Public Interest Counsel.

(c) Alignment of participants. Participants (both party and non-party) may be
aligned according to the nature of the proceeding and their relationship to it. The
judge may require participants of an aligned class to select one or more persons to
represent them in the proceeding. Unless otherwise ordered by the judge, each group
of aligned participants shall be considered to be one party for the purposes of §80.115 of this title (relating to Rights of Parties) for all purposes except settlement.

(d) Effect of postponement. If a hearing is postponed for any reason, any person already designated as a party retains party status.

§80.117. Order of Presentation.

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

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

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

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

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

   (B) a [the] permit, if 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 judge.
(3) Any party may present evidence to rebut the prima facie demonstration by demonstrating that one or more provisions in the draft permit violate a specifically applicable state or federal requirement that relates to a matter directly referred to SOAH or referred by the commission. If the prima facie demonstration is rebutted, the applicant or the executive director may present additional evidence to support the executive director's draft permit.

(d) 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 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 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) under §80.5 and §80.6 of this title (Referral to SOAH), of applications filed before September 1, 2015, or applications not referred under Texas Water Code, §5.556 or §5.557, the chief clerk’s case file shall contain the administrative record as described in subsection (a) of this section.

(c) In all hearings on permit applications filed on or after September 1, 2015, which are referred for hearing under Texas Water Code, §5.556 or §5.557, the administrative record in a contested case filed by the chief clerk with SOAH includes the following certified copies of documents:
(1) the items in subsection (a)(1) - (6) of this section, including technical memoranda, that demonstrate the draft permit meets all applicable requirements and, if issued, would protect human health and safety, the environment, and physical property; and

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

(d) For purposes of referral to SOAH under §80.6 of this title for hearings regarding permit applications filed on or after September 1, 2015, that are referred under Texas Water Code, §5.556 and §5.557, the applicant shall provide two duplicates 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.
SUBCHAPTER D: DISCOVERY

§80.151

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), Chapter 5, Subchapter M; 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, §5.115, which provides authority regarding persons affected in commission hearings; 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 amendment 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. In addition, the amendments are also proposed under Texas Government Code, §2001.004, which requires state agencies to
adopt procedural rules and Texas Government Code, §2003.047, which authorizes the State Office of Administrative Hearings to conduct hearings for the commission.

The rulemaking implements TWC, Chapter 5, Subchapter M; TWC, §§5.013, 5.102, 5.103, 5.122, 26.011, and 27.019; and THSC, §361.024 and §382.011.

§80.151. Discovery Generally.

(a) Discovery shall be conducted according to the Texas Rules of Civil Procedure, unless commission rules provide or the judge orders otherwise. The Texas Rules of Civil Procedure shall be interpreted consistently with this chapter, the Texas Water Code, the Texas Health and Safety Code, and the Texas Administrative Procedures Act [APA]. Drafts of prefiled testimony are not discoverable.

(b) Discovery in contested case hearings using prefiled testimony.

(1) This subsection is applicable to contested case hearings for applications which are subject to the jurisdiction of the State Office of Administrative Hearings (SOAH) under 1 TAC §155.151 (relating to Jurisdiction), except for

[(A) contested case hearings using prefiled testimony where all discovery was completed before September 1, 2011;]
(A) [(B)] water ratemaking proceedings; and

(B) [(C)] sewer ratemaking proceedings.

(2) All discovery on a party must be completed before the deadline for that party to submit its prefiled testimony.

(3) In cases where all parties share the same deadline for submission of prefiled testimony, a single deadline for completion of discovery shall apply to all parties.

(4) If parties have different deadlines for the submission of prefiled testimony, the deadline to complete discovery on a party shall be no later than the final deadline for that party to submit prefiled testimony. After a party’s final deadline to submit its prefiled testimony in a contested case, that party is no longer subject to discovery from other parties in the case.

(5) The requirements of this subsection do not relieve a party’s duty to supplement its discovery responses as required by Texas Rules of Civil Procedure §193.5 and §195.6.

(c) All other contested case hearings are governed by this section as it existed
immediately before the effective date of this section and the rule is continued in effect for that purpose.