

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: May 11, 2016

DATE OF REQUEST: April 22, 2016

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Kris Hogan, (512) 239-6812

CAPTION: Docket No. 2015-1015-RUL. Consideration for publication of, and hearing on, proposed new Sections 39.901 - 39.903 of 30 TAC Chapter 39, Public Notice; new Sections 295.300 - 295.306 of 30 TAC Chapter 295, Water Rights, Procedural; new Sections 297.200 - 297.210 of 30 TAC Chapter 297, Water Rights, Substantive; and, new Sections 318.1 - 318.9, 318.21 - 318.30, 318.40 - 318.43, 318.60, and 318.61 of 30 TAC Chapter 318, Marine Seawater Desalination Discharges.

The proposed rulemaking would implement House Bill (HB) 2031 from the 84th Texas Legislature, 2015, Regular Session, relating to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater and HB 4097 from the 84th Texas Legislature, 2015, Regular Session, relating to seawater desalination projects. (Kathy Ramirez, Michael Parr) (Rule Project No. 2015-029-295-OW)

L'Oreal Stepney, P.E.

Deputy Director

Kim Wilson

Division Director

Kristina M. Hogan

Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** April 22, 2016

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: L'Oreal W. Stepney, P.E., Deputy Director
Office of Water

Docket No.: 2015-1015-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 39, Public Notice
Chapter 295, Water Rights, Procedural
Chapter 297, Water Rights, Substantive
Chapter 318, Marine Seawater Desalination Discharges
HB 2031 and HB 4097: Marine Seawater Desalination
Rule Project No. 2015-029-295-OW

Background and reason(s) for the rulemaking:

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509, Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of treated marine seawater into the Gulf of Mexico.

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HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the Texas Parks and Wildlife Department (TPWD) and the Texas General Land Office (GLO) conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater and for the commission to adopt rules designating diversion zones by September 1, 2020. Under TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater must consult with TPWD and GLO regarding the point(s) of diversion or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities, amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 Texas Administrative Code (TAC) Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h),

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directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

For Chapters 295 and 297, the scope of the proposed rulemaking is to implement the directive in TWC, Chapter 18, and corresponding amendments to the TWC in order to address marine seawater desalination projects. In addition, the rulemaking is proposed to implement the directive in TWC, §11.1405 and §26.0272, and corresponding amendments to the TWC in order to address seawater desalination for industrial purposes.

The proposed rules would expedite permitting and related processes for: 1) the diversion of marine seawater and conveyance of treated marine seawater in the bed and banks of a watercourse in accordance with TWC, Chapter 18; and 2) the diversion of seawater for desalination and use for industrial purposes in accordance with TWC, §11.1405.

In newly created Chapter 318, the proposed rules provide an expedited permitting process for treated marine seawater discharges (e.g. the resulting freshwater from the desalination process) and off-shore discharges (wastewater discharges from the marine seawater desalination project into the Gulf of Mexico at a point located three or more miles off-shore). Near-shore discharges (wastewater discharges from the marine seawater desalination project into the Gulf of Mexico at a point located less than three miles off-shore) are subject to the Texas Discharge Pollutant Elimination System (TPDES) and must be processed in accordance with existing permitting procedures, however applications will be expedited within this framework.

Under the proposed rules, the permitting process for treated marine seawater discharges contains streamlined applications, reduced review periods, use of email, reduced applicant response times, a single web-based notice, and a shorter public comment period. For treated marine seawater discharges, the executive director will review timely public comments and develop a response to comments. In accordance with TWC, §18.005(e)(1), the public may request a public meeting and/or a contested case hearing on treated marine seawater discharges.

Under the proposed rules, the permitting process for off-shore discharges also contains streamlined applications, reduced review periods, use of email, reduced applicant response times, a single web-based notice, and a shorter public comment period. For off-shore discharges, the executive director will review timely public comments and develop a final technical summary instead of a response to comments. In accordance with TWC, §18.005(e)(3), there is no opportunity for a public meeting or contested case hearing for off-shore discharges.

The proposed rules in Chapter 39 provide an expedited public notice process for treated marine seawater discharges and off-shore discharges from the marine seawater desalination project.

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B.) Scope required by federal regulations or state statutes:

The proposed rulemaking would establish an expedited permitting and related processes for the diversion of marine seawater, treated marine seawater discharges, and off-shore discharges in accordance with TWC, Chapter 18. In addition, TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater to address seawater desalination for industrial purposes.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

TWC, Chapter 18; TWC, §§5.013, 5.102, 5.103, 5.120, 5.509, 5.551, 7.302, 11.0237, 11.082, 11.0842, 11.121, 11.1405, 16.053, 26.011, 26.027, 26.0272, 26.0291, 27.021, 27.025, 26.041; and THSC, Chapter 341, Subchapter C, §341.0316.

Effect on the:

A.) Regulated community:

Members of the regulated community who apply for a permit associated with the diversion of marine seawater, conveyance of treated marine seawater in the bed and banks of a watercourse, the diversion of seawater for desalination and use for industrial purposes, treated marine seawater discharges, and wastewater discharges from marine seawater desalination projects will be affected by this proposed rulemaking. The rules will be applied by TCEQ staff during the administrative and technical reviews of water rights applications associated with the diversion of marine seawater, conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and use for industrial purposes. After an application for a water right is granted, a permittee will be required to meet the terms and special conditions of their permit.

This rulemaking, in accordance with HB 2031 and HB 4097, requires a person who plans to divert and use state water that consists of marine seawater or seawater to determine the TDS concentrations of the seawater at the water source by monthly sampling for a period of one year and analysis. The data collected is to be provided to TCEQ in accordance with HB 2031 and HB 4097. The rulemaking requires reasonable measures to minimize impingement and entrainment and that marine seawater and seawater may be diverted for any beneficial purpose (if the seawater is treated before it is used). The rulemaking will require the applicant to consult with TPWD and the GLO in accordance with HB 2031 regarding the diversion and discharge points prior to submitting an application.

Additionally, this rulemaking provides an alternative expedited procedure for obtaining a discharge permit for a marine seawater desalination plant. The rules will be applied by TCEQ staff during the administrative and technical reviews and public notice process for

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wastewater discharge applications from marine seawater desalination plants. These types of discharges may, alternatively, be authorized under TWC, Chapter 26 and 30 TAC Chapter 305.

In accordance with TWC, §18.005(e), the rulemaking requires the application process for treated marine seawater discharges to include public notice, public comment, an opportunity for a public meeting, and an opportunity for a contested case hearing. However, the application process for off-shore discharges only includes public notice and comment.

Near-shore discharge applications are subject to TPDES requirements and must be processed in accordance with the existing permitting procedures. The executive director will make every reasonable effort to expedite the review of these applications.

B.) Public:

The proposed rules are required by HB 2031 and HB 4097 to provide expedited permitting processes associated with marine seawater desalination, including diversions and discharges. In HB 2031, the legislature states that marine seawater is a potential new source of water for drinking and other beneficial uses. Furthermore, the legislature stated the purpose of the bill is to streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination.

C.) Agency programs:

The proposed rulemaking would have little impact on agency programs. The Water Availability Division will implement the rules when processing applications associated with the diversion of marine seawater, conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and use for industrial purposes. If an applicant applies under these rules, program staff will expedite these types of applications.

The Water Quality Division will implement the rules when processing applications associated with treated marine seawater discharges and off-shore discharges when applicants choose to apply for a permit under the rules proposed by this rulemaking. Applicants still retain the option to apply for a discharge permit under TWC, Chapter 26, and 30 TAC Chapter 305. If an applicant chooses to apply under new Chapter 318, program staff will expedite reviews of these types of applications.

Stakeholder meetings:

A stakeholder meeting was held on October 8, 2015, in Austin, Texas. TCEQ staff presented general information about the proposed rulemaking and solicited stakeholder comments regarding the implementation of HB 2031 and HB 4097. The meeting was attended by 26 stakeholders representing a broad spectrum of interests affected by this rulemaking and across the state. The comment period related to this stakeholder meeting remained open until October 23, 2015, and the commission received comment letters from the Guadalupe-

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Blanco River Authority, the National Wildlife Federation, the Lone Star Chapter of the Sierra Club, and TPWD. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science, and other public interest and relevant factors.

A rule public hearing will be held during the comment period in Austin.

Potential controversial concerns and legislative interest:

There is legislative interest regarding the implementation of HB 2031 and HB 4097.

Will this rulemaking affect any current policies or require development of new policies?

No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

TWC, §§11.1405, 18.003, and 18.005, directs the commission to adopt rules providing an expedited procedure for acting on an application associated with the diversion of marine seawater, conveyance of treated marine seawater in the bed and banks of a watercourse, the diversion of seawater for desalination and use for industrial purposes, treated marine seawater discharges, and wastewater discharges from marine seawater desalination plants. This rulemaking complies with the statutes and any alternative course of action would not be in compliance with HB 2031 and HB 4097. These bills did not offer alternative regulatory methods of expediting a permit for a desalination facility.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: May 11, 2016

Anticipated *Texas Register* publication date: May 27, 2016

Anticipated public hearing date: June 21, 2016

Anticipated public comment period: May 27, 2016 - June 28, 2016

Anticipated adoption date: October 19, 2016

Agency contacts:

Kathy Ramirez, Water Availability Division, (512) 239-6757

Michael Parr, Staff Attorney, (512) 239-0611

Kris Hogan, Texas Register Coordinator, (512) 239-6812

Attachments

HB 2031

HB 4097

cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover

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Re: Docket No. 2015-1015-RUL

Erin Chancellor

Stephen Tatum

Jim Rizk

Office of General Counsel

Kathy Ramirez

Kris Hogan

AN ACT

relating to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater; adding provisions subject to a criminal penalty.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. (a) With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The purpose of this Act is not to hinder efforts to conserve or develop other surface water supplies but rather to more fully explore and expedite the development of all this state's water resources in order to balance this state's supply and demand for water, which is one of the most precious resources of this state.

(b) Currently, the projected long-term water needs of this state far exceed the firm supplies that are available and that can reasonably be made available from freshwater sources within this state. The legislature recognizes the importance of providing for this state's current and future water needs at all times, including, consistent with reasonable drought contingency measures, during severe droughts.

(c) In this state, marine seawater is a potential new source

1 of water for drinking and other beneficial uses. This state has
2 access to vast quantities of marine seawater from the Gulf of
3 Mexico. The purpose of this Act is to streamline the regulatory
4 process for and reduce the time required for and cost of marine
5 seawater desalination.

6 (d) The legislature finds that marine seawater desalination
7 facilities should be cost-effectively and timely developed,
8 concurrently with other water planning solutions, to help this
9 state meet its current and future water needs.

10 (e) The legislature finds that it is necessary and
11 appropriate to grant authority and provide for expedited and
12 streamlined authorization for marine seawater desalination
13 facilities, consistent with appropriate environmental and water
14 right protections, in order to avoid unnecessary costs, delays, and
15 uncertainty and thereby help justify the investment of significant
16 resources in the development of such facilities.

17 SECTION 2. Section 5.509(a), Water Code, is amended to read
18 as follows:

19 (a) The commission may issue an emergency or temporary order
20 relating to the discharge of waste or pollutants into or adjacent to
21 water in the state if:

22 (1) the order is necessary to enable action to be taken
23 more expeditiously than is otherwise provided by Chapter 18 or 26,
24 as applicable, to effectuate the policy and purposes of that
25 chapter; and

26 (2) the commission finds that:

27 (A) the discharge is unavoidable to:

1 (i) prevent loss of life, serious injury,
2 or severe property damage;

3 (ii) prevent severe economic loss or
4 ameliorate serious drought conditions, to the extent consistent
5 with the requirements for United States Environmental Protection
6 Agency authorization of a state permit program; or

7 (iii) make necessary and unforeseen repairs
8 to a facility;

9 (B) there is no feasible alternative to the
10 proposed discharge;

11 (C) the discharge will not cause significant
12 hazard to human life and health, unreasonable damage to the
13 property of persons other than the applicant, or unreasonable
14 economic loss to persons other than the applicant; and

15 (D) the discharge will not present a significant
16 hazard to the uses that will be made of the receiving water after
17 the discharge.

18 SECTION 3. Section 5.551, Water Code, is amended by adding
19 Subsection (a-1) to read as follows:

20 (a-1) Notwithstanding Section 18.002, this subchapter does
21 not apply to a permit issued under Section 18.005(c)(2) if the point
22 of discharge is not located within three miles of any point located
23 on the coast of this state.

24 SECTION 4. Section 7.302(a), Water Code, is amended to read
25 as follows:

26 (a) This section applies to a permit or exemption issued by
27 the commission under:

- 1 (1) Section 18.005 of this code;
- 2 (2) Chapter 26, 27, 28, or 31 of this code;
- 3 (3) [~~2~~] Subchapter C or R, Chapter 361, Health and
- 4 Safety Code;
- 5 (4) [~~3~~] Subchapter D, Chapter 366, Health and Safety
- 6 Code;
- 7 (5) [~~4~~] Chapter 382, Health and Safety Code; or
- 8 (6) [~~5~~] a rule adopted under any of those
- 9 provisions.

10 SECTION 5. Section 11.0237(b), Water Code, is amended to
11 read as follows:

12 (b) This section does not alter the commission's
13 obligations under Section 11.042(a-1), (b), or (c), 11.046(b),
14 11.085(k)(2)(F), 11.134(b)(3)(D), 11.147, 11.1471, 11.1491,
15 11.150, 11.152, 16.058, [~~or~~] 16.059, or 18.004.

16 SECTION 6. Section 11.082, Water Code, is amended by adding
17 Subsection (a-1) to read as follows:

18 (a-1) Notwithstanding Section 18.002, this section does not
19 apply to a violation of:

20 (1) Section 18.003 or a permit issued under that
21 section; or

22 (2) Section 18.004 or an authorization granted under
23 that section.

24 SECTION 7. Section 11.0842, Water Code, is amended by
25 adding Subsection (a-1) to read as follows:

26 (a-1) Notwithstanding Section 18.002, this section does not
27 apply to a violation of:

1 (1) Section 18.003 or a permit issued under that
2 section; or

3 (2) Section 18.004 or an authorization granted under
4 that section.

5 SECTION 8. Section 11.121, Water Code, is amended to read as
6 follows:

7 Sec. 11.121. PERMIT REQUIRED. Except as provided in
8 Sections 11.142, 11.1421, ~~and~~ 11.1422, and 18.003 ~~[of this code]~~,
9 no person may appropriate any state water or begin construction of
10 any work designed for the storage, taking, or diversion of water
11 without first obtaining a permit from the commission to make the
12 appropriation.

13 SECTION 9. Section 16.053(e), Water Code, is amended to
14 read as follows:

15 (e) Each regional water planning group shall submit to the
16 development board a regional water plan that:

17 (1) is consistent with the guidance principles for the
18 state water plan adopted by the development board under Section
19 16.051(d);

20 (2) provides information based on data provided or
21 approved by the development board in a format consistent with the
22 guidelines provided by the development board under Subsection (d);

23 (2-a) is consistent with the desired future conditions
24 adopted under Section 36.108 for the relevant aquifers located in
25 the regional water planning area as of the date the board most
26 recently adopted a state water plan under Section 16.051 or, at the
27 option of the regional water planning group, established subsequent

1 to the adoption of the most recent plan;

2 (3) identifies:

3 (A) each source of water supply in the regional
4 water planning area, including information supplied by the
5 executive administrator on the amount of modeled available
6 groundwater in accordance with the guidelines provided by the
7 development board under Subsections (d) and (f);

8 (B) factors specific to each source of water
9 supply to be considered in determining whether to initiate a
10 drought response;

11 (C) actions to be taken as part of the response;
12 and

13 (D) existing major water infrastructure
14 facilities that may be used for interconnections in the event of an
15 emergency shortage of water;

16 (4) has specific provisions for water management
17 strategies to be used during a drought of record;

18 (5) includes but is not limited to consideration of
19 the following:

20 (A) any existing water or drought planning
21 efforts addressing all or a portion of the region;

22 (B) approved groundwater conservation district
23 management plans and other plans submitted under Section [16.054](#);

24 (C) all potentially feasible water management
25 strategies, including but not limited to improved conservation,
26 reuse, and management of existing water supplies, conjunctive use,
27 acquisition of available existing water supplies, and development

1 of new water supplies;

2 (D) protection of existing water rights in the
3 region;

4 (E) opportunities for and the benefits of
5 developing regional water supply facilities or providing regional
6 management of water supply facilities;

7 (F) appropriate provision for environmental
8 water needs and for the effect of upstream development on the bays,
9 estuaries, and arms of the Gulf of Mexico and the effect of plans on
10 navigation;

11 (G) provisions in Section [11.085\(k\)\(1\)](#) if
12 interbasin transfers are contemplated;

13 (H) voluntary transfer of water within the region
14 using, but not limited to, regional water banks, sales, leases,
15 options, subordination agreements, and financing agreements; ~~and~~

16 (I) emergency transfer of water under Section
17 [11.139](#), including information on the part of each permit, certified
18 filing, or certificate of adjudication for nonmunicipal use in the
19 region that may be transferred without causing unreasonable damage
20 to the property of the nonmunicipal water rights holder; and

21 (J) opportunities for and the benefits of
22 developing large-scale desalination facilities for marine seawater
23 that serve local or regional entities;

24 (6) identifies river and stream segments of unique
25 ecological value and sites of unique value for the construction of
26 reservoirs that the regional water planning group recommends for
27 protection under Section [16.051](#);

1 (7) assesses the impact of the plan on unique river and
2 stream segments identified in Subdivision (6) if the regional water
3 planning group or the legislature determines that a site of unique
4 ecological value exists;

5 (8) describes the impact of proposed water projects on
6 water quality; and

7 (9) includes information on:

8 (A) projected water use and conservation in the
9 regional water planning area; and

10 (B) the implementation of state and regional
11 water plan projects, including water conservation strategies,
12 necessary to meet the state's projected water demands.

13 SECTION 10. Subtitle C, Title 2, Water Code, is amended by
14 adding Chapter 18 to read as follows:

15 CHAPTER 18. MARINE SEAWATER DESALINATION PROJECTS

16 Sec. 18.001. DEFINITIONS. In this chapter:

17 (1) "Commission" means the Texas Commission on
18 Environmental Quality.

19 (2) "Marine seawater" means water that is derived from
20 the Gulf of Mexico.

21 (3) "Project" means:

22 (A) a marine seawater desalination project; or

23 (B) a facility for the storage, conveyance, and
24 delivery of desalinated marine seawater.

25 Sec. 18.002. RELATIONSHIP TO OTHER LAWS. (a) Except as
26 provided by Subsection (b) or as otherwise provided by law:

27 (1) Chapter 11 applies to a permit or authorization

1 under Section 18.003 or 18.004 in the same manner as that chapter
2 applies to a permit or authorization under that chapter; and

3 (2) Chapter 26 applies to a permit under Section
4 18.005 in the same manner as that chapter applies to a permit under
5 that chapter.

6 (b) In the event of a conflict between this chapter and
7 Chapter 11 or 26, this chapter controls.

8 (c) This chapter is intended to provide an alternative
9 procedure for obtaining an authorization to divert and use state
10 water that consists of marine seawater or to discharge treated
11 marine seawater or waste resulting from the desalination of treated
12 marine seawater under the circumstances provided by this chapter.
13 This chapter does not affect the authority of a person to:

14 (1) divert and use state water that consists of marine
15 seawater in accordance with the procedures provided by Chapter 11,
16 including the authority to divert marine seawater from a point of
17 diversion located in a bay or estuary; or

18 (2) discharge treated marine seawater or waste
19 resulting from the desalination of treated marine seawater in
20 accordance with the procedures provided by Chapter 26, including
21 the authority to discharge waste resulting from the desalination of
22 marine seawater into a bay or estuary.

