

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Rulemaking Adoption

AGENDA REQUESTED: October 19, 2016

DATE OF REQUEST: September 30, 2016

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

CAPTION: Docket No. 2015-1015-RUL. Consideration of the adoption of 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 adoption 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. The proposed rules were published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3839). (Kathy Ramirez, Michael Parr) (Rule Project No. 2015-029-295-OW)

L'Oreal Stepney, P.E.

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Kim Wilson

Division Director

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Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** September 30, 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 Rulemaking Adoption
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.

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. HB 2031 prohibits: 1) the discharge of treated marine seawater into a flowing natural stream

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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, HB 2031 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. HB 4097 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 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.

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Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

For Chapters 295 and 297, the scope of the 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 adopted 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 adopted rulemaking expedites 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 adopted 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 Pollutant Discharge Elimination System (TPDES) program and must be processed in accordance with existing permitting procedures, however the executive director will make every reasonable effort to expedite the review of these applications.

Under the adopted 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 adopted 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 adopted 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.

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

The adopted rulemaking establishes 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

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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 adopted 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 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.

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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 adopted 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 HB 2031 is to streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination.

C.) Agency programs:

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

Public comment:

The commission held a public hearing on June 21, 2016, in Austin. The comment period closed on July 5, 2016. The commission received comments from AEM the Woodlands; Asociacion Amiga; Clean Water Action; Coastal Conservation Association Texas; EV Houston Newspaper; Glenrose Engineering, Inc.; the Honorable A.R. Senac, Chambers County Commissioner, Precinct 4; San Marcos River Foundation; Save Our Springs

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Alliance; Texas Conservation Alliance; Texas Desalination Association's Marine Subcommittee; TPWD; Viva! The Woodlands Magazine; joint comments submitted by the Galveston Bay Foundation, NWF, and Sierra Club; 41 individuals who submitted personalized comments through NWF; 940 individuals who submitted identical comments through NWF; 32 individuals who submitted personalized comments through the Sierra Club; and 1,299 individuals who submitted identical comments through the Sierra Club. The majority of the commenters requested that the rules include additional requirements and a more expansive review by the commission.

Comments on Chapter 39 related to increasing the public comment period, expanding the public notice to include additional individuals and entities, and adding additional information to the public notice text.

Comments on Chapter 295 related to clarifying the distinction between marine seawater under TWC, Chapter 18 and seawater under TWC, §11.1405, clarifying how exempt facilities would be treated, impingement and entrainment, determination of TDS concentration, and expanding the public notice requirements.

Comments on Chapter 297 related to clarifying the distinction between marine seawater under TWC, Chapter 18 and seawater under TWC, §11.1405, consideration of the adopted environmental flow standards in Chapter 298, and the commission's authority to deny applications.

Comments on Chapter 318 related to clarifying that the commission has authority to deny permit applications, clarifying the three-mile line that differentiates near-shore and off-shore discharges, deleting the statement in rule that treated marine seawater are not pollutant discharges, adding a requirement that treated marine seawater discharges meet water quality standards, expanding the application requirement to include the results of consultation with TPWD and GLO, adding additional information to the technical summary text, and requiring the commission to grant a public meeting request from county judges.

Significant changes from proposal:

Chapter 39 was revised to increase the public comment period from 10 calendar days to 15 calendar days, add county judges and individuals on the interested persons list to the list of individuals that are emailed the public notice, and add the quantity of wastewater proposed to be discharged to the public notice text.

Chapter 295 was revised to clarify the distinction between marine seawater under TWC, Chapter 18 and seawater under TWC, §11.1405, to provide more specific information on what would need to be provided to demonstrate that a facility is exempt from water rights permitting requirements, and to provide cross-references to specific technical requirements in new Chapter 297, Subchapter K.

Chapter 297 was revised to clarify the distinction between marine seawater under TWC, Chapter 18 and seawater under TWC, §11.1405 and to provide more specific requirements for determination of TDS concentration and impingement and entrainment.