23 Sec. 18.003. DIVERSIONS OF MARINE SEAWATER. (a) A person
24 must obtain a permit to divert and use state water that consists of
25 marine seawater if:

26 (1) the point of diversion is located less than three
27 miles seaward of any point located on the coast of this state; or

1 (2) the seawater contains a total dissolved solids
2 concentration based on a yearly average of samples taken monthly at
3 the water source of less than 20,000 milligrams per liter.

4 (b) A person may divert and use state water that consists of
5 marine seawater without obtaining a permit if Subsection (a) does
6 not apply.

7 (c) A person who diverts and uses state water that consists
8 of marine seawater under a permit required by Subsection (a) or as
9 authorized by Subsection (b) must determine the total dissolved
10 solids concentration of the seawater at the water source by monthly
11 sampling and analysis and provide the data collected to the
12 commission. A person may not begin construction of a facility for
13 the diversion of marine seawater without obtaining a permit until
14 the person has provided data to the commission based on the analysis
15 of samples taken at the water source over a period of at least one
16 year demonstrating that Subsection (a)(2) does not apply. A person
17 who has begun construction of a facility for the diversion of marine
18 seawater without obtaining a permit because the person has
19 demonstrated that Subsection (a)(2) does not apply is not required
20 to obtain a permit for the facility if the total dissolved solids
21 concentration of the seawater at the water source subsequently
22 changes so that Subsection (a)(2) applies.

23 (d) A person may use marine seawater diverted under a permit
24 required by Subsection (a) or as authorized by Subsection (b) for
25 any beneficial purpose, but only if the seawater is treated in
26 accordance with rules adopted by the commission before it is used.
27 Rules adopted under this subsection may impose different treatment

1 requirements based on the purpose for which the seawater is to be
2 used.

3 (e) The commission shall adopt rules providing an expedited
4 procedure for acting on an application for a permit required by
5 Subsection (a). The rules must provide for notice, an opportunity
6 for the submission of written comment, and an opportunity for a
7 contested case hearing regarding commission actions relating to an
8 application for a permit.

9 (f) A person may not divert marine seawater under a permit
10 required by Subsection (a) or as authorized by Subsection (b) from a
11 point of diversion located in a bay or estuary.

12 (g) An application for a permit required by Subsection (a)
13 must address the points from which, and the rate at which, the
14 facility the applicant proposes to construct will divert marine
15 seawater.

16 (h) The commission by rule shall prescribe reasonable
17 measures to minimize impingement and entrainment.

18 (i) The Parks and Wildlife Department and the General Land
19 Office jointly shall conduct a study to identify zones in the Gulf
20 of Mexico that are appropriate for the diversion of marine
21 seawater, taking into account the need to protect marine organisms.
22 Not later than September 1, 2018, the Parks and Wildlife Department
23 and the General Land Office shall submit a report on the results of
24 the study to the commission. The report must include recommended
25 diversion zones for designation by the commission and
26 recommendations for the number of points from which, and the rate at
27 which, a facility may divert marine seawater. Not later than

1 September 1, 2020, the commission by rule shall designate
2 appropriate diversion zones. A diversion zone may be contiguous
3 to, be the same as, or overlap a discharge zone. The point or points
4 from which a facility may divert marine seawater must be located in
5 a diversion zone designated by the commission under rules adopted
6 under this subsection if:

7 (1) the facility is authorized by a permit as required
8 by Subsection (a) issued after the rules are adopted; or

9 (2) the facility is exempt under Subsection (b) from
10 the requirement of a permit and construction of the facility begins
11 after the rules are adopted.

12 (j) Until the commission adopts rules under Subsection (i),
13 a person must consult the Parks and Wildlife Department and the
14 General Land Office regarding the point or points from which a
15 facility the person proposes to construct may divert marine
16 seawater before submitting an application for a permit for the
17 facility if Subsection (a) applies or before beginning construction
18 of the facility if Subsection (b) applies.

19 Sec. 18.004. BED AND BANKS AUTHORIZATION. (a) With prior
20 authorization granted under rules prescribed by the commission, a
21 person may use the bed and banks of any flowing natural stream in
22 this state or a lake, reservoir, or other impoundment in this state
23 to convey marine seawater that has been treated so as to meet
24 standards that are at least as stringent as the water quality
25 standards applicable to the receiving stream or impoundment adopted
26 by the commission.

27 (b) The commission shall provide for notice and an

1 opportunity for the submission of written comment but may not
2 provide an opportunity for a contested case hearing regarding
3 commission actions relating to an application for an authorization
4 under this section to use the bed and banks of a flowing natural
5 stream to convey treated marine seawater. The commission shall
6 provide for notice, an opportunity for the submission of written
7 comment, and an opportunity for a contested case hearing regarding
8 commission actions relating to an application for an authorization
9 under this section to use a lake, reservoir, or other impoundment to
10 convey treated marine seawater.

11 (c) A person may not discharge treated marine seawater into
12 a flowing natural stream in this state or a lake, reservoir, or
13 other impoundment in this state for the purpose of conveyance of the
14 water under an authorization granted under this section unless the
15 person holds a permit issued under Section 18.005 authorizing the
16 discharge.

17 (d) Treated marine seawater that is conveyed under an
18 authorization granted under this section may be used only by the
19 person to whom the authorization is granted.

20 (e) Section 11.042(c) applies to an authorization granted
21 under this section in the same manner as that subsection applies to
22 an authorization granted under Section 11.042.

23 (f) This section does not prohibit a person from conveying
24 treated marine seawater in any other manner authorized by law.

25 Sec. 18.005. DISCHARGE OF TREATED MARINE SEAWATER OR WASTE
26 RESULTING FROM DESALINATION OF MARINE SEAWATER. (a) In this
27 section, "permit," "person," "to discharge," "waste," and "water"

1 have the meanings assigned by Section 26.001.

2 (b) Section 26.011 applies to discharges governed by this
3 section in the same manner as that section applies to discharges
4 governed by Chapter 26.

5 (c) A person must obtain a permit to discharge:

6 (1) treated marine seawater into a natural stream in
7 this state or a lake, reservoir, or other impoundment in this state;
8 or

9 (2) waste resulting from the desalination of treated
10 marine seawater into the Gulf of Mexico.

11 (d) A person shall:

12 (1) treat marine seawater so as to meet standards that
13 are at least as stringent as the water quality standards adopted by
14 the commission applicable to the receiving stream or impoundment
15 before discharging the seawater under this section; and

16 (2) comply with all applicable state and federal
17 requirements when discharging waste resulting from the
18 desalination of marine seawater into the Gulf of Mexico.

19 (e) The commission by rule shall provide an expedited
20 procedure for acting on an application for a permit under this
21 section. The rules must provide for:

22 (1) notice, an opportunity for the submission of
23 written comment, and an opportunity to request a public meeting and
24 may authorize a contested case hearing regarding commission actions
25 relating to an application for a permit described by Subsection
26 (c)(1);

27 (2) notice, an opportunity for the submission of

1 written comment, an opportunity to request a public meeting, and an
2 opportunity for a contested case hearing regarding commission
3 actions relating to an application for a permit described by
4 Subsection (c)(2) if the point of discharge is located within three
5 miles of any point located on the coast of this state; and

6 (3) notice and an opportunity for the submission of
7 written comment regarding commission actions relating to an
8 application for a permit described by Subsection (c)(2) if
9 Subdivision (2) of this subsection does not apply.

10 (f) A person may not discharge waste resulting from the
11 desalination of marine seawater into a bay or estuary under a permit
12 issued under Subsection (c)(2).

13 (g) The Parks and Wildlife Department and the General Land
14 Office jointly shall conduct a study to identify zones in the Gulf
15 of Mexico that are appropriate for the discharge of waste resulting
16 from the desalination of marine seawater, taking into account the
17 need to protect marine organisms. Not later than September 1, 2018,
18 the Parks and Wildlife Department and the General Land Office shall
19 submit a report on the results of the study to the commission. The
20 report must include recommended discharge zones for designation by
21 the commission. Not later than September 1, 2020, the commission by
22 rule shall designate appropriate discharge zones. The point at
23 which a facility may discharge waste resulting from the
24 desalination of marine seawater must be located in a discharge zone
25 designated by the commission under rules adopted under this
26 subsection if the facility is authorized by a permit issued under
27 Subsection (c)(2) after the rules are adopted.

1 (h) Until the commission adopts rules under Subsection (g),
2 a person must consult the Parks and Wildlife Department and the
3 General Land Office regarding the point at which the facility the
4 person proposes to construct may discharge waste resulting from the
5 desalination of marine seawater before submitting an application
6 for a permit under Subsection (c)(2) for the facility.

7 SECTION 11. Section 26.0291(a), Water Code, is amended to
8 read as follows:

9 (a) An annual water quality fee is imposed on:

10 (1) each wastewater discharge permit holder,
11 including the holder of a permit issued under Section 18.005, for
12 each wastewater discharge permit held; and

13 (2) each user of water in proportion to the user's
14 water right, through permit or contract, as reflected in the
15 commission's records, provided that the commission by rule shall
16 ensure that no fee shall be assessed for the portion of a municipal
17 or industrial water right directly associated with a facility or
18 operation for which a fee is assessed under Subdivision (1) of this
19 subsection.

20 SECTION 12. Subchapter C, Chapter 341, Health and Safety
21 Code, is amended by adding Section 341.0316 to read as follows:

22 Sec. 341.0316. DESALINATION OF MARINE SEAWATER FOR DRINKING
23 WATER. (a) This section applies only to a desalination facility
24 that is intended to treat marine seawater for the purpose of
25 producing water for the public drinking water supply. This section
26 does not apply to a desalination facility used to produce
27 nonpotable water.

1 (b) The commission shall adopt rules to:

2 (1) allow water treated by a desalination facility to
3 be used as public drinking water; and

4 (2) ensure that water treated by a desalination
5 facility meets the requirements of Section 341.031 and rules
6 adopted under that section.

7 (c) A person may not begin construction of a desalination
8 facility that treats marine seawater for the purpose of removing
9 primary or secondary drinking water contaminants unless the
10 commission approves the construction of the facility.

11 SECTION 13. Section 16.060, Water Code, is repealed.

12 SECTION 14. This Act takes effect immediately if it
13 receives a vote of two-thirds of all the members elected to each
14 house, as provided by Section 39, Article III, Texas Constitution.
15 If this Act does not receive the vote necessary for immediate
16 effect, this Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I certify that H.B. No. 2031 was passed by the House on May 1, 2015, by the following vote: Yeas 137, Nays 0, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2031 was passed by the Senate on May 26, 2015, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor

AN ACT

relating to seawater desalination projects.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 39.203, Utilities Code, is amended by adding Subsection (i) to read as follows:

(i) The commission, in cooperation with transmission and distribution utilities and the ERCOT independent system operator, shall study whether existing transmission and distribution planning processes are sufficient to provide adequate infrastructure for seawater desalination projects. If the commission determines that statutory changes are needed to ensure that adequate infrastructure is developed for projects of that kind, the commission shall include recommendations in the report required by Section 31.003.

SECTION 2. Subchapter Z, Chapter 39, Utilities Code, is amended by adding Section 39.9055 to read as follows:

Sec. 39.9055. EXAMINATION OF DEMAND RESPONSE POTENTIAL OF SEAWATER DESALINATION PROJECTS. The commission and the ERCOT independent system operator shall study the potential for seawater desalination projects to participate in existing demand response opportunities in the ERCOT market. To the extent feasible, the study shall determine whether the operational characteristics of seawater desalination projects enable projects of that kind to participate in ERCOT-operated ancillary services markets or other

1 competitively supplied demand response opportunities. The study
2 shall also determine the potential economic benefit to a seawater
3 desalination project if the project is able to reduce its demand
4 during peak pricing periods. The commission shall include the
5 results of the study in the report required by Section 31.003.

6 SECTION 3. Section 11.121, Water Code, is amended to read as
7 follows:

8 Sec. 11.121. PERMIT REQUIRED. Except as provided in
9 Sections 11.1405, 11.142, 11.1421, and 11.1422 [~~of this code~~], no
10 person may appropriate any state water or begin construction of any
11 work designed for the storage, taking, or diversion of water
12 without first obtaining a permit from the commission to make the
13 appropriation.

14 SECTION 4. Subchapter D, Chapter 11, Water Code, is amended
15 by adding Section 11.1405 to read as follows:

16 Sec. 11.1405. DESALINATION OF SEAWATER FOR USE FOR
17 INDUSTRIAL PURPOSES. (a) The commission may issue a permit under
18 this section to authorize a diversion of state water from the Gulf
19 of Mexico or a bay or arm of the Gulf of Mexico for desalination and
20 use for industrial purposes if:

21 (1) the point of diversion is located less than three
22 miles seaward of any point located on the coast of this state; or

23 (2) the seawater contains a total dissolved solids
24 concentration based on a yearly average of samples taken monthly at
25 the water source of less than 20,000 milligrams per liter.

26 (b) A person may divert state water from the Gulf of Mexico
27 or a bay or arm of the Gulf of Mexico for desalination and use for

1 industrial purposes without obtaining a permit if Subsection (a)
2 does not apply.

3 (c) A person who diverts and uses state water that consists
4 of marine seawater under a permit issued under Subsection (a) or as
5 authorized by Subsection (b) must determine the total dissolved
6 solids concentration of the seawater at the water source by monthly
7 sampling and analysis and provide the data collected to the
8 commission. A person may not begin construction of a facility for
9 the diversion of marine seawater for the purposes provided by this
10 section without obtaining a permit until the person has provided
11 data to the commission based on the analysis of samples taken at the
12 water source over a period of at least one year demonstrating that
13 Subsection (a)(2) does not apply. A person who has begun
14 construction of a facility for the diversion of marine seawater for
15 the purposes provided by this section without obtaining a permit
16 because the person has demonstrated that Subsection (a)(2) does not
17 apply is not required to obtain a permit for the facility if the
18 total dissolved solids concentration of the seawater at the water
19 source subsequently changes so that Subsection (a)(2) applies.

20 (d) A permit application under this section must be
21 submitted as required by commission rule.

22 (e) The commission is not required to make a finding of
23 water availability for an application under this section.

24 (f) The commission shall evaluate whether any proposed
25 diversion under this section is consistent with any applicable
26 environmental flow standards established under Section [11.1471](#).

27 (g) The commission may include any provision in a permit

1 issued under this section that the commission considers necessary
2 to comply with the environmental flow standards established under
3 Section 11.1471.

4 (h) The commission shall adopt rules providing an expedited
5 procedure for acting on an application for a permit under
6 Subsection (a). The rules must provide for notice, an opportunity
7 for the submission of written comment, and an opportunity for a
8 contested case hearing regarding commission actions relating to an
9 application for a permit.

10 SECTION 5. Subchapter B, Chapter 26, Water Code, is amended
11 by adding Section 26.0272 to read as follows:

12 Sec. 26.0272. PERMITS AUTHORIZING DISCHARGES FROM CERTAIN
13 SEAWATER DESALINATION FACILITIES. (a) This section applies only to
14 a facility that generates water treatment residuals from the
15 desalination of seawater solely for use as part of an industrial
16 process.

17 (b) The commission may issue a permit for the discharge of
18 water treatment residuals from the desalination of seawater into
19 the portion of the Gulf of Mexico inside the territorial limits of
20 the state.

21 (c) Before issuing a permit under this section, the
22 commission must evaluate the discharge of water treatment residuals
23 from the desalination of seawater into the Gulf of Mexico for
24 compliance with the state water quality standards adopted by the
25 commission, the requirements of the Texas Pollutant Discharge
26 Elimination System program, and applicable federal law.

27 (d) The commission may issue individual permits or a general

1 permit under this section. If the commission elects to issue
2 individual permits under this section, the commission must
3 establish procedures for the review of an application that, at a
4 minimum, comply with the requirements of Subchapter M, Chapter 5.
5 If the commission elects to issue a general permit under this
6 section, the commission must comply with the requirements of
7 Section 26.040.

8 SECTION 6. Section 27.021, Water Code, is amended by adding
9 Subsection (a-1) to read as follows:

10 (a-1) A permit issued under this section may authorize the
11 disposal of water treatment residuals produced by the desalination
12 of seawater.

13 SECTION 7. Section 27.025, Water Code, is amended by adding
14 Subsection (a-1) to read as follows:

15 (a-1) A general permit issued under this section may
16 authorize an injection well for the disposal of concentrate
17 produced by the desalination of seawater. The general permit must
18 include any requirements necessary to maintain delegation of the
19 federal underground injection control program administered by the
20 commission.

21 SECTION 8. This Act takes effect immediately if it receives
22 a vote of two-thirds of all the members elected to each house, as
23 provided by Section 39, Article III, Texas Constitution. If this
24 Act does not receive the vote necessary for immediate effect, this
25 Act takes effect September 1, 2015.

President of the Senate

Speaker of the House

I certify that H.B. No. 4097 was passed by the House on May 11, 2015, by the following vote: Yeas 137, Nays 0, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 4097 on May 26, 2015, by the following vote: Yeas 145, Nays 0, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 4097 was passed by the Senate, with amendments, on May 23, 2015, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§39.901 - 39.903.

Background and Summary of the Factual Basis for the Proposed Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509,

Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater and for the commission to adopt

rules designating diversion zones by September 1, 2020. Under TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater must consult with the TPWD and the GLO regarding the point(s) of diversion or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of

water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In addition, TWC, §26.0272(b), indicates that TCEQ may issue a permit for the discharge of water treatment residuals from the desalination of seawater into the portion of the Gulf of Mexico inside the territorial limits of the state. TWC, §26.0272(c), specifies that prior to issuing a permit, TCEQ must evaluate the discharge of water treatment residuals from the desalination of seawater into the Gulf of Mexico for compliance with the state water quality standards, requirements of the Texas Pollutant Discharge Elimination System program, and applicable federal law. TWC, §26.0272(d), indicates that permits may be individual or general. TWC, §26.0272(d), also specifies that for individual permits, an application review procedure, at a minimum, must comply with the requirements of TWC, Chapter 5, Subchapter M; and the commission must comply with the requirements of TWC, §26.040, for a general permit.

TWC, §27.021, allows TCEQ to issue an individual Class I injection well permit authorizing the disposal of water treatment residuals produced by the desalination of seawater. TWC, §27.025, allows TCEQ to authorize a Class I injection well under a

general permit for the disposal of concentrate produced by the desalination of seawater. TWC, §27.025, specifies that the general permit must include any requirements necessary to maintain delegation of the federal underground injection control program administered by TCEQ.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also proposes new sections in 30 TAC Chapter 295, Water Rights, Procedural; 30 TAC Chapter 297, Water Rights, Substantive; and, 30 TAC Chapter 318, Marine Seawater Desalination Discharges to implement HB 2031 and HB 4097.

Section by Section Discussion

Subchapter O: Public Notice for Marine Seawater Desalination Projects

§39.901, Applicability

Proposed new §39.901, identifies the types of applications subject to Chapter 39, Subchapter O, which establishes the public notice process for treated marine seawater and off-shore discharge permits from marine seawater desalination projects under

TWC, Chapter 18. This section clarifies that the terms "Treated marine seawater," "Off-shore discharges," and "Marine seawater desalination project" have the same meanings as the terms are defined in 30 TAC §318.2.

§39.902, Public Notice and Comment for Treated Marine Seawater Discharges

Proposed new §39.902, identifies the public notice and comment process. Proposed §39.902(a) specifies that the executive director will file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk. Proposed §39.902(b) describes the contents of the notice. Proposed §39.902(c) specifies that the notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and the technical summary will be published on the TCEQ website for public review and comment. Additionally, these documents will be emailed to the state senator and representative who represent the area where the facility is or will be located and to the TPWD and the GLO. Proposed §39.902(d) requires a new notice if major amendments or transfers are made after notice is published. Proposed §39.902(e) specifies that the public comment period ends 10 days after notice is published unless the comment period is extended by the executive director for good cause. This section also specifies that the comment period is extended to the close of any public meeting. Proposed §39.902(f) describes the public meeting notice content. Proposed §39.902(g) specifies that notice of a public meeting will be mailed or emailed to any person who submitted

comments or requested a public meeting; emailed to the state senator and representative who represent the area where the facility is or will be located, the TPWD and the GLO; and published on the TCEQ website.