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Chapter 318 was revised to clarify the three-mile boundary that differentiates near-shore and off-shore discharges, add a requirement that treated marine seawater discharges meet water quality standards, expand the application requirement to include the results of consultation with TPWD and GLO, and to add the quality of wastewater proposed to be discharged to the technical summary text. Changes were not made to Chapter 318 relating to the commission authority to deny permit applications because the rule already includes this authority. The statement that treated marine seawater are not pollutant discharges was not removed but the definition of treated marine seawater was revised to require treatment to meet water quality standards and to protect water quality. The rule allows anyone to request a public meeting, however the requirement for when a public meeting is granted is found in 30 TAC §55.154, which is cross-referenced in Chapter 318. This requested change would result in more public meetings conducted under this rule than would be required under existing rule, thereby increasing instead of decreasing the length of the permitting process.

Potential controversial concerns and legislative interest:

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

Does 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:

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

***Anticipated Texas Register* adoption publication date:** November 4, 2016

Anticipated effective date: November 10, 2016

***Six-month Texas Register* filing deadline:** November 28, 2016

Agency contacts:

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Attachments

HB 2031

HB 4097

Commissioners
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cc: Chief Clerk, 2 copies
Executive Director's Office
Marshall Coover
Erin Chancellor
Stephen Tatum
Jim Rizk
Office of General Counsel
Kathy Ramirez
Kris Hogan

1 AN ACT

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

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

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

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

24 (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) adopts new §§39.901 - 39.903.

Section 39.902 and §39.903 are adopted *with changes* to the proposed text as published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3839). Section 39.901 is adopted *without change* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted 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 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. The commission must adopt rules designating diversion and discharge zones by September 1, 2020. Under

TWC, §18.003(j) and §18.005(g), 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 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 adopted 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 adopts 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

Adopted 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

Adopted new §39.902, identifies the public notice and comment process. Adopted

§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. Adopted §39.902(b) describes the contents of the notice. Adopted §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 posted on the TCEQ website for public review and comment. Concurrently with posting on the website, the notice of application and preliminary decision will be emailed to the state senator, state representative, and county judge who represent the area where the facility is or will be located. Adopted §39.902(c) also specifies that the notice of application and preliminary decision will also be emailed to the TPWD, the GLO, and persons on the mailing lists required by §39.407 that have provided a valid email address. Lastly, adopted §39.902(c) specifies that the emails will be sent to the email address on file with the Office of the Chief Clerk. Adopted §39.902(d) requires a new notice if major amendments or transfers are made after notice is posted on the TCEQ website. Adopted §39.902(e) specifies that the public comment period ends 15 calendar days after notice is posted on the TCEQ website 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. Adopted §39.902(f) describes the public meeting notice content. Adopted §39.902(g) specifies that, at least 14 calendar days prior to the public meeting, 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, state representative, and county judge who represent the area where the facility is or will be located, emailed to

the TPWD and the GLO; and posted on the TCEQ website.

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

Adopted new §39.903, identifies the public notice and comment process for off-shore discharges. Adopted §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. Adopted §39.903(b) describes the contents of the notice. Adopted §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 posted on the TCEQ website for public review and comment. Concurrently with posting on the website, the notice of application and preliminary decision will be emailed to the state senator, state representative, and county judge who represent the area where the facility is or will be located. Adopted §39.903(c) also specifies that the notice of application and preliminary decision will also be emailed to the TPWD, the GLO, and persons on the mailing lists required by §39.407 that have provided a valid email address. Lastly, adopted §39.903(c) specifies that the emails will be sent to the email address on file with the Office of the Chief Clerk. Adopted §39.903(d) requires new notice if major amendments or transfers are made after notice is posted on the TCEQ website. Adopted §39.903(e) specifies that the public comment period ends 15 calendar days after the notice is posted on the TCEQ website 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. Adopted §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.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted 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 adopted 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 adopted 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 adopted new rules will protect the health and safety of aquatic and wildlife resources, as well as water quality, however, the adopted 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 adopted 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 adopted rulemaking does not come under a delegation agreement or contract with a federal program, and finally, it is not being adopted under the TCEQ's general rulemaking authority. This rulemaking is being adopted under specific state statutes enacted in HB 2031. Therefore, the commission does not adopt the rules solely under the commission's general powers.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted 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 adopted 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 adopted rulemaking will substantially advance this stated purpose by adopting 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 adopted 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 adopted 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 adopted 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 adopted rulemaking and found that the adoption 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 adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted 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 adopted 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 adopted 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 adopted 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 adopted rules will include effluent limitations to ensure compliance with water quality standards. Further, the expedited permitting process in these adopted 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).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on June 21, 2016, in Austin. The comment period closed on July 5, 2016. The commission received comments from AEM the Woodlands (AEM); Asociacion Amiga; Clean Water Action (CWA); Coastal Conservation Association Texas (CCA-Texas); EV Houston Newspaper (EVHN); Glenrose Engineering, Inc. (GEI); the Honorable A. R. Senac, Chambers County Commissioner, Precinct 4 (Commissioner Senac); San Marcos River Foundation (SMRF); Save Our Springs Alliance (SOS); TPWD; Viva! The Woodlands Magazine (Viva!); joint comments submitted by the Galveston Bay Foundation (GBF), National Wildlife Federation (NWF), and the Sierra Club Lone Star Chapter (Sierra Club); four individuals who submitted personalized comments through NWF; 32 individuals who submitted personalized comments through the Sierra Club; and 1,299 individuals who submitted identical comments through the Sierra Club. The comments submitted by Commissioner Senac do not in

any manner necessarily reflect the opinion of Chambers County Commissioners Court or Chambers County.

One individual supported the rules. Generally, AEM, Asociacion Amiga, CWA, CCA-Texas, EVHN, GEI, Commissioner Senac, SMRF, SOS, TPWD, Viva!, GBF, NWF, Sierra Club and 1,331 individuals supported the rules but were concerned that the rules did not provide sufficient public notice. Three individuals did not support the rules. TPWD, GBF, NWF, and Sierra Club suggested specific changes to the rules.

Response to Comments

General Comments

Comment

One individual commented in support of the rules.

Response

The commission acknowledges this comment.

Comment

One individual commented that he is opposed to discharges from desalination facilities along the Texas coast. One individual commented that TCEQ should not take any action to streamline the authorization process for discharges from desalination facilities. One individual commented that wastewater discharges should not be exempt from permit or hearing requirements.

Response

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."

HB 2031, specifically TWC, §18.005(e), instructed the commission to develop rules to provide an expedited procedure for acting on an application for a permit. The bill also identified the procedural components of the permitting process for near-shore discharges, off-shore discharges, and treated marine seawater discharges. Near-shore discharges and treated marine seawater must include notice, public comment, and an opportunity for a public meeting and/or a contested case hearing. However, the process for off-shore discharges must include notice and public comment only. The adopted rulemaking complies with the requirements of HB 2031. No changes were made in response to these comments.

Comment

TPWD recommended revising "Texas Parks & Wildlife Department" to "Texas Parks and Wildlife Department."

Response

The commission agrees to make the recommended change throughout this adopted subchapter.

Comment

GBF, NWF, and Sierra Club recommended replacing the phrase "published on the TCEQ website" with "posted on the TCEQ website."

Response

The commission agrees to make the recommended change throughout this adopted subchapter.

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

Comment

GBF, NWF, and Sierra Club commented that the rule language should acknowledge the potential that the executive director may decide that a permit should not be issued and no draft permit will be available. The commenters recommended revising §39.902(a) to add the word "any" as follows: "...the executive director shall file the application, any draft permit, technical summary..."

Response

The public notice and comment procedures in §39.902 do not apply to applications that the executive director recommends not granting, therefore it is not necessary to revise §39.902(a) to acknowledge the potential that the executive director may decide that a permit should not be issued and no draft permit will be available. No change was made in response to this comment.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, TPWD, Viva!, GBF, NWF, Sierra Club, and 1,331 individuals recommended additional methods of issuing public notice in §39.902(c). Suggestions included maintaining an interested person email list for treated marine seawater discharges and emailing public notice to individuals or entities on the interested person email list; developing a sign-in sheet (i.e., membership sign-up) for interested persons who want to receive notice; emailing public notice to the county judge and county commissioners for each county in which part of the facility is proposed to be located; emailing public notice to media outlets, and having the notice available for public inspection at the county courthouse and at least one public library in each county where the discharge or discharges will be located.

GBF, NWF, and Sierra Club additionally recommended adding language to note that emailed notice will occur concurrently with posting the notice on the website.