§39.903, Public Notice and Comment for Off-Shore Discharges

Proposed new §39.903, identifies the public notice and comment process for off-shore discharges. Proposed §39.903(a) specifies that the executive director will file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk. Proposed §39.903(b) describes the contents of the notice. Proposed §39.903(c) specifies that the notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and technical summary will be published on the TCEQ website for public review and comment. Additionally, these documents will be emailed to the state senator and representative who represent the area where the facility is or will be located and to the TPWD and the GLO. Proposed §39.903(d) requires new notice if major amendments or transfers are made after notice is published. Proposed §39.903(e) specifies that the public comment period ends 10 days after the notice is published unless the comment period is extended by the executive director for good cause. Late comments will be added to the application file but will not be processed. Proposed §39.903(f) specifies that after the close of the comment period, the executive director will evaluate timely and relevant public comments and develop a final technical summary. The final

technical summary will include a summary of all timely and relevant public comments, a response to the issues raised in public comments, and the executive director's final decision on the application. This response to issues raised is not intended to be a detailed discussion and response to each comment, but rather a high level discussion and response to the issues raised in public comment. This high level discussion is to demonstrate that the executive director reviewed and considered the issues raised in public comment.

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 and no fiscal implications are expected for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The rules are proposed in order to implement HB 2031 which created an expedited permitting process for marine seawater desalination projects. HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process.

These proposed rules in Chapter 39 establish the public notice and comment process for treated marine seawater and off-shore discharge permit applications from marine seawater desalination projects. Although the permitting process is expedited, the agency does not expect significant costs or cost savings due to the implementation of the proposed rules. Agency staff does not expect a need for additional resources to issue any permits under the proposed rules as they do not expect a significant number of permit applications. Under the current permitting process, permittees must publish two legal notices in the largest newspaper in the county where the facility is or will be located. The expedited permitting process in the proposed rulemaking allows for a single web-based public notice rather than two newspaper public notices. This change is not expected to significantly impact agency operations.

Desalination plants are not expected to be owned or operated by other units of state or local government. No significant revenue or costs are expected for the agency due to the administration of the proposed rules.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and a streamlined regulatory process for marine seawater desalination that would assist the state to develop new water supplies

to meet the ever-increasing demand for water.

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

Under the current permitting process, permittees must publish two legal notices in the largest newspaper in the county where the facility is or will be located. The expedited permitting process in the proposed rulemaking allows for a single web-based public notice rather than two newspaper public notices. Legal notices in newspapers can range from approximately \$500 for small newspapers and up to \$4,000 for large newspapers. So the cost savings from using web-based notices rather than two newspaper publications can be \$1,000 - \$8,000 depending on the location of the facility.

According to agency staff, there are currently no marine seawater desalination plants in Texas nor are there a significant number expected to be constructed in the first five years after the proposed rules would come into effect. Any marine seawater desalination plants that would be constructed would be owned by large businesses capable of funding large financial capital expenditures. Even though individuals would pay for water from a desalination plant, they would also benefit from having a new water supply.

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 rules do not affect the regulatory burden on small or micro-businesses unless they intend to own or operate a marine seawater desalination plant. Under the proposed rules, if a business does apply for a permit associated with a marine seawater desalination plant, there would be some cost savings from using web-based notices rather than two newspaper publications.

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 rules are necessary in order to comply with state law and does not adversely affect small or micro-businesses in a material way for the first five years that the proposed rules are 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 rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a) because it does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a "major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and 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. 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 or the state.

The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination. HB 2031 states that the purpose of the new law is to remain

economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. More specifically, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

Therefore, the specific intent of the proposed rulemaking is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rules in Chapter 39 are for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the processes for obtaining a permit to discharge treated marine seawater and waste resulting from the desalination of marine seawater under TWC, Chapter 18. The proposed new rules will protect the health and safety of aquatic and wildlife resources, as well as water quality, however, the proposed rules will not adversely affect the economy, a sector of the economy, productivity, competition, or jobs within the state or a sector of the state. Accordingly, the commission concludes that the proposed rulemaking does not meet the definition of a "major environmental rule."

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather creates an expedited process under state

law to ensure efficient regulatory oversight, while comprehensively protecting the state's natural resources. Third, the proposed rulemaking does not come under a delegation agreement or contract with a federal program, and finally, it is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB 2031. Therefore, the commission does not proposed the rules solely under the commission's general powers.

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 it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis. The specific purpose of the proposed rulemaking is to modify the TAC to implement the changes to the TWC, from HB 2031, which creates procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rulemaking will substantially advance this stated purpose by proposing rules in Chapter 39, that are intended to articulate and expedite the permitting process for marine seawater desalination discharges in accordance with HB

2031 and TWC, Chapter 18.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. For marine seawater, there are no real property rights that have been granted for use of the water in the Gulf of Mexico. These actions will not affect or burden private real property rights because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore

must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and, 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the proposed rules include: discharges must comply with water quality-based effluent limits; discharges that increase pollutant loadings to coastal waters must not impair designated uses of coastal waters and must not significantly degrade coastal water quality, unless necessary for important economic or social development; and to the greatest extent practicable, new wastewater outfalls must be located where they will not adversely affect critical areas.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies. The proposed rules are consistent with these CMP goals and policies because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because the proposed rules do not allow a discharge from marine seawater desalination projects into or adjacent to water in the

state, except in accordance with an individual permit issued by the commission.

Individual permits issued under these proposed rules will include effluent limitation to ensure compliance with water quality standards. Further, the expedited permitting process in these proposed rules cannot be used to authorize discharges of reject water into bays and estuaries. Reject water must be discharged into the Gulf of Mexico, and applicants must consult with the TPWD and the GLO regarding the outfall location(s).

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 June 21, 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 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: <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 2015-029-295-OW. The comment period closes on June 28, 2016. 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 Kathy Ramirez, Water Availability Section, at (512) 239-6757 or Laurie Fleet, Wastewater Permitting Section, at (512) 239-5445.

**SUBCHAPTER O: PUBLIC NOTICE FOR MARINE SEAWATER
DESALINATION PROJECTS**

§§39.901 - 39.903

Statutory Authority

The rules 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 TWC, §5.103; 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, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC,

Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

§39.901. Applicability

The provisions of this subchapter establish the public notice process for treated marine seawater discharge permits and off-shore discharge permits from marine seawater desalination projects under Texas Water Code, Chapter 18. For the purposes of this subchapter, the terms "Treated marine seawater," "Off-shore discharges," and "Marine seawater desalination project" have the same meaning as the definitions of these terms found in §318.2 of this title (relating to Definitions).

§39.902. Public Notice and Comment for Treated Marine Seawater Discharges.

(a) Filing the administrative record. After the technical review is completed, the executive director shall file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk.

(b) Notice text. The notice of application and preliminary decision must contain the following information:

(1) the permit number;

(2) the name, address, and telephone number of the applicant;

(3) a brief description of the location and nature of the proposed marine seawater desalination project, including the location of each outfall;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(5) if applicable, a statement that the application is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(6) a brief description of public comment procedures, including:

(A) a description of the manner in which comments regarding the executive director's preliminary decision may be submitted;

(B) the deadline to file comments; and

(C) the deadline to request a public meeting or a contested case hearing;

(7) a statement that the executive director will respond to comments raising issues that are timely received and are relevant, material or otherwise significant;

(8) a brief description of procedures by which the public may request a public meeting and a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility will be located or there is substantial public interest in the proposed activity;

(9) a statement that there is an opportunity for a contested case hearing, the procedures by which the public may request a contested case hearing, and that only disputed issues of fact or mixed issues of fact and law that are relevant and material to the commission's decision that are raised during the comment period can be considered if a contested case hearing is granted;

(10) a statement that the executive director may issue final approval of the application unless a timely contested case hearing request is filed with the chief clerk after transmittal of the executive director's decision and response to public comment;

(11) the name and telephone number of an agency contact that interested persons may contact for further information; and

(12) any additional information required by the executive director.

(c) Publication of the notice. The notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and the technical summary, excluding oversized documents, will be published on the TCEQ website for public review and comment. Additionally, these documents will be emailed to the state senator and representative who represent the general area in which the facility is or will be located, the Texas Parks & Wildlife Department, and the Texas General Land Office at the email address on file for these individuals and agencies.

(d) Amendment after notice. No amendments to an application which would constitute a major amendment under the terms of §318.6 of this title (relating to Amendment of a Permit) can be made by the applicant after the notice of application

and preliminary decision has been published, unless new notice is published which includes a description of the proposed amendments to the application. For purposes of this subsection, an attempted transfer of an application shall constitute an amendment requiring additional notice.

(e) Public comment. Public comments must be filed with the chief clerk within the time period specified in the notice. The public notice period shall end 10 calendar days after the date of publication on the TCEQ website unless extended by the executive director for good cause. The public comment period shall be extended to the close of any public meeting.

(f) Public meeting notice. Notice of a public meeting must include the following information:

(1) the information required by subsection (b)(1) - (3) and (11) of this section;

(2) the date, time, and place of the meeting;

(3) a brief description of the nature and purpose of the meeting, including the applicable rules and procedures; and

(4) a brief description of public comment procedures, including a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and a statement in the notice for any permit application for which there is an opportunity for contested case hearing, that only relevant and material issues raised during the comment period can be considered if a contested case hearing is granted.

(g) Recipients of public meeting notice. Notice of a public meeting will be mailed or emailed to any person who submitted comments or requested a public meeting; emailed to the state senator and representative who represent the area where the facility is or will be located, the Texas Parks & Wildlife Department, and the Texas General Land Office; and published on the TCEQ website at least 14 calendar days prior to the meeting date. The chief clerk need not mail or email notice of the public meeting to persons submitting public comment or public meeting requests who have not provided a return mailing address or email address.

§39.903. Public Notice and Comment for Off-Shore Discharges.

(a) Filing the administrative record. After the technical review is completed, the executive director shall file the application, draft permit, technical summary, and draft notice of application and preliminary decision with the chief clerk.

(b) Notice text. The notice of application and preliminary decision must contain the following information:

(1) the permit number;

(2) the name, address, and telephone number of the applicant;

(3) a brief description of the location and nature of the proposed marine seawater desalination project, including the location of each outfall;

(4) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(5) a statement that the application is subject to the Coastal Management Program and must be consistent with the Coastal Management Program goals and policies;

(6) a description of the manner in which comments regarding the executive director's preliminary decision may be submitted and the deadline to file comments;

(7) a statement that the executive director will evaluate comments raising issues that are timely received and are relevant, material or otherwise significant and develop a final technical summary;

(8) the name and telephone number of an agency contact that interested persons may contact for further information; and

(9) any additional information required by the executive director.

(c) Publication of the notice. The notice of application and preliminary decision, the administratively and technically complete application, the draft permit, and the technical summary, excluding oversized documents, will be published on the TCEQ website for public review and comment. Additionally, these documents will be emailed to the state senator or representative who represent the area where the facility is or will be located, the Texas Parks & Wildlife Department, and the Texas General Land Office at the email address on file for these individuals and agencies.

(d) Amendment after notice. No amendments to an application which would constitute a major amendment under the terms of §318.6 of this title (relating to Amendment of a Permit) can be made by the applicant after the notice of application

and preliminary decision has been published, unless new notice is published which includes a description of the proposed amendments to the application. For purposes of this subsection, an attempted transfer of an application shall constitute an amendment requiring additional notice.

(e) Public comment. Public comment must be filed with the chief clerk within the time period specified in the notice. The public notice period shall end 10 calendar days after the date of publication on the TCEQ website unless extended by the executive director for good cause. A public comment that is not filed with the chief clerk by the deadline provided in the notice shall be accepted by the chief clerk and placed in the application file but the chief clerk shall not process it.

(f) Response to comments and final decision. After the close of the comment period, the executive director shall:

(1) evaluate all timely received and relevant, material or otherwise significant issues raised in public comments;

(2) develop a final technical summary which includes:

(A) a summary of all timely received and relevant, material or otherwise significant issues raised in public comments;

(B) a response to the issues raised in public comments; and

(C) a summary of the executive director's final decision;

(3) revise the draft permit in response to comments, if necessary; and

(4) file the final technical summary and revised draft permit, if applicable, with the chief clerk within the shortest practical time after the comment period ends.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§295.300 - 295.306.

Background and Summary of the Factual Basis for the Proposed Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509,

Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of treated marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater and for the commission to adopt

rules designating diversion zones by September 1, 2020. Under TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater must consult with the TPWD and the GLO regarding the point(s) of diversion or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of

water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also proposes new sections in 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 318, Marine Seawater Desalination Discharges to implement HB 2031 and HB 4097.

Section by Section Discussion

Subchapter G: Desalination, Procedural

The commission proposes new Subchapter G in Chapter 295 to contain all of the requirements for a water right application to divert marine seawater or seawater and a water right application to convey treated marine seawater in the bed and banks of a

watercourse. This new subchapter also contains the requirements for notice of a water right application to divert marine seawater or seawater and for notice of a water right application to convey treated marine seawater in the bed and banks of a watercourse. The commission must adopt rules to implement TWC, §11.1405 and Chapter 18. The commission specifically invites commenters to provide any relevant information that may differ from its proposed rules, which in the commenter's opinion would assist the commission in deciding on adopted rules for water right applications to divert marine seawater or seawater and for water right applications to convey treated marine seawater in the bed and banks of a watercourse. The adopted rules may differ from this proposal and may include additional components based on public comment. The commission invites comments on all aspects of the proposed rules.

§295.300, Applicability

The commission proposes new §295.300 to describe the purpose of Subchapter G and under what circumstances it applies. Subchapter G is intended to provide an alternate procedure for obtaining an authorization to divert and use state water that consists of marine seawater, to divert and desalinate water for industrial purposes from a bay or arm of the Gulf of Mexico, and to convey treated marine seawater in the bed and banks of a watercourse.

§295.301, Definitions

The commission proposes new §295.301. The proposed section has definitions of terms that only apply to Subchapter G. 30 TAC Chapter 55 does not apply to applications to divert marine sea water from the Gulf of Mexico or to take seawater from a bay or arm of the Gulf of Mexico for industrial purposes. In §295.301(1) the commission proposes a definition of "Affected person." In §295.301(2) the commission proposes a definition of "Marine seawater" consistent with TWC, §18.001(2). In §295.301(3) the commission proposes a definition of "Seawater" as water that is derived from a bay or arm of the Gulf of Mexico.

§295.302, Requirements for Diversion of Marine Seawater and Diversion of Seawater.

The commission proposes new §295.302. The proposed section sets out the application requirements for a water rights application to divert marine seawater or seawater that will apply only to applications under Subchapter G. In §295.302(a) and (b), the commission proposes that an application for diversion of marine seawater or seawater conform to the requirements in §295.2 and §295.14 so that an application to divert marine seawater or seawater will be submitted in the form of a water rights application. In §295.302(c) and (d) the commission proposes that an application for a water right permit to divert marine seawater or seawater should include the location of the diversion point(s), the total amount of marine seawater or seawater to be diverted and the rate of diversion for the marine seawater or seawater to be consistent with the requirements for a water right application for a new diversion. In §295.302(e) the

commission proposes that the application shall include a purpose of use, and if the diverted marine seawater is to be used for more than one purpose, the specific amount to be used annually for each purpose. The commission proposes this requirement so that it can determine whether the proposed use is a beneficial use, and whether the proposed treatment of the marine seawater is consistent with the proposed use. The commission further proposes new §295.302(f) requiring the applicant to provide evidence that the marine seawater or seawater will be treated in accordance with commission rules based on the purpose of use for which the marine seawater or seawater will be used in accordance with TWC, §18.002(d). In §295.302(g) and (h) the commission proposes that an application to divert marine seawater or seawater include a Water Conservation Plan and evidence that the application is consistent with the State and Regional Water Plans because under TWC, §18.002(a)(1), TWC, Chapter 11, including the requirement for a conservation plan and consistency with state and regional water plans, applies to a permit to divert marine seawater. In §295.302(i) and (j) the commission proposes to also include requirements related to water conservation and consistency with state and regional water plans for applications for diversions of seawater. Finally, in §295.302(k) the commission proposes that an application to divert marine seawater shall include evidence of consultation with the TPWD and the GLO in accordance with TWC, §18.005(i). The commission proposes that an applicant for diversion of seawater should also provide evidence of consultation because diversion zones have not been identified at the time of this rulemaking.

§295.303, Review Timeframes

The commission proposes new §295.303 regarding review timeframes for a water right application to divert marine seawater and to divert seawater for industrial use from a bay or arm of the Gulf of Mexico to provide for an expedited review of applications submitted under Subchapter G in accordance with TWC, §18.003(e). In §295.303(a) the commission proposes that an application must be administratively complete when submitted in order for expedited review to apply. In §295.303(b) applications will be reviewed within 10 working days to determine whether the application is administratively complete and contains the information required under §295.302. In §295.303(c) the commission proposes that technical review of a water right application to divert marine seawater be completed within 60 working days in order to provide for expedited review of these applications. In §295.303(d) the commission proposes requirements and timeframes that would apply to a water right application to divert marine seawater or seawater if the information required under §295.302 is not sufficient for a complete review. The commission proposes that an applicant be provided no less than 30 days to submit the necessary information and provides that if the necessary information is not received, the application may be returned. The commission proposes this requirement to expedite processing of water right applications to divert marine seawater and seawater.

§295.304, Notice of Application to Divert Marine Seawater or Seawater

The commission proposes new §295.304 to provide the notice requirements for an application to divert marine seawater or to divert and desalinate seawater for industrial use. In §295.304(a) the commission proposes that mailed notice of an application be provided to the TPWD and the GLO because water right applications to divert marine seawater and to divert and desalinate seawater for industrial use would not be located in a river basin as set out in TWC, §11.002(11). The notice requirements in this section do not apply to points of diversion which are located in a river basin as set out in TWC, §11.002(11). In §295.304(b)(1) - (8) the commission proposes that the notice include the applicable information required for mailed notice of a water right application, as set out in §295.151. In §295.304(b)(9) the commission proposes that the notice state that an affected person may submit written comments and request a contested case hearing in accordance with TWC, §18.003(e). In §295.304(b)(11) the commission proposes that the notice can also include any additional information the commission considers necessary which provides the commission flexibility to ensure that the notice includes all relevant information on the application. In §295.304(c) the commission proposes that requests for a contested case hearing submitted on applications to divert marine seawater or seawater will be processed in accordance with 30 TAC Chapter 55, Subchapter G. The commission notes that the definition of "Affected person" in §295.301 is intended to control over the definition of "Affected person" in 30 TAC §55.103.