Response

The commission agrees to expand the dissemination of the public notice to include county judges and persons on mailing lists maintained by the Office of the Chief Clerk. However, due to attachment size limitations on email servers, the commission revised the list of documents that will be emailed to only include the notice of application and preliminary decision while adding a requirement for the notice text in §39.902(b) to include the website address where the other documents are posted. In response to this comment, the commission added §39.902(b)(6) and renumbered subsequent paragraphs to require the notice text to include the website address where the application, draft permit, and technical summary are posted. The commission revised §39.902(c) to require emailed notice to occur concurrently with posting on the website; to require emailed notice to the county judge that represents the area where the facility is or will be located and persons on the mailing list required by §39.407 that have provided a valid email address; and to require only the notice of application and preliminary decision to be attached to emails. For consistency, the commission also revised §39.902(g) to require notice of a public meeting be sent to the county judge who represents the area where the facility is or will be located.

County commissioners were not included in the revised list of notice recipients because county judges preside over county commissioner's courts. Requiring the applicant to post the notice at the county courthouse and at least one public library in each county would extend the permit processing timeframe to an extent that

would not be consistent with the legislative directive to create an expedited process for review of these applications. Providing notice to media outlets doesn't necessarily result in media outlets publicizing the information and would extend the permit processing timeframe.

Comment

AEM, Asociacion Amiga, CCA-Texas, Commissioner Senac, CWA, EVHN, GEI, SMRF, SOS, TPWD, Viva!, GBF, NWF and Sierra Club commented that the proposed comment period in §39.902(e) is too short to allow for meaningful comment, especially given that comments submitted during this period are the basis for any issues referred to a contested case hearing on an authorization to discharge treated marine seawater. Suggestions included increasing the public comment period from 10 calendar days to 15 business days or 21 calendar days.

Response

The commission recognizes that there must be a balance between allowing for an expedited permitting process while still allowing for meaningful public comment. In response to this comment, the commission revised §39.902(e) to increase the public notice period to 15 calendar days.

Comment

GBF, NWF, and Sierra Club commented that the rule language should acknowledge the potential that the executive director may decide that a permit should not be issued and

no draft permit will be available. The commenters recommended revising §39.903(a) to add the word "any" as follows: "...the executive director shall file the application, any draft permit, technical summary..."

Response

The public notice and comment procedures in §39.903 do not apply to applications that the executive director recommends not granting, therefore it is not necessary to revise §39.903(a) to acknowledge the potential that the executive director may decide that a permit should not be issued and no draft permit will be available. No change was made in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that §39.903(b) should be revised to include information about the specific quantity and quality of the water proposed to be discharged from each outfall in the public notice text.

Response

The commission partially agrees with this comment. The commission agrees the notice should contain the total quantity of water proposed to be discharged by the facility, but not the quantity from each outfall. The quantity from each outfall is more appropriately described in the application, the draft permit, and the technical summary. Additionally, the quality of water proposed to be discharged depends on many factors and is more appropriately described in the application, the draft

permit, and the technical summary. In response to this comment, the commission revised §39.903(b)(3) to include the total quantity of water proposed to be discharged by the facility. The commission also revised §39.902(b)(3) similarly for consistency.

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

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, Viva!, GBF, NWF, Sierra Club, and 1,331 individuals recommended additional methods of issuing public notice in §39.903(c). Suggestions included maintaining an interested person email list for off-shore discharges and emailing public notice to individuals or entities on the interested person email list; developing a sign-in sheet (i.e., membership sign-up) for interested persons who want to receive notice; emailing public notice to the county judge and county commissioners for each county in which part of the facility is proposed to be located, and emailing public notice to media outlets.

Response

The commission agrees to expand the dissemination of the public notice to include county judges and persons on mailing lists maintained by the Office of the Chief Clerk. However, due to attachment size limitations on email servers, the commission revised the list of documents that will be emailed to only include the notice of application and preliminary decision while adding a requirement for the notice text in §39.903(b) to include the website address where the other documents

are posted. In response to this comment, the commission added §39.903(b)(6) and renumbered subsequent paragraphs to require the notice text to include the website address where the application, draft permit, and technical summary are posted. The commission revised §39.903(c) to require emailed notice to occur concurrently with posting on the website; to require emailed notice to the county judge that represents the area where the facility is or will be located and persons on the mailing list required by §39.407 that have provided a valid email address; and to require only the notice of application and preliminary decision to be attached to emails.