§295.305, Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks

The commission proposes new §295.305. The proposed section sets out the application requirements for a water rights application to convey treated marine seawater in the bed and banks of a watercourse that will apply only to applications under Subchapter G. In §295.305(a), the commission proposes that an applicant for a water right to convey treated marine seawater in the bed and banks of a watercourse provide evidence that the marine seawater will be treated so as to meet standards that are at least as stringent as the commission's adopted water quality standards for the watercourse in which the treated marine seawater will be conveyed in accordance with TWC, §18.004(a). In §295.305(b) the commission proposes that treated marine seawater conveyed under an authorization granted under this section may only be used by the person to whom the authorization is granted in accordance with TWC, §18.004(d). The commission proposes §295.305(c) to implement TWC, §18.004(f), which states that §295.305 does not prohibit a person from conveying marine seawater in any other manner authorized by law. The commission proposes §295.305(d) to provide the application requirements for a water right permit to convey treated marine seawater in the bed and banks of a watercourse. The requirements in §295.305(d) are substantially the same requirements for an application under §295.113; however, §295.305(d) does not include requirements for information on interbasin transfers because the conveyed treated marine seawater does not originate from a river basin. The commission's proposed application

requirement in §295.305(d)(4) implements TWC, §18.004(c), which relates to discharge of the treated marine seawater, and the commission's proposed application requirement in §295.305(d)(5), relating to consistency with environmental flow standards, implements TWC, §11.1405(f) and (g). The commission's proposed application requirement in §295.305(d)(6) ensures that sufficient information is provided in the application to allow the commission to determine whether other water rights could be affected by the application. The commission's proposed application requirement in §295.305(d)(7) facilitates expedited processing of an application because the accounting plan will be required to be submitted with the application.

§295.306, Notice of Application to Convey Treated Marine Seawater in Bed and Banks

The commission proposes new §295.306 to provide the notice requirements for a water right application to convey treated marine seawater in the bed and banks of a watercourse. In §295.306(a) - (c) the commission proposes that mailed notice of an application be provided to every water right holder of record downstream of the discharge point, that the application not require published notice, and that the applicant shall be responsible for the costs of providing notice. The commission's proposed notice is consistent with the notice requirements in §295.161, which states the notice requirements for an application under TWC, §11.402(c) consistent with TWC, §18.004(e). In §295.306(d)(1) - (7) and (10), the commission proposes that notice include general information on the application and contact information for the agency.

Section 295.306(d)(8) and (9) specifically implements TWC, §18.004(b), relating to notice. In §295.306(d)(11) the commission proposes that the notice can also include any additional information the commission considers necessary which provides the commission flexibility to ensure that the notice includes all relevant information on the application. Finally, in §295.306(e) the commission proposes that requests for a contested case hearing submitted on applications to divert marine seawater or seawater will be processed in accordance with Chapter 55, Subchapter G. The commission notes that the definition of "Affected person" in §295.301 is intended to control over the definition of "Affected person" in §55.103.

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 and no fiscal implications are expected for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules implement HB 2031 and HB 4097. HB 2031 establishes an expedited permitting process for marine seawater desalination projects. HB 4097 addresses seawater desalination as it is used for industrial purposes. The proposed rules implement a new expedited permitting process that will be applied by TCEQ staff during

the administrative and technical reviews of applicable water rights applications associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and use for industrial purposes. The rulemaking does not propose any new fees.

Although the permitting process is expedited, the agency does not expect the need for additional resources to issue any permits under the proposed rules as staff does not expect a significant number of permit applications. The rulemaking will require the applicant to consult with the TPWD and the GLO in accordance with the provisions of HB 2031 prior to submitting an application. The permit application fee for a water rights permit under this expedited permitting process would not change from the current fee for applying for a water rights permit.

Although governmental entities could apply for a water rights permit under the proposed expedited permitting process, no state or local governments are anticipated to do so at this time. Because few marine seawater diversion, conveyance, or industrial use permit applications are expected under the proposed rules, no significant fiscal implications are anticipated for the agency.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and a streamlined regulatory process for marine seawater desalination that would assist the state to develop new water supplies to meet the ever-increasing demand for water.

No fiscal implications are anticipated for businesses or individuals as a result of the administration and enforcement of the proposed rules. The proposed rules would affect businesses or individuals who apply for water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and its use for industrial purposes.

The proposed rules would require any person or business entity that plans to divert and use state water that consists of marine seawater to determine the TDS concentrations of the seawater at the water source by monthly analysis and sampling for a period of one year. The data collected is to be provided to TCEQ in accordance with provisions in HB 2031 and HB 4097. Costs associated with TDS sampling would include monthly sample collection for one year, sampling equipment, laboratory costs, data analysis and submittal to TCEQ. The proposed rules require reasonable measures to minimize impingement and entrainment and also allow that marine seawater may be diverted for

any beneficial purpose (if the seawater is treated before it is used). Personnel costs for the required sample collection and data analysis, as well as laboratory costs and reasonable measures to minimize impingement and entrainment will be specific to each applicant. These specific costs are context dependent and can't be quantified without knowing the specific nature of each application.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration and enforcement of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. It is not known how many small or micro-businesses would submit water rights applications under the proposed rules. The proposed rules do not increase the regulatory burden on small or micro-businesses unless they intend to obtain water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, or the diversion of seawater for desalination and its use for industrial purposes. If a small or micro-business does apply for such a water rights permit, then it is assumed that any costs would be recovered through increased costs passed on to its customers.

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 rules are necessary in order to comply with state law and does not adversely affect small or micro-businesses in a material way for the first five years that the proposed rules are 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 rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission has reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and has determined that this rulemaking is not a "major environmental rule." The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination, and HB 4097, creating TWC, §11.1405, relating to seawater desalination projects for industrial purposes. HB 2031 states that the purpose of the new law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The legislature also stated that in this state, marine seawater is a potential new source of water for drinking and other beneficial uses, and that this state has access to vast quantities of marine seawater from the Gulf of

Mexico. The legislature stated that the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

Therefore, the purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way 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" (Texas Government Code, §2001.0225(g)(3)). The purpose of this rulemaking is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The rules proposed in Chapter 295 streamline the processes for obtaining a permit to divert or transport marine seawater under TWC, Chapter 18, and to divert seawater for industrial purposes under TWC, §11.1405.

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB

2031 and HB 4097.

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 these proposed rules and performed analysis of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rules would substantially advance this stated purpose by adding provisions to Chapter 295 to streamline the processes for obtaining a permit to divert or transport marine seawater under TWC, Chapter 18, and to divert seawater for industrial purposes under TWC, §11.1405.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." For marine

seawater, there are no permanent water rights, real property rights that have been granted for use of the water in the Gulf of Mexico. For seawater in a bay or arm of the Gulf of Mexico, very few water rights have been granted for this water. There is no potential for harm to other water rights by this rulemaking. The burden on private real property rights will be nonexistent or minimal because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. Diversions of seawater in a bay or arm of the Gulf of Mexico are also limited to industrial water and water for municipal and domestic needs will not be taken from this part of the Gulf of Mexico.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and, 2) to ensure sound management of all coastal resources by allowing

for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the proposed rules include those contained in 31 TAC

§501.33(a). The proposed rules implement HB 2031 and HB 4097, which direct the commission to regulate the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater through expedited permitting and related processes. In HB 2031, the legislature finds "...that it is necessary and appropriate to grant authority and provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water right protections, ..." Since one of the purposes of the proposed rules is to protect coastal natural resources, the rules are consistent with the CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because one of the purposes of the proposed rules is to protect coastal and natural resources.

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 June 21, 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 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: <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 2015-029-295-OW. The comment period closes on June 28, 2016.

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 Kathy Ramirez, Water Availability Section, at (512) 239-6757 or Lori Hamilton, Water Rights Permitting and Availability Section, at (512) 239-3169.

SUBCHAPTER G: DESALINATION, PROCEDURAL

§§295.300 - 295.306

Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the TCEQ's authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; and TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes.

The proposed rules implement TWC, §§5.013, 5.102, 5.103, 5.120, and 18.005; and House Bill (HB) 2031 and HB 4097 (84th Texas Legislature, 2015).

§295.300. Applicability.

(a) This subchapter only applies to diversion and use of marine seawater, diversion of seawater from a bay or arm of the Gulf of Mexico, and conveyance of marine seawater through the bed and banks of a flowing stream. The commission may issue a permit under this section to authorize a diversion of state water from the Gulf of Mexico or a bay or arm of the Gulf of Mexico for desalination and use if:

(1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or

(2) the seawater contains a total dissolved solids concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter.

(b) A person may divert and use state water that consists of marine seawater or seawater without obtaining a permit if subsection (a) of this section does not apply.

(c) A person may not begin construction of a facility for the diversion of marine seawater or seawater without obtaining a permit until the person has provided data to the commission based on the analysis of samples taken at the water source over a period of at least one year demonstrating that subsection (a)(2) of this section does not apply.

(d) A person who has begun construction of a facility for the diversion of marine seawater or seawater without obtaining a permit because the person has demonstrated that subsection (a)(2) of this section does not apply is not required to obtain a permit for the facility if the total dissolved solids concentration of the marine seawater or seawater at the water source subsequently changes so that subsection (a)(2) of this section applies.

(e) This section does not apply to a diversion of marine seawater from a point of diversion located in a bay or estuary unless the application is for a diversion of seawater for industrial use under Texas Water Code (TWC), §11.1405.

(f) TWC, Chapter 11, applies to a permit or authorization under this section in the same manner as that chapter applies to a permit or authorization under that chapter.

§295.301. Definitions.

The following words or phrases have the following meanings in this subchapter unless the context clearly indicates otherwise:

(1) Affected person--One who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application.

(2) Marine seawater--Water that is derived from the Gulf of Mexico.

(3) Seawater--Water that is derived from a bay or arm of the Gulf of Mexico.

§295.302. Requirements for Diversion of Marine Seawater and Diversion of Seawater.

(a) An application for diversion of marine seawater or diversion of seawater from a bay or arm of the Gulf of Mexico for industrial purposes must be submitted in accordance with §295.2 of this title (relating to Preparation of Application) and include, for each applicant, the full name, post office address, telephone number, and federal identification number. If the applicant is a partnership, it shall be designated by the firm name followed by the words "a partnership." If the applicant is acting as trustee for another, it shall be designated by the trustee's name followed by the word "trustee." If one other than the named applicant executes the application, the name, position, post office address, and telephone number of the person executing the application shall be given.

(b) The application shall include the signature of the applicant in accordance with §295.14 of this title (relating to Signature of Applicant). Each applicant shall subscribe and swear to the application before any person entitled to administer oaths, who shall also sign his or her name and affix his or her seal of office to the application.

(c) The application shall state the location of point(s) of diversion and provide latitude and longitude coordinates in decimal degrees to six decimal places for each

point.

(d) The total amount of marine seawater or seawater from a bay or arm of the Gulf of Mexico to be diverted and used shall be stated in definite terms, i.e., a definite number of acre-feet annually and the application shall state the maximum rate of diversion in gallons per minute or cubic feet per second.

(e) The application shall state the purpose or purposes of each use in definite terms. If the marine seawater is to be used for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth. If the application requests authorization to use marine seawater for multiple purposes, the application shall expressly state an annual amount of marine seawater to be used for the multiple purposes as well as for each purpose of use.

(f) The applicant shall provide evidence that the marine seawater or seawater diverted from a bay or arm of the Gulf of Mexico will be treated in accordance with applicable commission rules, based on the purpose for which the water is to be used, before it is used.

(g) The application must include a water conservation plan meeting the requirements contained in §297.208 of this title (relating to Consideration of Water

Conservation).

(h) An application shall contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan or, in the alternative, describe conditions that warrant a waiver of this requirement.

(i) The application must include a determination of the total dissolved solids concentration of the marine seawater or seawater at the water source based on monthly sampling and analysis and provide the data collected to the commission.

(j) The application shall provide documentation that the applicant will take reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater or seawater.

(k) The application shall include evidence of consultation with Texas Parks & Wildlife Department and the Texas General Land Office regarding the point or points from which a facility the person proposes to construct may divert marine seawater or seawater before submitting an application for a permit for the facility if §295.300(a)(1) of this title (relating to Applicability) applies or before beginning construction of the facility if §295.300(a)(2) of this title applies.

§295.303. Review Timeframes.

(a) The review timeframes in this section only apply to applications which are determined to be administratively complete when submitted. If the application is not administratively complete, the application will not be considered for expedited processing under this section.

(b) Applications shall be reviewed by the staff for administrative completeness within 10 working days of receipt of the application by the executive director.

(c) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of this subchapter, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 60 working days.

(d) The applicant shall be promptly notified of any additional technical material as may be necessary for a complete review. If the applicant provides the information within the period of time prescribed by subsection (c) of this section, the executive director will complete processing of the application within the technical review period

extended by the number of days required for the additional data. If the necessary additional information is not received by the executive director prior to expiration of the technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 30 days to provide the technical data before an application is returned. Decisions to return material to the applicant during the technical review stage will be made on a case-by-case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision instead of having the application returned.

§295.304. Notice of Application to Divert Marine Seawater or Seawater.

(a) At the time that the technical review of an application for a permit to divert marine seawater or seawater has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the chief clerk shall give notice by email to the Texas Parks & Wildlife Department and the Texas General Land Office.

(b) The notice must:

(1) state the name and address of the applicant;

(2) state the date on which the application was received by the
commission;

(3) state the date the application was filed by the executive director with
the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt
of Application and Declaration of Administrative Completeness);

(4) state that the executive director has determined that the technical
review of the application is complete;

(5) state the application number;

(6) state the purpose and amount of the proposed diversion of marine
seawater or seawater;

(7) identify the location of the diversion point(s);

(8) state the executive director's recommendation regarding the
application;

(9) state that an affected person may submit written comments and request a contested case hearing;

(10) include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information; and

(11) give any additional information the commission considers necessary.

(c) Requests for a contested case hearing will be processed in accordance with Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications).

§295.305. Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks.

(a) The application shall include evidence that the marine seawater conveyed under a permit subject to the requirement in this section will be treated so as to meet standards that are at least as stringent as the water quality standards adopted by the commission and applicable to the receiving stream or impoundment.

(b) Treated marine seawater that is conveyed under an authorization granted under this section may be used only by the person to whom the authorization is granted.

(c) This section does not prohibit a person from conveying treated marine seawater in any other manner authorized by law.

(d) A person wishing to place treated marine seawater into a stream or watercourse, convey the treated marine seawater in the watercourse or stream, and subsequently divert such treated marine seawater shall file an application with the commission containing the following information:

(1) the name, mailing address, and telephone number of the applicant;

(2) the name of the stream and the locations of the point of discharge and diversion as identified on a United States Geological Survey 7.5-minute topographical map(s);

(3) the source, amount, and rates of discharge and diversion;

(4) a description of the water quality of the water discharged and the permit number and name of any related discharge permit;

(5) an assessment of the adequacy of the quantity and quality of flows remaining after the proposed diversion to meet instream uses and bay and estuary freshwater inflow needs;

(6) the estimated amount of treated marine seawater that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion, including the method used to calculate the losses;

(7) an accounting plan that demonstrates that the applicant will only divert the amount of treated marine seawater discharged less losses; and

(8) any other information the executive director may need to complete an analysis of the application.

§295.306. Notice of Application to Convey Treated Marine Seawater in Bed and Banks.

(a) Notice of an application to convey treated marine seawater in the bed and banks of a stream or watercourse shall be provided by first class mail, postage prepaid, by the commission to every water right holder of record downstream of the discharge point at least 30 days prior to commission consideration of the application.

(b) No published notice shall be required for an application under this section.

(c) The applicant shall be responsible for the costs of providing notice under this section.

(d) The notice must:

(1) state the name and address of the applicant;

(2) state the date on which the application was received by the commission;

(3) state the date the application was filed by the executive director with the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness);

(4) state that the executive director has determined that the technical review of the application is complete;

(5) state the application number;

(6) state the purpose of use for the conveyed treated marine seawater;

(7) state the executive director's recommendation regarding the application;

(8) for applications that do not request authorization to convey treated marine seawater through a reservoir or impoundment the notice shall state that an affected person may provide written comments but may not request a contested case hearing;

(9) for applications that request authorization to convey treated marine seawater through a reservoir or impoundment the notice shall state that an affected person may request a contested case hearing;

(10) include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information; and

(11) give any additional information the commission considers necessary.

(e) Requests for a contested case hearing will be processed in accordance with Chapter 55, Subchapter G of this title (relating to Request for Contested Case Hearing and Public Comment on Certain Applications).

(f) Nothing in this section is intended to deny any additional notice to an affected person that may be required under the Texas Administrative Procedure Act.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§297.200 - 297.210.

Background and Summary of the Factual Basis for the Proposed Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509,

Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of treated marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey treated marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater and for the commission to adopt

rules designating diversion zones by September 1, 2020. Under TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater must consult with the TPWD and the GLO regarding the point(s) of diversion or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of

water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also proposes new sections in 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 318, Marine Seawater Desalination Discharges to implement HB 2031 and HB 4097.

Section by Section Discussion

Subchapter K: Desalination, Substantive

The commission proposes new Subchapter K in Chapter 297 to contain the approval criteria for a water right application to divert marine seawater and seawater and a water right application to convey treated marine seawater in the bed and banks of a

watercourse. The commission must adopt rules to implement TWC, §11.1405 and Chapter 18. The commission specifically invites commenters to provide any relevant information that may differ from its proposed rules, which in the commenter's opinion would assist the commission in deciding on adopted rules for water right applications to divert marine seawater or seawater and for water right applications to convey treated marine seawater in the bed and banks of a watercourse. The adopted rules may differ from this proposed rule and may include additional components based on public comment. The commission invites comments on all aspects of the proposed rules.

§297.200, Applicability

The commission proposes new §297.200 to describe the purpose of Subchapter K. Subchapter K is intended to provide the approval criteria for an authorization to divert and use state water that consists of marine seawater or seawater and to convey treated marine seawater in the bed and banks of a watercourse.

§297.201, Definitions

The commission proposes new §297.201. The proposed section has definitions of terms that only apply to Subchapter K. In §297.201(1) the commission proposes a definition of "Marine seawater" consistent with TWC, §18.001(2). In §297.201(2) the commission proposes a definition of "Seawater" as water that is derived from a bay or arm of the Gulf of Mexico.

§297.202, Approval Criteria for Diversion of Marine Seawater and Seawater

The commission proposes new §297.202. The proposed section sets out the approval criteria for a water rights application to divert marine seawater or seawater that will apply only to applications considered under Subchapter K. In §297.202, the commission proposes that an application for diversion of marine seawater or seawater may only be granted if the application conforms to the requirements in 30 TAC §295.302 to ensure that the commission considers only applications that meet the requirements in its rules and the requirements of TWC, §18.002(a)(1).

§297.203, Water Availability

The commission proposes new §297.203 stating that a finding of water availability is not required for an application for a water right permit to divert marine seawater or seawater in accordance with TWC, §11.1405(e).

§297.204, Applicability of Environmental Flow Standards

The commission proposes new §297.204 stating that it will evaluate whether a water right application for diversion of marine seawater or seawater is consistent with the commission's rules in 30 TAC Chapter 298 (Environmental Flow Standards for Surface Water). The new section allows the commission to include provisions in a water rights permit to divert marine seawater or seawater to comply with Chapter 298 rules in

accordance with TWC, §11.1405(f) and (g).

§297.205, Determination of Total Dissolved Solids Concentration

The commission proposes new §297.205 to specifically state that it will review water quality information submitted under §295.302(i) to ensure that any permit issued meets the requirements for an expedited permit under TWC, §11.1405(a)(2) and §18.003(a)(2).

The commission proposes §297.205(b) to ensure that if the application is an amendment to an existing water right, the commission's review of the application is in accordance with TWC, §11.122(b).

§297.206, Treatment of Diverted Marine Seawater and Seawater

The commission proposes new §297.206 to ensure that any permit issued under 30 TAC Chapter 295, Subchapter G, complies with TWC, §18.003(d).

§297.207, Diversion of Marine Seawater and Seawater

The commission proposes new §297.207 to ensure that the proposed point of diversion for an application submitted under Chapter 295, Subchapter G, is not located in a bay or estuary in accordance with TWC, §18.003(f) unless the diversion is for industrial use under TWC, §11.1405.

§297.208, Consideration of Water Conservation

The commission proposes new §297.208 to provide that the water conservation requirements for an application to divert marine seawater or seawater are those requirements under Chapter 295, Subchapter G. The commission proposes that the water conservation review would determine whether there are practicable alternatives, whether the amount requested in the application is reasonable and necessary and whether the applicant will use reasonable diligence to avoid waste and achieve water conservation. The commission proposes new §297.208(b) to provide that the contents of the water conservation plan are those required under §295.302. HB 2031, Section 1(a) states the purpose of the act is not to hinder efforts to conserve or develop other surface water supplies. Under TWC, §18.002(a)(1), TWC, Chapter 11 applies to a permit to divert marine seawater.

§297.209, Impingement and Entrainment

The commission proposes new §297.209 to require that an applicant for a water rights permit to divert marine seawater or seawater take reasonable measures to avoid impingement and entrainment in accordance with TWC, §18.003(h).

§297.210, Approval Criteria for an Application to Convey Treated Marine Seawater in the Bed and Banks

The commission proposes new §297.210. The proposed section sets out the approval criteria for a water rights application to convey treated marine seawater in the bed and

banks that will apply only to applications considered under Subchapter K. In §297.210(1) - (3), the commission proposes that an application for conveyance of treated marine seawater may only be granted if the application conforms to the requirements in §295.305 to ensure that the commission considers only applications that meet the requirements in its rules and the requirements in TWC, §18.004(a) and (c). In §297.210(4) and (5), the commission proposes that its decision to grant an application to convey treated marine seawater in the bed and banks consider whether losses are reasonable and appropriate and whether the accounting plan has been approved by the executive director. This will ensure that existing water rights are not affected by an application to convey treated marine seawater as the commission proposes in §297.210(6).

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 and no fiscal implications are expected for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules implement HB 2031 and HB 4097. HB 2031 establishes an expedited permitting process for marine seawater desalination projects. HB 4097

addresses seawater desalination as it is used for industrial purposes. The proposed rules implement a new expedited permitting process that will be applied by TCEQ staff during the administrative and technical reviews of applicable water rights applications associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and use for industrial purposes. The rulemaking does not propose any new fees.

Although the permitting process is expedited, the agency does not expect the need for additional resources to issue any permits under the proposed rules as staff does not expect a significant number of permit applications. The rulemaking will require the applicant to consult with the TPWD and the GLO in accordance with the provisions of HB 2031 prior to submitting an application. The permit application fee for a water rights permit under this expedited permitting process would not change from the current fee for applying for a water rights permit.

Although governmental entities could apply for a water rights permit under the proposed expedited permitting process, no state or local governments are anticipated to do so at this time. Because few marine seawater diversion, conveyance, or industrial use permit applications are expected under the proposed rules, no significant fiscal implications are anticipated for the agency.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and a streamlined regulatory process for marine seawater desalination that would assist the state to develop new water supplies to meet the ever-increasing demand for water.

No fiscal implications are anticipated for businesses or individuals as a result of the administration and enforcement of the proposed rules. The proposed rules would affect businesses or individuals who apply for water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, and the diversion of seawater for desalination and its use for industrial purposes.

The proposed rules would require any person or business entity that plans to divert and use state water that consists of marine seawater to determine the TDS concentrations of the seawater at the water source by monthly analysis and sampling for a period of one year. The data collected is to be provided to TCEQ in accordance with provisions in HB 2031 and HB 4097. Costs associated with TDS sampling would include monthly sample collection for one year, sampling equipment, laboratory costs, data analysis and

submittal to TCEQ. The proposed rules require reasonable measures to minimize impingement and entrainment and also allow that marine seawater may be diverted for any beneficial purpose (if the seawater is treated before it is used). Personnel costs for the required sample collection and data analysis, as well as laboratory costs and reasonable measures to minimize impingement and entrainment will be specific to each applicant. These specific costs are context dependent and can't be quantified without knowing the specific nature of each application.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration and enforcement of the proposed rules. The proposed rules would have the same effect on a small business as it does on a large business. It is not known how many small or micro-businesses would submit water rights applications under the proposed rules. The proposed rules do not increase the regulatory burden on small or micro-businesses unless they intend to obtain water rights permits associated with the diversion of marine seawater, the conveyance of treated marine seawater in the bed and banks of a watercourse, or the diversion of seawater for desalination and its use for industrial purposes. If a small or micro-business does apply for such a water rights permit, then it is assumed that any costs would be recovered through increased costs passed on to its customers.

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 rules are necessary in order to comply with state law and does not adversely affect small or micro-businesses in a material way for the first five years that the proposed rules are 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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission has reviewed this rulemaking under Texas Government Code, §2001.0225, "Regulatory Analysis of Major Environmental Rules," and has determined that this rulemaking is not a "major environmental rule." The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination, and HB 4097, creating TWC, §11.1405, relating to seawater desalination projects for industrial purposes. HB 2031 states that the purpose of the new law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The legislature also stated that in this state,

marine seawater is a potential new source of water for drinking and other beneficial uses, and that this state has access to vast quantities of marine seawater from the Gulf of Mexico. The legislature stated that the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

Therefore, the purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way 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" (Texas Government Code, §2001.0225(g)(3)). The purpose of this rulemaking is to establish the requirements for obtaining permits for the diversion and transport of marine seawater and the diversion of seawater. The proposed rules in Chapter 297 are for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits.

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a

federal program, and is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB 2031 and HB 4097.

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 these proposed rules and performed analysis of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rules would substantially advance this stated purpose by adding requirements for the diversion or transport of marine seawater under TWC, Chapter 18, and the diversion of seawater for industrial purposes under TWC, §11.1405.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these proposed rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a

potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." For marine seawater, there are no permanent water rights, real property rights that have been granted for use of the water in the Gulf of Mexico. For seawater in a bay or arm of the Gulf of Mexico, very few water rights have been granted for this water. There is no potential for harm to other water rights by this rulemaking. The burden on private real property rights will be nonexistent or minimal because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. Diversions of seawater in a bay or arm of the Gulf of Mexico are also limited to industrial water. Water for municipal and domestic needs will not be taken from this part of the Gulf of Mexico.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and

enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and, 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the proposed rules include those contained in 31 TAC §501.33(a). The proposed rules implement HB 2031 and HB 4097, which direct the TCEQ to regulate the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater through expedited permitting and related processes. In HB 2031, the legislature finds "...that it is necessary and appropriate to grant authority and provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water right protections, ..." Since one of the purposes of the proposed rules is to protect coastal natural resources, the rules are consistent with the CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because one of the purposes of the proposed rules is to protect coastal and natural resources.

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 June 21, 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 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:

<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 2015-029-295-OW. The comment period closes on June 28, 2016. 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 Kathy Ramirez, Water Availability Section, at (512) 239-6757 or Lori Hamilton, Water Rights Permitting and Availability Section, at (512) 239-3169.

SUBCHAPTER K: DESALINATION, SUBSTANTIVE

§§297.200 - 297.210

Statutory Authority

The rules are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the TCEQ's authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; and TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes.

The proposed rules implement House Bill (HB) 2031 and HB 4097 (84th Texas Legislature, 2015).

§297.200. Applicability.

This subchapter only applies to diversion and use of marine seawater and seawater and conveyance of treated marine seawater in the bed and banks of a watercourse. The requirements for an application to divert marine seawater and seawater and to convey treated marine seawater in the bed and banks of a watercourse are in Chapter 295, Subchapter G of this title (relating to Desalination, Procedural).

§297.201. Definitions.

The following words or phrases have the following meanings in this subchapter unless the context clearly indicates otherwise:

(1) Marine seawater--Water that is derived from the Gulf of Mexico.

(2) Seawater--Water that is derived from a bay or arm of the Gulf of Mexico.

§297.202. Approval Criteria for Diversion of Marine Seawater and Seawater.

The commission shall grant an application for a water right to divert marine seawater or seawater only if:

(1) the application conforms to the requirements prescribed by §295.302 of this title (relating to Requirements for Diversion of Marine Seawater and Diversion of Seawater) and is accompanied by the prescribed fee;

(2) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or the marine seawater contains a total dissolved solids concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter;

(3) the diverted marine seawater or seawater is intended for a beneficial use and the marine seawater or seawater will be treated in accordance with applicable commission rules, based on the purpose for which the marine seawater or seawater is to be used, before it is used;

(4) the application is not detrimental to the public welfare;

(5) the applicant has consulted with Texas Parks & Wildlife Department and the Texas General Land Office;

(6) the application addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan unless the commission determines that new, changed, or unaccounted for conditions warrant waiver of this requirement; and

(7) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 of this title (relating to Definitions).

§297.203. Water Availability.

The commission is not required to make a finding of water availability for an application under Chapter 295, Subchapter G of this title (relating to Desalination, Procedural).

§297.204. Applicability of Environmental Flow Standards.

(a) The commission shall evaluate whether an application for a diversion of marine seawater or seawater under Chapter 295, Subchapter G of this title (relating to Desalination, Procedural) is consistent with any applicable environmental flow standards established under Chapter 298 of this title (relating to Environmental Flow Standards for Surface Water).

(b) The commission may include any provisions in a permit issued under Chapter 295, Subchapter G of this title that the commission considers necessary to comply with the environmental flow standards established under Chapter 298 of this title.

§297.205. Determination of Total Dissolved Solids Concentration.

(a) In its consideration of an application for a new or amended water right to divert marine seawater or seawater, the commission shall review the information required under §295.302(i) of this title (relating to Requirements for Diversion of Marine Seawater and Diversion of Seawater) and determine whether the application meets the requirements of Texas Water Code (TWC), §11.1405(a)(2) and §18.003(a)(2).

(b) The assessment of any conditions upon a proposed amendment to a water right under this section shall be limited by §297.45(b) of this title (relating to "No Injury" Rule) as provided by TWC, §11.122(b).

§297.206. Treatment of Diverted Marine Seawater and Seawater.

The commission shall review the information submitted under §295.302(f) of this title (relating to Requirements for Diversion of Marine Seawater and Diversion of Seawater) and determine whether the diverted marine seawater or seawater will be treated in accordance with applicable commission rules, based on the purpose for which the marine seawater or seawater is to be used.

§297.207. Diversion of Marine Seawater and Seawater.

The commission shall review the information submitted under §295.302(c) of this title (relating to Requirements for Diversion of Marine Seawater and Diversion of Seawater) to ensure that the point of diversion is not located in a bay or estuary unless the application is for industrial use under Texas Water Code, §11.1405.

§297.208. Consideration of Water Conservation.

(a) Information in the water conservation plan provided by an applicant for a water right permit to divert marine seawater or seawater shall be considered by the commission in determining whether any practicable alternative exists, whether the requested amount is reasonable and necessary for the proposed use, and to ensure that reasonable diligence will be used to avoid waste and achieve water conservation.

(b) A water conservation plan submitted with an application requesting to divert marine seawater or seawater must include data and information which:

(1) supports the applicant's proposed use of marine seawater or seawater with consideration of the water conservation goals of the water conservation plan;

(2) evaluates conservation as an alternative to the proposed diversion of marine seawater or seawater; and

(3) evaluates other feasible alternatives to new water development. It shall be the burden of proof of the applicant to demonstrate that the requested amount is necessary and reasonable for the proposed use.

§297.209. Impingement and Entrainment.

An application to divert marine seawater or seawater under Chapter 295, Subchapter G of this title (relating to Desalination, Procedural) shall include a written statement of facility-specific, reasonable measures to minimize impingement and entrainment that will be implemented at the proposed desalination facility.

§297.210. Approval Criteria for an Application to Convey Treated Marine Seawater in the Bed and Banks.

The commission shall grant an application for a water right to convey treated marine seawater in the bed and banks of a watercourse only if:

(1) the application conforms to the requirements prescribed by §295.305 of this title (relating to Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks) and is accompanied by the prescribed fee;

(2) the marine seawater to be conveyed is treated so as to meet standards that are at least as stringent as the water quality standards adopted by the commission and applicable to the receiving stream or impoundment;

(3) the treated marine seawater conveyed will only be used by the person to whom the authorization is granted;

(4) the estimate of the amount of treated marine seawater that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses is reasonable and appropriate for the stream in which the treated marine seawater will be conveyed;

(5) the accounting plan submitted required by §295.305(d)(7) of this title has been approved by the executive director; and

(6) the application does not impair existing water rights or vested riparian rights.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§318.1 - 318.9, 318.21 - 318.30, 318.40 - 318.43, 318.60, and 318.61.

Background and Summary of the Factual Basis for the Proposed Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509,

Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and, TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) to conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and the discharge of waste resulting from the desalination process. The commission must adopt rules

designating diversion and discharge zones by September 1, 2020. Until such time as the commission adopts rules designating diversion and discharge zones, an applicant for a permit to divert marine seawater or discharge waste resulting from the desalination process must consult with the TPWD and the GLO regarding the point(s) of diversion and discharge.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application

is required, TWC, §11.1405(e) specifies that the application does not require a finding of water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In addition, TWC, §26.0272(b), indicates that TCEQ may issue a permit for the discharge of water treatment residuals from the desalination of seawater into the portion of the Gulf of Mexico inside the territorial limits of the state. TWC, §26.0272(c), specifies that prior to issuing a permit, TCEQ must evaluate the discharge of water treatment residuals from the desalination of seawater into the Gulf of Mexico for compliance with the state water quality standards, requirements of the Texas Pollutant Discharge Elimination System program, and applicable federal law. TWC, §26.0272(d), indicates that permits may be individual or general. TWC, §26.0272(d), also specifies that for individual permits, an application review procedure, at a minimum, must comply with the requirements of TWC, Chapter 5, Subchapter M; and the commission must comply with the requirements of TWC, §26.040, for a general permit.

TWC, §27.021, allows TCEQ to issue an individual Class I injection well permit authorizing the disposal of water treatment residuals produced by the desalination of

seawater. TWC, §27.025, allows TCEQ to authorize a Class I injection well under a general permit for the disposal of concentrate produced by the desalination of seawater. TWC, §27.025, specifies that the general permit must include any requirements necessary to maintain delegation of the federal underground injection control program administered by TCEQ.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these proposed rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also proposes new sections in 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 295, Water Rights, Procedural; and, 30 TAC Chapter 297, Water Rights, Substantive to implement HB 2031 and HB 4097.

Section by Section Discussion

General Comments

The major substance of this proposed chapter was developed from existing regulations related to the permitting process such as 30 TAC Chapters 39, 50, 55, 281, and 305. They were then revised to remove requirements that don't apply to wastewater

discharges, to expedite the existing permitting process for wastewater discharges, and to incorporate only the required procedural elements in TWC, §18.005(e)(1) - (3).

The chapter is organized into four subchapters: General Requirements for Marine Seawater Desalination Discharges; Treated Marine Seawater Discharges; Off-Shore Discharges; and Near-Shore Discharges. This organizational structure allows for clearly and separately defined permitting procedures for each type of permit.

Some key terms, which are defined in the proposal, will help improve understanding of this preamble: "Off-shore discharges" are the discharge of wastewater from a marine seawater desalination project into the Gulf of Mexico where the point of discharge is located three or more miles from any point located on the coast of Texas; and "Near-shore discharges" are the discharge of wastewater from a marine seawater desalination project into the Gulf of Mexico where the point of discharge is located within three miles from any point located on the coast of Texas.

Subchapter A: General Requirements for Marine Seawater Desalination Discharges

§318.1, Applicability and Purpose

Proposed new §318.1, identifies the purpose of Chapter 318, which is to establish an expedited permitting process for new, renewal, and amendment applications for treated marine seawater discharges, off-shore discharges, and near-shore discharges that originate from a marine seawater desalination project. These types of discharges may,

alternatively, be authorized under the provisions of TWC, Chapter 26 and 30 TAC Chapter 305. Proposed new §318.1 also identifies which portions of the chapter apply to near-shore discharges. These types of discharges are governed by the Texas Pollutant Discharge Elimination System program and as such must be processed in accordance with the Memorandum of Agreement between TCEQ and the United States Environmental Protection Agency (EPA). Lastly, proposed new §318.1 states that this chapter does not apply to discharges into a bay, estuary, or fresh waterbody. This provision complies with TWC, §18.005(f).

§318.2, Definitions

Proposed new §318.2, defines words and terms that are used in the chapter. The definitions for "Off-shore discharges" and "Near-shore discharges" are discussed earlier in this Section by Section Discussion and are consistent with TWC, §18.005(e)(2). Other definitions that would benefit from further discussion are "Facility" and "Marine seawater desalination project." The term "Facility" includes all contiguous land and fixtures, structures, or appurtenances used for the collection, transportation, and treatment of marine seawater and the storage, transportation, and discharge of treated marine seawater and wastewater from a marine seawater desalination project. The term "Marine seawater desalination project" is limited to the operation that desalinates marine seawater.

Desalination plants in other areas of the world are often co-located with power plants. The power plants also have wastewater discharges. Power plant discharges would not be authorized under the expedited process in the proposed rules because the power plant does not desalinate marine seawater. Additionally, other operations may be occurring at the site, such as a water bottling operation or an operation that uses the desalinated water in an industrial process. Wastewater generated by the bottling operation or the industrial operation would not be authorized under the expedited process in the proposed rules because the bottling plant and industrial operation do not desalinate marine seawater. Conversely, the operation that desalinates marine seawater may generate multiple types of wastewater, such as brine concentrate which is sometimes called reject water, filter backwash wastewater, and domestic wastewater from restrooms at the desalination operation. These wastewater discharges, if they are near-shore discharges or off-shore discharges, could be authorized under the expedited process in the proposed rules because they are generated by the operation that desalinates marine seawater.

These definitions are crucial for limiting the applicability of the proposed rules to only wastewaters generated by the operation that desalinates marine seawater, not wastewater generated by other operations such as a co-located power plant or water bottling plant.

§318.3, Application Requirements

Proposed new §318.3, requires the owner and the operator, if the operator is a different entity, to apply for the permit. The original application and three copies must be submitted to the executive director on forms provided by the executive director. The remaining portions of proposed new §318.3 identify the contents of the permit application. It is the intent of the executive director to develop an application form specific to treated marine seawater discharges and off-shore discharges processed under this chapter. Developing an application form specific to these discharges allows the executive director to collect and review information relevant to these discharges. This will assist in reducing the application review time for these permit applications.

§318.4, Application Fees and Water Quality Fees

Proposed new §318.4, identifies the application fees for each type of permit action and identifies other regulations for the water quality fee. The application fees are consistent with fees in 30 TAC §305.53 (Application Fee) for minor facilities subject to the EPA's categorical standards. The water quality fees are consistent with the fees for marine seawater desalination plants that obtain a permit under existing procedural rules.

§318.5, Permit Conditions

Proposed new §318.5, identifies other regulations that are applicable to these permits.

§318.6, Amendment of a Permit

Proposed new §318.6, defines the types of amendments and modifications, who can initiate amendments, specifies the contents of an amendment application, and the effect of an amendment application on the expiration of the existing permit. Proposed new §318.6 also specifically allows an applicant who files a major amendment application to simultaneously request a renewal of the permit. This provision allows the permittee to get a full five-year permit following a major amendment rather than retaining the expiration date of the current permit.

§318.7, Renewal of a Permit

Proposed new §318.7, specifies the timing for submitting a renewal application, the effect of a renewal application on the expiration of the existing permit, and a requirement that a renewal application must request continuation of the same requirements and conditions of the expiring permit.

§318.8, Other Permit Actions

Proposed new §318.8, identifies other regulations that are applicable to these permits for the following permit actions: permit transfers; permit denial, suspension, and revocation; permit cancellation; and corrections to permits.

§318.9, Discharge Zones for Near-Shore and Off-Shore Discharges

Proposed new §318.9, requires an applicant to include documentation of consultation with the TPWD and the GLO regarding the outfall locations in the permit application for near-shore discharges and off-shore discharges. This requirement only applies to new permit applications and amendment applications that propose a new outfall or a new location for an existing outfall.

Subchapter B: Treated Marine Seawater Discharges

§318.21, Applicability

Proposed new §318.21, identifies the application types that this subchapter applies to. In addition to applications seeking authorization for treated marine seawater discharges, this subchapter also applies to applications for a single permit to authorize both treated marine seawater and off-shore discharges.

§318.22, Application Review for Treated Marine Seawater Discharges

Proposed new §318.22, identifies the administrative and technical review process that the executive director will use. The application will be assigned a permit number and reviewed for administrative completeness within five business days of receipt. If an application is not administratively complete, the applicant will be notified by email and must provide a response within five business days of the request for additional information. If the applicant fails to provide the additional information by the deadline, the application will be considered withdrawn unless there are extenuating

circumstances. The administrative review process is expedited by reducing the review period and using email for incoming and outgoing correspondence with applicants.

After the application is administratively complete, it will undergo a technical review for a period of time not to exceed 30 business days from the date the application is declared administratively complete. If an application is not technically complete, the applicant will be notified by email and must provide a response within the timeframe established by the technical review staff. The timeframe for submitting additional technical information can vary based on the level of complexity of the data requested. If the applicant fails to provide the additional information by the deadline, the executive director may return the application. The applicant can request that the commission determine the sufficiency of the technical data prior to having the application returned. The technical review process is expedited by reducing the review period and using email for incoming and outgoing correspondence with applicants. Additionally, developing an application form that is specific to marine seawater desalination discharges will assist the executive director in conducting an expedited technical review. After the application is declared technically complete, the executive director will prepare a draft permit and technical summary unless a recommendation is made to not grant the application. The proposed rule describes the contents of the technical summary. The draft permit and technical summary will be emailed to the applicant for a 10-day review period. The public notice and comment procedures are proposed in new 30 TAC §39.902.

§318.23, Public Meeting

Proposed new §318.23, describes the application actions that are subject to public meeting and the procedures for requesting, notification of, and conducting a public meeting. A public meeting is not a contested case hearing, but rather a forum for receiving oral public comments. Minor amendment and minor modification applications are not subject to a public meeting. A public meeting request will be granted if the executive director determines that there is substantial or significant public interest in the application; or if requested by a member of the state legislature representing the area where the facility is or will be located. Notice of a public meeting must comply with the requirements in proposed new §39.902. The applicant must attend any public meeting held by the executive director or chief clerk. An audio recording or written transcript of the public meeting will be made available to the public.

§318.24, Public Comment Processing

Proposed new §318.24, identifies other regulations that prescribe how the executive director will process timely filed public comments. The executive director will respond to all timely filed public comments. Late comments will be added to the application file but will not be processed.

§318.25, Action by the Executive Director

Proposed new §318.25, describes when the executive director may take action on an application, the process following the executive director's action, and the process that applies when the executive director cannot take action on an application. The executive director may take action on the application if: public notice is completed and response to comments has been filed; the application meets all relevant statutory and administrative criteria; the application doesn't raise new issues requiring interpretation of commission policy; the executive director's staff and public interest counsel don't raise objections; and the application is uncontested. If the executive director acts on an application, the chief clerk will mail or email notice of the action, the response to comments, the draft permit, if applicable, and the instructions for filing a motion to overturn the executive director's decision. The notice will be sent to the applicant, the public interest counsel, and to persons who timely filed public comment or hearing requests that the commission denied. If the application doesn't meet the criteria in §318.25(a) allowing the executive director to take action on the application, the chief clerk will schedule the application for consideration and action by the commission. If the criteria preventing the executive director from taking action changes such that the executive director can take action, the application will be remanded to the executive director. The permit is effective when signed by the executive director, unless otherwise specified in the permit.

§318.26, Motion to Overturn Executive Director's Decision

Proposed new §318.26, identifies the procedures for persons to file a motion to overturn the executive director's decision; how the motion will be processed by the chief clerk; disposition of the motion by the commission; and how a person can appeal the denial of a motion to overturn. A person must file a written motion to overturn the executive director's decision within 23 days after the chief clerk sends notice of the executive director's decision. The proposed rule describes the required contents of the motion. After the deadline for filing a motion, the chief clerk shall schedule the motion for a commission meeting. If the commission has delegated authority to act on the motion to the general counsel, the motion shall be scheduled for a commission meeting only if instructed to do so by the general counsel.

If the commission intends to take action, the chief clerk will schedule the motion for a commission meeting approximately 44 days after the deadline for filing a motion to overturn and send notice of the commission meeting at least 35 days prior to the meeting to the applicant, executive director, public interest counsel, and all persons who timely filed comments or motions to overturn. The applicant, executive director, and public interest counsel may file responses to the motion no later than 23 days prior to the commission meeting and the requestors may file replies to the responses no later than nine days prior to the commission meeting.

If the commission does not take action on the motion to overturn within 45 days after the final deadline to file motions to overturn, the motion is denied. If a motion to overturn is denied because the commission did not take action within the 45-day period, the commission decision may be appealed.

§318.27, Request for Contested Case Hearing on an Application

Proposed new §318.27, identifies the application actions that are subject to contested case hearings; who can request a contested case hearing; the procedures for filing a request for contested case hearing; how a request for contested case hearing will be processed by the chief clerk; and requirements related to requests by a group or association. Minor amendment and minor modification applications are not subject to a contested case hearing. A contested case hearing may be requested by the executive director, the commission, the applicant, and an affected person. A request for contested case hearing must be filed with the chief clerk no later than 30 days after the chief clerk sends notice of the executive director's decision and response to comments. A request for contested case hearing by an affected person must be based on an issue raised in the requestor's timely filed comments that were not withdrawn by the requestor. The proposed rule describes the contents of a hearing request. Late filed requests for contested case hearing will be placed in the application file but not processed. For timely filed hearing requests, the chief clerk will schedule the hearing request for a commission meeting approximately 44 days after the deadline for filing a hearing request and send

notice of the commission meeting at least 35 days prior to the meeting to the applicant, executive director, public interest counsel, and all persons who timely filed comments or hearing requests. Additionally, the chief clerk will refer the application and hearing requests to the alternative dispute resolution director to try to resolve any disputes. The applicant, executive director, and public interest counsel may file responses to the hearing request no later than 23 days prior to the commission meeting. The proposed rule identifies the items that the responses to hearing request must address. The requestors may file replies to the responses no later than nine days prior to the commission meeting.

The proposed rule identifies the requirements that must be met for a group or association to request a contested case hearing and the requirements that must be met for a group or association to be granted a contested case hearing. The group or association may be required to explain how it meets the requirements.

§318.28, Direct Referrals

Proposed new §318.28, identifies the procedures for the executive director or applicant to request that the chief clerk send the application directly to State Office of Administrative Hearings (SOAH) without commission action. After receiving of a request for referral and after the executive director has issued a preliminary decision, the chief clerk will refer the application directly to SOAH for a hearing on whether the

application complies with all applicable statutory and regulatory requirements. The proposed rule describes the procedures for conducting public meetings on applications that have been directly referred to SOAH. The proposed rule requires the executive director to process public comments for applications that have been directly referred to SOAH. The administrative law judge may not hold a preliminary hearing until after the executive director issues the response to comments.

§318.29, Action by the Commission

Proposed new §318.29, describes the actions that the commission may take on applications, motions to overturn, and contested case hearing requests; the conditions for when a hearing request must be granted and when it may be granted; the conditions that allow the commission to act on an application without granting a contested case hearing; the actions required by the commission and chief clerk if a hearing request is granted; the criteria for referring an issue to SOAH; the actions required by the chief clerk if the commission acts on an application; and the requirements to file a motion for rehearing if the commission acts on an application or hearing request.

§318.30, Contested Case Hearing Proceedings

Proposed new §318.30, identifies other regulations that prescribe how contested case hearings are conducted.

Subchapter C: Off-Shore Discharges

§318.40, Applicability

Proposed new §318.40, specifies that this subchapter applies to applications seeking authorization for off-shore discharges. However, as noted in proposed new §318.21, if an application is seeking authorization for both off-shore discharges and treated marine seawater discharges, the application is subject to the requirements in proposed new Subchapter B.

§318.41, Application Review for Off-Shore Discharges

Proposed new §318.41, identifies the administrative and technical review process that the executive director will use. The application will be assigned a permit number and reviewed for administrative completeness within five business days of receipt. If an application is not administratively complete, the applicant will be notified by email and must provide a response within five business days of the request for additional information. If the applicant fails to provide the additional information by the deadline, the application will be considered withdrawn unless there are extenuating circumstances. The administrative review process is expedited by reducing the review period and using email for incoming and outgoing correspondence with applicants.

After the application is administratively complete, it will undergo a technical review for a period of time not to exceed 30 business days from the date the application is declared

administratively complete. If an application is not technically complete, the applicant will be notified by email and must provide a response within the timeframe established by the technical review staff. The timeframe for submitting additional technical information can vary based on the level of complexity of the data requested. If the applicant fails to provide the additional information by the deadline, the executive director may return the application. The applicant can request that the commission determine the sufficiency of the technical data prior to having the application returned. The technical review process is expedited by reducing the review period and using email for incoming and outgoing correspondence with applicants. Additionally, developing an application form that is specific to marine seawater desalination discharges will assist the executive director in conducting an expedited technical review.

After the application is declared technically complete, the executive director will prepare a draft permit and technical summary unless a recommendation is made to not grant the application. The proposed rule describes the contents of the technical summary. The draft permit and technical summary will be emailed to the applicant for a 10-day review period. The public notice and comment procedures are proposed in new 30 TAC §39.903.

§318.42, Action by the Executive Director

Proposed new §318.42, describes when the executive director may take action on an

application, the process following the executive director's action, and the process for when the executive director cannot take action on an application. The executive director may take action on the application if: public notice is completed and the final technical summary has been filed; the application meets all relevant statutory and administrative criteria; the application doesn't raise new issues requiring interpretation of commission policy; and the executive director's staff and public interest counsel don't raise objections. If the executive director acts on an application, the chief clerk will mail or email notice of the action, the final technical summary, the revised draft permit, if applicable, and the instructions for filing a motion to overturn the executive director's decision. The notice will be sent to the applicant, the public interest counsel, and to persons who timely filed public comments. If the application doesn't meet the criteria in §318.42(a) allowing the executive director to take action on the application, the chief clerk will schedule the application for consideration and action by the commission. If the criteria preventing the executive director from taking action changes such that the executive director can take action, the application will be remanded to the executive director. The permit is effective when signed by the executive director, unless otherwise specified in the permit.

§318.43, Motion to Overturn Executive Director's Decision

Proposed new §318.43, identifies the procedures for persons to file a motion to overturn the executive director's decision; how the motion will be processed by the chief clerk;

disposition of the motion by the commission; and how a person can appeal the denial of a motion to overturn. A person must file a written motion to overturn the executive director's decision within 23 days after the chief clerk sends notice of the executive director's decision. The proposed rule describes the required contents of the motion. After the deadline for filing a motion, the chief clerk shall schedule the motion for a commission meeting. If the commission has delegated authority to act on the motion to the general counsel, the motion shall be scheduled for a commission meeting only if instructed to do so by the general counsel.

If the commission intends to take action, the chief clerk will schedule the motion for a commission meeting approximately 44 days after the deadline for filing a motion to overturn and send notice of the commission meeting at least 35 days prior to the meeting to the applicant, executive director, public interest counsel, and all persons who timely filed comments or motions to overturn. The applicant, executive director, and public interest counsel may file responses to the motion no later than 23 days prior to the commission meeting and the requestors may file replies to the responses no later than nine days prior to the commission meeting.

If the commission does not take action on the motion to overturn within 45 days after the final deadline to file motions to overturn, the motion is denied. If a motion to overturn is denied because the commission did not take action within the 45-day period,

the commission decision may be appealed.

Subchapter D: Near-Shore Discharges

§318.60, Applicability

Proposed new §318.60, identifies the application types that this subchapter applies to.

§318.61, Application Review and Processing for Near-Shore Discharges

Proposed new §318.61, explains why an expedited permitting process will not be codified in this chapter; identifies other regulations that prescribe how near-shore discharges will be reviewed and processed; and, states that the executive director will make every reasonable effort to expedite the application review within the current framework.

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 and no fiscal implications are expected for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules implement HB 2031 which created an expedited permitting process

for marine seawater desalination projects. HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated and marine seawater and waste resulting from the desalination process.

HB 2031 also requires that the TPWD and the GLO conduct a study to identify zones in the Gulf of Mexico that are appropriate for the discharge of waste resulting from the marine seawater desalination process. The bill requires the commission to adopt rules designating discharge zones by September 1, 2020. An applicant for a permit to discharge waste resulting from the marine seawater desalination process must consult with the TPWD and the GLO regarding the point(s) of discharge until such time as the commission adopts rules designating discharge zones.

Although the permitting process is expedited, the agency does not expect the need for additional resources to issue any permits under the proposed rules. Agency staff does not expect a significant number of permit applications for desalination plants in Texas.

The proposed rulemaking establishes application fees and annual water quality fees for discharges associated with marine seawater desalination. Under the proposed rules, a new permit application fee would be \$1,250; a major amendment (with or without renewal) of an existing permit would be \$1,250; and a renewal of an existing permit would be \$1,215. An annual water quality fee would be assessed in accordance with 30

TAC Chapter 21. This fee is calculated using several criteria and is capped by statute at \$150,000. No permittee has ever reached the \$150,000 cap (the highest current annual water quality fee is \$116,000 and the cap is not expected to be reached for several years). The minimum fee may not be less than \$1,250 for each active permit or contract. No significant revenue is anticipated and no significant costs are expected for the agency due to the low number of anticipated permit applications. Desalination plants are not expected to be owned or operated by other units of state or local government.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be compliance with state law and a streamlined regulatory process for marine seawater desalination that would assist the state to develop new water supplies to meet the ever-increasing demand for water.

No fiscal implications are anticipated for businesses or individuals as a result of the administration and enforcement of the proposed rules. The proposed rulemaking provides an alternative, expedited procedure for obtaining a discharge permit for a marine seawater desalination plant. Discharges associated with marine seawater desalination may also alternatively be authorized under the provisions of TWC, Chapter 26, and 30 TAC Chapter 305.

According to agency staff, there are currently no marine seawater desalination plants in Texas nor are there a significant number expected to be constructed in the first five years after the proposed rules would come into effect. Any marine seawater desalination plants that would be constructed would be owned by large businesses capable of funding large capital projects. Even though individuals may pay a higher cost for water from a desalination plant, they would also benefit from having a new water supply.

Additionally, a facility that applies for a permit for only off-shore discharges (no treated marine seawater discharges or near-shore discharges) would not be subject to a contested case hearing. A contested case hearing can add a significant cost for obtaining a permit. Costs for a contested case hearing would vary depending on the costs for hiring attorneys, technical experts, and travel expenses.

The proposed rulemaking establishes application fees and annual water quality fees for discharges associated with marine seawater desalination. Under the proposed rules, a new permit application fee would be \$1,250; a major amendment (with or without renewal) of an existing permit would be \$1,250; and a renewal of an existing permit would be \$1,215. An annual water quality fee would be assessed against permittees in accordance with Chapter 21. This fee is calculated using several criteria and is capped by statute at \$150,000. No permittee has ever reached the cap (the highest current annual

water quality fee is \$116,000 and the \$150,000 cap is not expected to be reached for several years). The minimum fee may not be less than \$1,250 for each active permit or contract. This fiscal note assumes that any operating costs for businesses or individuals that own or operate marine seawater desalination plants would be offset through charges and fees assessed to their customers.

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 rules only would affect those businesses that intend to own or operate a marine seawater desalination plant and would provide an alternative, expedited procedure for obtaining discharge permits which could result in positive fiscal implications. This fiscal note also assumes that any operating costs for businesses or individuals that own or operate marine seawater desalination plants would be offset through charges and fees assessed to their customers.

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 rules are necessary in order to comply with state law and does not adversely affect small or micro-

businesses in a material way for the first five years that the proposed rules are 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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission has reviewed the proposed rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225(a) because it does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a "major environmental rule" adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and 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. 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 or the state.

The legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination. HB 2031 states that the purpose of the new law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. More specifically, the legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

Therefore, the specific intent of the proposed rulemaking is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rules in Chapter 318 are for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the processes for obtaining a permit to discharge treated marine seawater and waste resulting from the desalination process under TWC, Chapter 18. The proposed new rules will protect the health and safety of aquatic and wildlife resources, as well as water quality, however, the proposed rules will not adversely affect the economy, a sector of the economy,

productivity, competition, or jobs within the state or a sector of the state. Accordingly, the commission concludes that the proposed rulemaking does not meet the definition of a "major environmental rule."

Even if this rulemaking was a "major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather creates an expedited process under state law to ensure efficient regulatory oversight, while comprehensively protecting the state's natural resources. Third, it does not come under a delegation agreement or contract with a federal program, and finally, it is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB 2031. Therefore, the commission does not adopt the rule solely under the commission's general powers.

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 it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis. The specific purpose of the proposed rulemaking is to modify the TAC to implement the changes to the TWC, from HB 2031, which creates procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The proposed rulemaking will substantially advance this stated purpose by proposing rules in a new Chapter 318 that are intended to articulate and expedite the permitting process for marine seawater desalination discharges in accordance with HB 2031 and TWC, Chapter 18.

Promulgation and enforcement of the proposed rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to these proposed rules because these rules do not impact private real property. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." Specifically, the proposed rulemaking does not apply to or affect any landowner's rights in any private real property because it does not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. For marine seawater, there are no real property rights

that have been granted for use of the water in the Gulf of Mexico. These actions will not affect or burden private real property rights because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico.

Consistency with the Coastal Management Program

The commission has reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and, 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

CMP policies applicable to the proposed rules include: discharges must comply with water quality-based effluent limits; discharges that increase pollutant loadings to coastal waters must not impair designated uses of coastal waters and must not significantly degrade coastal water quality, unless necessary for important economic or social

development; and to the greatest extent practicable, new wastewater outfalls must be located where they will not adversely affect critical areas.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies. The proposed rules are consistent with these CMP goals and policies because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because the proposed rules do not allow a discharge from marine seawater desalination projects into or adjacent to water in the state, except in accordance with an individual permit issued by the commission.

Individual permits issued under these proposed rules will include effluent limitations to ensure compliance with water quality standards. Further, the expedited permitting process in these proposed rules cannot be used to authorize discharges of wastewater into bays and estuaries. Wastewater must be discharged into the Gulf of Mexico, and applicants must consult with the TPWD and the GLO regarding the outfall location(s).

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 June 21, 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 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: <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 2015-029-295-OW. The comment period closes on June 28, 2016. 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 Kathy Ramirez, Water Availability Section, at (512) 239-6757 or Laurie Fleet,
Wastewater Permitting Section, at (512) 239-5445.

**SUBCHAPTER A: GENERAL REQUIREMENTS FOR MARINE SEAWATER
DESALINATION DISCHARGES**

§§318.1 - 318.9

Statutory Authority

The rules 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 TWC, §5.103; 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, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC,

Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

§318.1. Applicability and Purpose.

(a) The provisions of this chapter establish an expedited process for new, renewal, and amendment applications for treated marine seawater discharges, off-shore discharges, and near-shore discharges that originate from a marine seawater desalination project under Texas Water Code (TWC), Chapter 18. Discharges from a marine seawater desalination project may, alternatively, be authorized under the provisions of TWC, Chapter 26 and Chapter 305 of this title (relating to Consolidated Permits).

(b) Near-shore discharges from marine seawater desalination projects are subject to, and must comply with, §318.9 of this title (relating to Discharge Zones for Near-Shore and Off-Shore Discharges) and Subchapter D of this chapter (relating to Near-Shore Discharges).

(c) This chapter does not apply to discharges into a bay, estuary, or fresh

waterbodies.

§318.2. Definitions.

The definitions contained in Texas Water Code, §26.001 apply to this chapter.

The following words and terms, when used in this chapter, have the following meanings.

(1) Affected person--A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. The determination of whether a person is affected shall be governed by §55.203 of this title (relating to Determination of Affected Person).

(2) Application--A formal written request for commission action relative to a permit, together with all materials and documents submitted to complete the application.

(3) Commission--The Texas Commission on Environmental Quality.

(4) Facility--Includes all contiguous land and fixtures, structures, or appurtenances used for the collection, transportation, and treatment of marine seawater

and the storage, transportation, and discharge of treated marine seawater and wastewater from a marine seawater desalination project. A facility may consist of several storage, processing, treatment, or disposal units.

(5) Marine seawater--Water that is derived from the Gulf of Mexico.

(6) Marine seawater desalination project--An operation that desalinates marine seawater. Marine seawater desalination project does not include other businesses, entities, or operations that do not desalinate marine seawater regardless of whether or not they are associated with the desalination operation by ownership, location, business structure, or business dependencies.

(7) Near-shore discharges--The discharge of wastewater from a marine seawater desalination project into the Gulf of Mexico where the point of discharge is located within three miles seaward of any point located on the coast of Texas.

(8) Off-shore discharges--The discharge of wastewater from a marine seawater desalination project into the Gulf of Mexico where the point of discharge is located three or more miles seaward from any point located on the coast of Texas.

(9) Operator--The person responsible for the overall operation of a facility.

(10) Outfall--The point or location where treated marine seawater or reject water is discharged from a marine seawater desalination project into or adjacent to water in this state.

(11) Owner--The person who owns a facility or part of a facility.

(12) Permit--A written document issued by the commission which, by its conditions, may authorize the permittee to construct, install, modify, or operate, in accordance with stated limitations, a specified facility for treated marine seawater and reject water discharges.

(13) Site--The land or water area where any marine seawater desalination project is physically located or conducted, including adjacent land or water used in connection with the marine seawater desalination project.

(14) Treated marine seawater--Marine seawater that has been treated to reduce salinity. Treated marine seawater is not a pollutant discharge.

§318.3. Application Requirements.

(a) Any person who requests a permit or who requests an amendment, modification, or renewal of a permit for treated marine seawater discharges or off-shore discharges shall complete, sign, and submit an application to the executive director according to the requirements of this chapter. A permittee shall keep records of data used to complete the final application and any supplemental information throughout the term of the permit.

(b) It is the duty of the owner of a facility to submit an application for a permit. However, if the facility is owned by one person and operated by another, it is the duty of the operator and the owner to jointly submit an application for a permit.

(c) Only one application needs to be filed for each geographical location from which treated marine seawater or wastewater is discharged, even though there may be more than one outfall requested in the application.

(d) The original and three copies of the permit application shall be submitted on forms provided by or approved by the executive director, and shall be accompanied by a like number of copies of all technical supplements and attachments.

(e) All applications shall be signed in accordance with §305.44 of this title (relating to Signatories to Applications).

(f) Each application for a permit must include the following:

(1) the name, mailing address, and location of the facility for which the application is submitted;

(2) the ownership status as federal, state, private, public, or other entity;

(3) the applicant's name, mailing address, email address, and telephone number;

(4) a topographic map, ownership map, county highway map, or a map prepared by a Texas licensed professional engineer, Texas licensed professional geoscientist, or a registered surveyor which shows the facility and each of its intake and outfall structures. Maps must be of material suitable for a permanent record, and shall be on sheets 8-1/2 inches by 11 inches or folded to that size, and shall be on a scale of not less than one inch equals one mile. The map shall depict the approximate boundaries of the tract of property owned or to be used by the applicant and shall extend at least one mile beyond the tract boundaries sufficient to show the following:

(A) each well, spring, and surface water body or other water in the state within the map area;

(B) the general character of the areas adjacent to the facility, including public roads, towns and the nature of development of adjacent lands such as residential, commercial, agricultural, recreational, undeveloped, and so forth; and

(C) the location of any waste disposal activities conducted on the tract not included in the application;

(5) a supplementary technical report submitted in connection with an application. The report must be prepared either by a Texas licensed professional engineer, a Texas licensed professional geoscientist, or by a qualified person who is competent and experienced in the field to which the application relates and thoroughly familiar with the proposed marine seawater desalination project. The report must include the following:

(A) a general description of the facilities and systems used for or in connection with the intake, collection, transportation, and treatment of marine seawater and the storage, transportation, and discharge of treated marine seawater and wastewater; and

(B) for each outfall:

(i) the volume and rate of the discharge of treated marine seawater and wastewater, including daily average flow, daily maximum flow, and detailed information regarding patterns of discharge; and

(ii) the chemical, physical, thermal, organic, bacteriological, or radiological properties or characteristics of the wastewater, as applicable, described in enough detail to allow evaluation of the water and environmental quality considerations involved; and

(6) the applicant shall provide other information as reasonably may be required by the executive director for an adequate understanding of the project, and which is necessary to provide the commission an adequate opportunity to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and federal statutes.

(g) If the applicant is an individual, the application shall contain:

(1) the individual's full legal name and date of birth;

(2) the street address of the individual's place of residence;

(3) the identifying number from the individual's driver's license or personal identification certificate issued by the state or country in which the individual resides;

(4) the individual's sex; and

(5) any assumed business or professional name of the individual filed under Texas Business and Commerce Code, Chapter 36.

§318.4. Application Fees and Water Quality Fees.

(a) An applicant shall include with each application a fee. The application fee is due at the time that the application is filed with the commission. Unless the recommendation of the executive director is that the application be denied, the commission will not consider an application for final decision until such time as the application fee is paid.

(b) The permit application fees are as follows:

(1) new - \$1,250;

(2) major amendment (with or without renewal) of an existing permit -
\$1,250;

(3) renewal of an existing permit - \$1,215;

(4) minor amendment and minor modification of an existing permit -
\$150.

(c) An annual water quality fee will be assessed against permittees authorized
under this chapter in accordance with Chapter 21 of this title (relating to Water Quality
Fees).

§318.5. Permit Conditions.

(a) A permit issued under this chapter is subject to the requirements of:

(1) §305.122 of this title (relating to Characteristics of Permits);

(2) §305.123 of this title (relating to Reservation in Granting Permit);

(3) §305.124 of this title (relating to Acceptance of Permit, Effect);

(4) §305.125 of this title (relating to Standard Permit Conditions); and

(5) §305.127 of this title (relating to Conditions to be Determined for Individual Permits).

(b) All reports required by permits issued under this chapter and other information requested by the executive director shall be signed in accordance with §305.128 of this title (relating to Signatories to Reports).

§318.6. Amendment of a Permit.

(a) Amendments generally. A change in a term, condition, or provision of a permit requires an amendment, except corrections to permits under subsection (c)(2)(A) of this section and permit transfers under §318.8 of this title (relating to Other Permit Actions).

(b) Application for amendment. An application for amendment shall include all requested changes to the permit. Information sufficient to review the application shall

be submitted in the form and manner and under the procedures specified in §318.3 of this title (relating to Application Requirements). The application shall include a statement describing the reason for the requested changes.

(c) Types of amendments.

(1) A major amendment is an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit.

(2) A minor amendment is an amendment to improve or maintain the permitted quality or method of disposal of treated marine seawater or wastewater if there is neither a significant increase of the quantity of treated marine seawater or wastewater to be discharged nor a material change in the pattern or place of discharge. A minor amendment includes any other change to a permit issued under this chapter that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state. A minor amendment may also include, but is not limited to:

(A) correcting typographical errors;

(B) changing an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date;

(C) requiring more frequent monitoring or reporting by the permittee;

(D) changing the construction schedule for a discharger. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation before discharge; and

(E) deleting an outfall when the discharge from that outfall is terminated and does not change the discharge from other outfalls except within permit limits.

(d) Good cause for amendments. If good cause exists, the executive director may initiate and the commission may order a major amendment, minor amendment, or minor modification to a permit and the executive director may request an updated application if necessary. Good cause includes, but is not limited to:

(1) there are material and substantial changes to the permitted facility or activity which justify permit conditions that are different or absent in the existing permit;

(2) information, not available at the time of permit issuance, is received by the executive director, justifying amendment of existing permit conditions;

(3) the standards or regulations on which the permit or a permit condition was based have been changed by statute, through promulgation of new or amended standards or regulations, or by judicial decision after the permit was issued; or

(4) an act of God, strike, flood, material shortage, or other event over which the permittee has no control and for which there is no reasonably available alternative may be determined to constitute good cause for amendment of a compliance schedule.

(e) Amendment initiated by the executive director. If the executive director determines to amend a permit, notice of the determination stating the reason for the amendment and a copy of a proposed amendment draft shall be mailed, by United States Postal Service or electronic mail, to the permittee at the last address of record with the commission.

(f) Amendment initiated permit expiration. The existing permit will remain effective and will not expire until commission action on the application for amendment is final. The commission may extend the term of a permit when taking action on an application for amendment.

(g) Amendment application with renewal. An application for a major amendment to a permit may include a request for a renewal of the permit.

§318.7. Renewal of a Permit.

Any permittee with an effective permit shall submit an application for renewal at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the executive director. The executive director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.

(1) An application for renewal shall be in the same form as that required for the original permit application.

(2) An application for renewal shall request continuation of the same requirements and conditions of the expiring permit.

(3) If an application for renewal in fact requests a modification of requirements and conditions of the existing permit, an application for amendment shall be filed in place of an application for renewal.

(4) If an application for renewal is received by the executive director before the permit expiration date, the existing permit will remain in full force and effect and will not expire until commission action on the application for renewal is final.

(5) The commission may deny an application for renewal for the grounds set forth in §305.66 of this title (relating to Permit Denial, Suspension, and Revocation).

(6) During the renewal process, the executive director may make any changes or additions to permits authorized by §318.6 of this title (relating to Amendment of a Permit).

§318.8. Other Permit Actions.

(a) Permit transfer. A permit issued under this chapter is issued to a specific

person and may be transferred only upon approval of the commission in accordance with §305.64 of this title (relating to Transfer of Permits).

(b) Permit denial, suspension, and revocation. A permit issued under this chapter does not become a vested right and may be denied, suspended, or revoked in accordance with §305.66 of this title (relating to Permit Denial, Suspension, and Revocation).

(c) Permit cancellation. If a permittee no longer desires to continue the activity authorized under a permit issued under this chapter, or is agreeable to a suspension of authorization for a specified period of time, the permittee should file with the executive director a written request, or a written consent and waiver in accordance with §305.67 of this title (relating to Revocation and Suspension upon Request or Consent). In the absence of a request filed by the permittee or of sufficient consent and waiver, the commission may revoke or suspend a permit in accordance with §305.66 of this title.

(d) Correction to permits. Nonsubstantive changes to a permit issued under this chapter may be made in accordance with §50.145 of this title (relating to Corrections to Permits).

§318.9. Discharge Zones for Near-Shore and Off-Shore Discharges.

An application for near-shore discharges or off-shore discharges must contain documentation of consultation with the Texas Parks & Wildlife Department and the Texas General Land Office regarding the outfall location(s) as required by Texas Water Code, §18.005(h). This provision only applies to new applications and amendment applications that propose a new outfall or a new location for an existing outfall.

SUBCHAPTER B: TREATED MARINE SEAWATER DISCHARGES

§§318.21 - 318.30

Statutory Authority

The rules 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 TWC, §5.103; 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, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC,

Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

§318.21. Applicability.

This subchapter applies to:

(1) applications to discharge treated marine seawater from a marine seawater desalination project; and

(2) applications for a consolidated permit to discharge treated marine seawater and off-shore discharges.

§318.22. Application Review for Treated Marine Seawater Discharges.

(a) Upon receipt of an application, the executive director or his designee shall assign the application a number for identification purposes.

(b) Applications for permits shall be reviewed by the staff for administrative

completeness within five business days of receipt of the application by the executive director.

(c) If an application is received which is not administratively complete, the executive director shall notify the applicant of the deficiencies by email by the end of the five-day review period.

(1) If the additional information is received within five business days of notice of the deficiency, the executive director will evaluate the information within five business days of receipt of the additional information.

(2) If the additional information is not received within five business days of notice of the deficiency, the application shall be considered withdrawn unless there are extenuating circumstances.

(d) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate for a period of time not to exceed 30 business days from the date the application is declared administratively complete.

(e) If an application is received which is not technically complete, the executive

director shall notify the applicant by email and prior to the end of the 30-day review period of any additional technical material as may be necessary for a complete review.

(1) If the additional information is received within the timeframe established by the technical review staff, the staff will review the additional information to determine if the application is technically complete.

(2) If the additional information is not received within the timeframe established by the technical review staff, and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 15 days to provide the technical data before an application is returned. Decisions to return an application during the technical review stage will be made on a case-by-case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision prior to having the application returned.

(f) After an application is determined by the executive director to be technically complete, the executive director shall prepare a draft permit consistent with all applicable commission rules, unless a recommendation is made not to grant an application. The draft permit will be filed with the commission to be included in the

consideration of the application for permit and is subject to change during the course of the proceedings on the application. The draft permit shall be available for public review.

(g) The executive director shall prepare a technical summary which sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The summary shall include the following information, where applicable:

(1) a brief description of the marine seawater desalination project which is the subject of the draft permit;

(2) the quantity of treated marine seawater that is proposed to be discharged;

(3) a brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(4) reasons why any requested variances or alternatives to required standards do or do not appear justified;

(5) a description of the procedures for reaching a final decision on the draft permit, including procedures by which the public may participate in the final decision; and

(6) the name and telephone number of agency personnel to contact for additional information.

(h) After the draft permit and technical summary are prepared and prior to issuance of public notice, the executive director shall email the draft permit and technical summary to the applicant. The applicant shall have 10 business days to review and provide comment on the draft permit.

(i) Public notice and comment must comply with procedures in §39.902 of this title (relating to Public Notice and Comment for Treated Marine Seawater Discharges).

§318.23. Public Meeting.

(a) A public meeting is intended for the taking of public comment, and is not a contested case hearing under the Texas Administrative Procedure Act.

(b) New, major amendment, and renewal applications have the opportunity for a

public meeting. Minor amendment and minor modification applications are not subject to a public meeting.

(c) The executive director shall hold a public meeting if:

(1) the executive director determines that there is a substantial or significant degree of public interest in an application; or

(2) a member of the state legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held.

(d) Notice of a public meeting must follow the procedures in §39.902(f) and (g) of this title (relating to Public Notice and Comment for Treated Marine Seawater Discharges).

(e) The applicant shall attend any public meeting held by the executive director or chief clerk.

(f) An audio recording or written transcript of the public meeting shall be made available to the public.

(g) The executive director will respond to comments made at the public meeting in accordance with §318.24 of this title (relating to Public Comment Processing).

§318.24. Public Comment Processing.

(a) If timely comments are received, the following procedures shall apply to applications processed under this subchapter:

(1) §55.156 of this title (relating to Public Comment Processing); and

(2) §39.420(a), (b), and (f) of this title (relating to Transmittal of Executive Director's Response to Comments and Decision).

(b) A public comment that is not filed with the chief clerk by the deadline provided in the notice shall be accepted by the chief clerk and placed in the application file but the chief clerk shall not process it.

§318.25. Action by the Executive Director.

(a) The executive director may act on an application if:

(1) public notice requirements have been satisfied and the executive director has considered the public comments and filed a response;

(2) the application meets all relevant statutory and administrative criteria;

(3) the application does not raise new issues that require the interpretation of commission policy;

(4) the executive director's staff and public interest counsel do not raise objections; and

(5) the application is uncontested because:

(A) no timely requests for contested case hearing are filed with the chief clerk;

(B) the applicant and the persons who filed timely requests for contested case hearing have agreed in writing to the action to be taken by the executive director;

(C) any timely requests for contested case hearing have been withdrawn in writing or have been denied; or

(D) a settlement was reached in a contested case hearing, and the application has been remanded from the State Office of Administrative Hearings (SOAH).

(b) If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action, the response to comments, the revised draft permit, if applicable, and an explanation of the opportunity to file a motion to overturn the executive director's decision under §318.26 of this title (relating to Motion to Overturn Executive Director's Decision). The chief clerk shall mail or email this notice to the applicant, the public interest counsel, and to persons who timely filed public comment or hearing requests that the commission denied. The chief clerk need not mail or email notice of executive director action to persons submitting public comment or hearing requests who have not provided a return mailing address or email address. The chief clerk may mail or email the information to a representative group of persons when a substantial number of public comments have been submitted.

(c) If an application does not meet the requirements of subsection (a) of this section, the executive director shall refer the application to the chief clerk. The chief

clerk shall schedule the application for consideration and action by the commission.

(d) At any time during the processing of an application, if all timely requests for hearing on the application are withdrawn or denied, the commission or the general counsel, or the judge if SOAH holds jurisdiction over the application, may remand the application to the executive director. If the application has been scheduled for a commission meeting, the chief clerk shall remove it from the commission's agenda.

(e) A permit is effective when signed by the executive director, unless otherwise specified in the permit.

§318.26. Motion to Overturn Executive Director's Decision.

(a) Filing a motion to overturn.

(1) The applicant, public interest counsel, or other person may file with the chief clerk a motion to overturn the executive director's action on an application. Notwithstanding any other law, a state agency, except a river authority, may not file a motion to overturn the executive director's action on an application unless the state agency is the applicant.

(2) A motion to overturn must be in writing and be filed with the chief clerk no later than 23 days after the date the agency mails notice of the executive director's action on an application. The request should contain the name, address, and daytime telephone number of the person who files the request. The request must expressly state that the person is requesting a motion to overturn the executive director's action on an application, and give reasons why the executive director's decision should be overturned.

(b) Processing a motion to overturn.

(1) After the final deadline to submit a motion to overturn, the chief clerk shall process any motion to overturn by scheduling the motion to overturn for a commission meeting. However, if the commission has delegated its authority to act on the motion to overturn to the general counsel, the motion to overturn shall be scheduled for a commission meeting only if the general counsel directs the chief clerk to do so.

(2) If the commission intends to take action on the motion to overturn, the chief clerk should try to schedule the motion to overturn for a commission meeting that will be held approximately 44 days after the final deadline to file motions to overturn. The chief clerk shall mail or email notice to the applicant, executive director, public interest counsel, and all persons that timely filed comments or motions to overturn at

least 35 days before the first meeting at which the commission considers the motions to overturn. The notice shall explain how to participate in the commission decision, and explain the relevant requirements of this subchapter.

(3) The executive director, the public interest counsel, and the applicant may submit written responses to the motions to overturn no later than 23 days before the commission meeting at which the commission will evaluate the requests. Responses to motions to overturn should address the issues raised in the motion. Responses shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, the applicant, and any requestors.

(4) The requestors may submit written replies to a response no later than nine days before the commission meeting at which the commission will evaluate the motions to overturn. A reply shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, and the applicant.

(c) Disposition of motion. If a motion to overturn is not acted on by the commission within 45 days after the final deadline to file motions to overturn, the motion is denied.

(d) Appeal of commission decision on the motion to overturn. When a motion to

overturn is denied under subsection (c) of this section, a motion for rehearing does not need to be filed as a prerequisite for appeal. Section 80.272 of this title (relating to Motion for Rehearing) and Texas Government Code, §2001.146, regarding motions for rehearing in contested cases do not apply when a motion to overturn is denied. The commission decision may be subject to judicial review under Texas Water Code, §5.351.

§318.27. Request for Contested Case Hearing on an Application.

(a) New, major amendment, and renewal applications have the opportunity for a contested case hearing. Minor amendment and minor modification applications are not subject to a contested case hearing.

(b) Filing a request for contested case hearing.

(1) The following may request a contested case hearing under this subchapter:

(A) the commission;

(B) the executive director;

(C) the applicant; and

(D) affected persons, as defined and determined by §55.103 of this title (relating to Definitions) and §55.203 of this title (relating to Determination of Affected Person).

(2) A request for contested case hearing must be filed no later than 30 days after the chief clerk mails or otherwise transmits the executive director's decision and response to comments and provides instructions for requesting a contested case hearing.

(3) A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided by paragraph (2) of this subsection, and must be based on an issue that was raised in the requestor's timely filed comments that were not withdrawn by the requestor in writing by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment.

(4) A hearing request must substantially comply with the following:

(A) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

(B) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility and how and why the requestor believes he or she will be adversely affected by the proposed facility in a manner not common to members of the general public;

(C) request a contested case hearing;

(D) list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and

(E) provide any other information specified in the public notice of application.

(c) Processing a request for contested case hearing.

(1) The chief clerk shall accept a request for contested case hearing that is filed after the deadline but the chief clerk shall not process it. The chief clerk shall place the late documents in the application file.

(2) Documents that are filed with the chief clerk before the public comment deadline that comment on an application but do not request a contested case hearing shall be treated as public comment.

(3) After the final deadline to submit requests for contested case hearing, the chief clerk shall process any requests for contested case hearing by both:

(A) referring the application and requests for contested case hearing to the alternative dispute resolution director. The alternative dispute resolution director shall try to resolve any dispute between the applicant and the requestors; and

(B) scheduling the hearing request for a commission meeting. The chief clerk should try to schedule the request for a commission meeting that will be held approximately 44 days after the final deadline for timely filed requests for contested case hearing.

(4) The chief clerk shall mail or email notice to the applicant, executive director, public interest counsel, and all timely commenters and requestors at least 35 days before the first meeting at which the commission will evaluate the requests for contested case hearing. The notice shall explain how to participate in the commission decision, describe alternative dispute resolution under commission rules, and explain the relevant requirements of this subchapter.

(5) The executive director, the public interest counsel, and the applicant may submit written responses to the requests no later than 23 days before the first meeting at which the commission will evaluate the requests for contested case hearing. Responses shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, the applicant, and any requestors. Responses to hearing requests must specifically address:

(A) whether the requestor is an affected person;

(B) which issues raised in the hearing request are disputed;

(C) whether the dispute involves questions of fact or of law;

(D) whether the issues were raised by the requestor during the public comment period;

(E) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment;

(F) whether the issues are relevant and material to the decision on the application; and

(G) a maximum expected duration for the contested case hearing.

(6) The requestors may submit written replies to a response no later than nine days before the first meeting at which the commission will evaluate the requests for contested case hearing. A reply shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, and the applicant.

(d) Request by group or association.

(1) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(A) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(B) the interests the group or association seeks to protect are germane to the organization's purpose; and

(C) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(2) A request by a group or association for a contested case hearing may not be granted unless all of the following requirements are met:

(A) comments on the application are timely submitted by the group or association;

(B) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;

(C) the interests the group or association seeks to protect are germane to the organization's purpose; and

(D) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

(3) The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of paragraph (1) or (2) of this subsection. The request and reply shall be filed according to the procedure in subsection (c) of this section.

§318.28. Direct Referrals.

(a) The executive director or the applicant may file a request with the chief clerk that the application be sent directly to the State Office of Administrative Hearings (SOAH) for a hearing on the application.

(b) After receipt of a request filed under this section and after the executive director has issued a preliminary decision on the application, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

(c) A case which has been referred to SOAH under this section shall not be subject to the public meeting requirements of §318.23 of this title (relating to Public Meeting). The agency may, however, call and conduct public meetings in response to public comment. A public meeting is intended for the taking of public comment, and is not a contested case proceeding under the Texas Administrative Procedure Act. Public meetings held under this section shall be subject to following procedures.

(1) The executive director shall hold a public meeting when there is a significant degree of public interest in a draft permit, or when required by law.

(2) To the extent practicable, the public meeting for any case referred under this section shall be held prior to or on the same date as the preliminary hearing.

(3) Public notice of a public meeting may be abbreviated to facilitate the convening of the public meeting prior to or on the same date as the preliminary hearing. In any case, public notice must be provided at least 10 days before the meeting.

(4) The public comment period shall be extended to the close of any public meeting.

(5) The applicant shall attend any public meeting held.

(6) An audio recording or written transcript of the public meeting shall be filed with the chief clerk and will be included in the chief clerk's case file to be sent to SOAH as provided by §80.6 of this title (relating to Referral to SOAH).

(d) A case which has been referred to SOAH under this section shall be subject to the public comment processing requirements of §318.24 of this title (relating to Public Comment Processing).

(e) The administrative law judge may not hold a preliminary hearing until after the issuance of the executive director's response to comment.

§318.29. Action by the Commission.

(a) Commission consideration of the following items is not itself a contested case subject to the Texas Administrative Procedure Act (APA):

(1) public comment;

(2) executive director's response to comment;

(3) motion to overturn; or

(4) request for contested case hearing.

(b) The commission will evaluate public comment, executive director's response to comment, motions to overturn, and requests for contested case hearing and may:

(1) grant or deny the motion to overturn;

(2) determine that a hearing request does not meet the requirements of this subchapter, and act on the application; or

(3) determine that a hearing request meets the requirements of this subchapter and:

(A) if the request raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application:

(i) specify the number and scope of the specific factual issues to be referred to the State Office of Administrative Hearings (SOAH);

(ii) specify the maximum expected duration of the hearing;
and

(iii) direct the chief clerk to refer the issues to SOAH for a hearing; or

(B) if the request raises only disputed issues of law or policy, make a decision on the issues and act on the application; or

(4) direct the chief clerk to refer the hearing request to SOAH. The referral may specify that SOAH should prepare a recommendation on the sole question of whether the requestor is an affected person. If the commission refers the hearing request to SOAH it shall be processed as a contested case under the APA. If the commission determines that a requestor is an affected person, SOAH may proceed with a contested case hearing on the application if either the commission has specified, or the parties have agreed to, the number and scope of the issues and maximum expected duration of the hearing.

(c) A request for a contested case hearing shall be granted if the request is:

(1) made by the applicant or the executive director;

(2) made by an affected person, as determined by §55.203 of this title (relating to Determination of Affected Person), and the request:

(A) raises disputed issues of fact or mixed questions of fact or law that were raised during the comment period by the affected person whose request is granted, that were not withdrawn by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

(B) is timely filed with the chief clerk; and

(C) complies with the requirements of §318.27 of this title (relating to Request for Contested Case Hearing on an Application).

(d) The commission may refer an application to SOAH if the commission determines that:

(1) a hearing would be in the public interest; or

(2) the application is for renewal or amendment of a permit to discharge treated marine seawater and the applicant's compliance history, as determined under Chapter 60 of this title (relating to Compliance History), raises an issue regarding the applicant's ability to comply with a material term of its permit.

(e) After the deadline for filing a request for motion to overturn under §318.26 of this title (relating to Motion to Overturn Executive Director's Decision) or contested case hearing under §318.27 of this title, the commission may act on an application without granting a contested case hearing if:

(1) no timely request for contested case hearing has been received;

(2) all timely requests for contested case hearing have been withdrawn, or have been denied by the commission;

(3) a judge has remanded the application because of settlement;

(4) the commission finds that there are no issues that:

(A) involve a disputed question of fact or a mixed question of law and fact;

(B) were raised in a timely comment made by an affected person whose request is granted; and

(C) are relevant and material to the decision on the application; and

(5) the commission finds that an applicant's compliance history, as determined under Chapter 60 of this title, does not raise an issue regarding the applicant's ability to comply with a material term of its permit.

(f) If a request for a contested case hearing is granted, a decision on a request for contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under §80.109 of this title (relating to Designation of Parties) or the issues referred to SOAH under this section. A judge may consider additional issues beyond the list referred by the commission as provided by §80.4(c)(16) of this title (relating to Judges). A person whose request for contested case hearing is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's request for hearing.

(g) If all requests for contested case hearing are denied, §80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed no more than 25 days after the date that the commission's final decision or order is signed. If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing; and Decision Final and Appealable) the commission's decision is final and appealable under Texas Water Code (TWC), §5.351.

(h) If all hearing requestors, whose requests for a contested case hearing were granted with regard to an issue, withdraw in writing their hearing requests with regard to the issue before issuance of the notice of the contested case hearing, the scope of the hearing no longer includes that issue except as authorized under §80.4(c)(16) of this

title.

(i) When the commission grants a request for a contested case hearing, the following shall apply.

(1) The commission shall issue an order specifying the number and scope of the issues to be referred to SOAH for a hearing. The commission shall submit a list of detailed and complete issues to SOAH.

(2) The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue:

(A) involves a disputed question of fact or a mixed question of law and fact;

(B) was raised in a timely comment made by an affected person whose request is granted; and

(C) is relevant and material to the decision on the application.

(3) The commission may limit the scope of a contested case hearing to only those portions of a permit for which the applicant requests action through an amendment or modification. All terms, conditions, and provisions of an existing permit remain in full force and effect during the proceedings, and the permittee shall comply with an existing permit until the commission acts on the application.

(4) Consistent with the nature and number of the issues to be considered at the contested case hearing, the commission by order shall specify the maximum expected duration of the hearing by stating the date by which the judge is expected to issue a proposal for decision. No hearing shall be longer than 180 days from the first day of the preliminary hearing, or an earlier date specified by the commission, to the date the proposal for decision is issued, unless the hearing is extended by the judge. A judge may extend any hearing if the judge determines that failure to grant an extension will unduly deprive a party of due process or another constitutional right, or by agreement of the parties with approval of the judge.

(5) The chief clerk shall mail or email notice of a contested case hearing to the applicant, executive director, public interest counsel, and persons who filed public comment or requests for contested case hearing. The notice shall be mailed or emailed to the parties no less than 13 days before the hearing. The chief clerk shall mail or email notice, consistent with this paragraph, if the commission refers an application to SOAH

on the sole question of whether the requestor is an affected person. Notice of contested case hearing and affected person status may be combined into a single notice. After an initial preliminary hearing, the judge shall give reasonable notice of subsequent prehearing conferences or the evidentiary hearing by making a statement on the record in a prehearing conference or by written notice to the parties.

(6) After the conclusion of the contested case hearing, if the commission issues a final decision on an application rather than remanding, continuing, or referring the case back to SOAH, the commission shall issue a single decision on the application.

(j) When acting on an application, the commission:

(1) may grant or deny an application in whole or in part, suspend the authority to discharge treated marine seawater for a specified period of time, dismiss proceedings, amend or modify a permit, or take any other appropriate action;

(2) may direct a person to perform or refrain from performing any act or activity, and set forth in the order the findings on which the directive is based;

(3) may set a reasonable compliance deadline in its order in which to:

(A) terminate the operation or activity;

(B) cease disposal, handling, or storage of treated marine seawater;

(C) conform to the permit requirements, including any new or additional conditions imposed by the commission; or

(D) otherwise comply with the commission's order;

(4) may, for good cause, grant an extension of time to a compliance deadline upon application by the permittee; and

(5) shall consider all timely public comments in making its decision and shall either adopt the executive director's response to public comment in whole or in part or prepare a commission response.

(k) If the commission acts on an application, the chief clerk shall mail or otherwise transmit the order and notice of the action to the applicant; executive director; public interest counsel; and to other persons who timely filed public comment, motions to overturn, or requests for contested case hearing. The notice shall explain the opportunity to file a motion under §80.272 of this title. If the commission adopts a

response to comments that is different from the executive director's response to comments, the chief clerk shall also mail or email the final response to comments. The chief clerk need not mail or email notice of commission action to persons submitting public comment, motions to overturn, or requests for contested case hearing who have not provided a return mailing address or email address. The chief clerk may mail or email the information to a representative group of persons when a substantial number of public comments have been submitted.

(1) If the commission acts on an application, §80.272 of this title applies.

(1) A motion for rehearing must be filed not later than 25 days after the date the commission's final decision or order on the application is signed. If the motion is denied under §80.272 and §80.273 of this title the commission's decision is final and appealable under TWC, §5.351.

(2) Motions for rehearing may be filed on:

(A) an issue that was referred to SOAH for contested case hearing, or an issue that was added by the judge;

(B) issues that the commission declined to send to SOAH for hearing; and

(C) the commission's decision on an application.

(3) A motion for rehearing must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The motion must also state the legal and factual basis for the claimed error.

§318.30. Contested Case Hearing Proceedings.

Contested case hearings on applications for discharges of treated marine seawater shall be conducted in accordance with Chapter 80 of this title (relating to Contested Case Hearings).

SUBCHAPTER C: OFF-SHORE DISCHARGES

§§318.40 - 318.43

Statutory Authority

The rules 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 TWC, §5.103; 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, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC,

Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

§318.40. Applicability.

This subchapter applies to off-shore discharges from a marine seawater desalination project.

§318.41. Application Review for Off-Shore Discharges.

(a) Upon receipt of an application, the executive director or his designee shall assign the application a number for identification purposes.

(b) Applications for permits shall be reviewed by the staff for administrative completeness within five business days of receipt of the application by the executive director.

(c) If an application is received which is not administratively complete, the executive director shall notify the applicant of the deficiencies by email by the end of the

five-day review period.

(1) If the additional information is received within five business days of notice of the deficiency, the executive director will evaluate the information within five business days of receipt of the additional information.

(2) If the additional information is not received within five business days of notice of the deficiency, the application shall be considered withdrawn unless there are extenuating circumstances.

(d) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate for a period of time not to exceed 30 business days from the date the application is declared administratively complete.

(e) If an application is received which is not technically complete, the executive director shall notify the applicant by email and prior to the end of the 30-day review period of any additional technical material as may be necessary for a complete review.

(1) If the additional information is received within the timeframe established by the technical review staff, the staff will review the additional information to determine if the application is technically complete.

(2) If the additional information is not received within the timeframe established by the technical review staff, and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 15 days to provide the technical data before an application is returned. Decisions to return the application during the technical review stage will be made on a case-by-case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision prior to having the application returned.

(f) After an application is determined by the executive director to be technically complete, the executive director shall prepare a draft permit consistent with all applicable commission rules, unless a recommendation is made not to grant an application. The draft permit will be filed with the commission to be included in the consideration of the application for permit and is subject to change during the course of the proceedings on the application. The draft permit shall be available for public review.

(g) The executive director shall prepare a technical summary which sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The summary shall include the following information, where applicable:

(1) a brief description of the marine seawater desalination project which is the subject of the draft permit;

(2) the sources and quantity of wastewater that is proposed to be discharged;

(3) a brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(4) reasons why any requested variances or alternatives to required standards do or do not appear justified;

(5) a description of the procedures for reaching a final decision on the draft permit, including procedures whereby the public may participate in the final decision; and

(6) the name and telephone number of any persons to contact for additional information.

(h) After the draft permit and technical summary are prepared and prior to issuance of public notice, the executive director shall email the draft permit and technical summary to the applicant. The applicant shall have 10 business days to review and provide comment on the draft permit.

(i) Public notice and comment must comply with the procedures in §39.903 of this title (relating to Public Notice and Comment for Off-Shore Discharges).

§318.42. Action by the Executive Director.

(a) The executive director may act on an application subject to this subchapter if:

(1) public notice requirements have been satisfied and the executive director has considered the public comment and filed a final technical summary;

(2) the application meets all relevant statutory and administrative criteria;

(3) the application does not raise new issues that require the interpretation of commission policy; and

(4) the executive director's staff and public interest counsel do not raise objections.

(b) If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action, the final technical summary, the revised draft permit, if applicable, and an explanation of the opportunity to file a motion to overturn under §318.43 of this title (relating to Motion to Overturn Executive Director's Decision). The chief clerk shall mail or email this notice to the applicant, the public interest counsel, and to other persons who timely filed public comment. The chief clerk need not mail or email notice of executive director action to persons submitting public comment who have not provided a return mailing address or email address. The chief clerk may mail or email the information to a representative group of persons when a substantial number of public comments have been submitted.

(c) If an application does not meet the requirements of subsection (a) of this section, the executive director shall refer the application to the chief clerk. The chief clerk shall schedule the application for consideration and action by the commission.

(d) A permit is effective when signed by the executive director, unless otherwise specified in the permit.

§318.43. Motion to Overturn Executive Director's Decision.

(a) Filing a motion to overturn.

(1) The applicant, public interest counsel or other person may file with the chief clerk a motion to overturn the executive director's action on an application.

Notwithstanding any other law, a state agency, except a river authority, may not file a motion to overturn the executive director's action on an application unless the state agency is the applicant.

(2) A motion to overturn must be in writing and be filed with the chief clerk no later than 23 days after the date the agency mails or emails notice of the executive director's action on an application. The request should contain the name, address, and daytime telephone number of the person who files the request. The request must expressly state that the person is requesting a motion to overturn the executive director's action on an application, and give reasons why the executive director's decision should be overturned.

(b) Processing a motion to overturn.

(1) After the final deadline to submit a motion to overturn, the chief clerk shall process any motion to overturn by scheduling the motion to overturn for a commission meeting. However, if the commission has delegated its authority to act on the motion to overturn to the general counsel, the motion to overturn shall be scheduled for a commission meeting only if the general counsel directs the chief clerk to do so.

(2) If the commission intends to take action on the motion to overturn, the chief clerk should try to schedule the motion to overturn for a commission meeting that will be held approximately 44 days after the final deadline to file motions to overturn. The chief clerk shall mail or email notice to the applicant, executive director, public interest counsel, and all persons that timely filed comments or motions to overturn at least 35 days before the first meeting at which the commission considers the motions to overturn. The notice shall explain how to participate in the commission decision and explain the relevant requirements of this subchapter.

(3) The executive director, the public interest counsel, and the applicant may submit written responses to the motions to overturn no later than 23 days before the commission meeting at which the commission will evaluate the requests. Responses to motions to overturn should address the issues raised in the motion. Responses shall

be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, the applicant, and any requestors.

(4) The requestors may submit written replies to a response no later than nine days before the commission meeting at which the commission will evaluate the motions to overturn. A reply shall be filed with the chief clerk, and served on the same day to the executive director, the public interest counsel, and the applicant.

(c) Disposition of motion. If a motion to overturn is not acted on by the commission within 45 days after the final deadline to file motions to overturn, the motion is denied.

(d) Appeal of commission decision to overturn. When a motion to overturn is denied under subsection (c) of this section, the commission decision may be subject to judicial review under Texas Water Code, §5.351.

SUBCHAPTER D: NEAR-SHORE DISCHARGES

§318.60, §318.61

Statutory Authority

The rules 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 TWC, §5.103; 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, §5.120 which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; TWC, §26.011 which provides the commission with the authority to establish the level of quality to be maintained in, and to control the quality of, the water in the state by subjecting waste discharges or impending waste discharges to reasonable rules or orders adopted or issued by the commission in the public interest; TWC, §26.027 and §26.041 which authorize the commission to issue permits for the discharge of waste or pollutants into or adjacent to water in the state, and to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §18.005(e) which directs the commission to adopt rules to expedite permitting and related processes for the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC,

Chapter 18.

The proposed rules implement TWC, §18.005 and House Bill 2031 (84th Texas Legislature, 2015).

§318.60. Applicability.

This subchapter applies to near-shore discharges from a marine seawater desalination project.

§318.61. Application Review and Processing for Near-Shore Discharges.

Wastewater discharges within three miles of any point on the coast of Texas are governed by the Texas Pollutant Discharge Elimination System program. As such, the permitting process for these discharges must comply with Chapters 39, 50, 55, 80, 281, and 305 of this title (relating to Public Notice; Action on Applications and Other Authorizations; Requests for Reconsideration and Contested Case Hearings; Public Comment; Contested Case Hearings; Applications Processing; and Consolidated Permits). The executive director will make every reasonable effort to expedite the administrative and technical reviews, including the use of email for correspondence.