County commissioners were not included in the revised list of notice recipients because county judges preside over county commissioner's courts. Requiring the applicant to post the notice at the county courthouse and at least one public library in each county would extend the permit processing timeframe to an extent that would not be consistent with the legislative directive to create an expedited process for review of these applications. Providing notice to media outlets doesn't necessarily result in media outlets publicizing the information and would extend the permit processing timeframe.

Comment

AEM, Asociacion Amiga, CCA-Texas, Commissioner Senac, CWA, EVHN, GEI, SMRF, SOS, Viva!, GBF, NWF, and Sierra Club commented that the proposed comment period in §39.903(e) is too short to allow for meaningful comment. Some commenters suggested

increasing the public comment period from 10 calendar days to 15 business days.

Response

The commission recognizes that there must be a balance between allowing for an expedited permitting process while still allowing for meaningful public comment. In response to this comment, the commission revised §39.903(e) to increase the public notice period to 15 calendar days.

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

§§39.901 - 39.903

Statutory Authority

The rules are adopted 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 adopted 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 and the total quantity of water proposed to be discharged by the facility;

(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) the website address where the administratively and technically complete application, the draft permit, and the technical summary are posted for public review;

(7) ~~(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;

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

(9) ~~(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;

(10) ~~(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;

(11) ~~(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;

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

(13) (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 posted published on the TCEQ website for public review and comment. Concurrently with posting on the website, the notice of application and preliminary decision. Additionally, these documents will be emailed to the email address on file with the Office of the Chief Clerk for the following individuals and agencies:

(1) the state senator and the state representative who represent the general area where in which the facility is or will be located;

(2) the Texas Parks and Wildlife Department; and

(3) the Texas General Land Office; at the email address on file for these individuals and agencies.

(4) the county judge who represents the area where the facility is or will be located; and

(5) persons on the mailing lists required by §39.407 of this title (relating to Mailing Lists) that have provided a valid email address.

(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 posted on the TCEQ website published, unless new notice is posted on the TCEQ website 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 15 ±10 calendar days after the date of posting 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 (12) ~~(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 the state representative who represent the area where the facility is or will be located, the Texas Parks and Wildlife Department, and the Texas General Land Office; emailed to the county judge who represents the area where the facility is or will be located; and posted 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 and the total quantity of water proposed to be discharged by the facility;

(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) the website address where the administratively and technically complete application, the draft permit, and the technical summary are posted for public review;

(7) (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;

(8) (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;

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

(10) (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 posted published on the TCEQ website for public review and comment. Concurrently with posting on the website, the notice of application and preliminary decision. Additionally, these documents will be emailed to the email address on file with the Office of the Chief Clerk for the following individuals and agencies:

(1) the state senator and the state or representative who represent the area where the facility is or will be located;

(2) the Texas Parks and Wildlife Department; and

(3) the Texas General Land Office; at the email address on file for these individuals and agencies.

(4) the county judge who represents the area where the facility is or will be located; and

(5) persons on the mailing lists required by §39.407 of this title (relating to Mailing Lists) that have provided a valid email address.

(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 posted on the TCEQ website published, unless new notice is posted on the TCEQ website 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 15 ±0 calendar days after the date of posting 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) adopts new §§295.300 - 295.306.

Sections 295.300 - 295.306 are adopted *with changes* to the proposed text as published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3845).

Background and Summary of the Factual Basis for the Adopted 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."

These rules allow the regulatory process for the diversion of seawater or marine

seawater and conveyance of treated marine seawater in the bed and banks to be expedited. These applications can be expedited because they do not require a determination of water availability and; consequently, do not require the extensive technical review associated with a water availability determination nor do they have to be processed in priority date order. Additionally, the statute requires the Texas Parks and Wildlife Department (TPWD) and the Texas General Land Office (GLO) to conduct a study to develop zones appropriate for the diversion of marine seawater. HB 2031 requires the TPWD and the GLO to submit a report to the commission that "must include recommended diversion zones for designation by the commission and recommendations for the number of points from which, and the rate at which, a facility may divert marine seawater." HB 2031 then requires the commission to adopt rules to designate appropriate diversion zones. The designation of diversion zones will also expedite the review of these applications.

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 TPWD and the 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 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 adopts 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 adopts 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 invited 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 commission invited comments on all aspects of the rules as they were proposed. The commission made various revisions to the proposed rules and added new subsections in response to comments as noted in this preamble.

§295.300, Applicability

The commission adopts 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. In response to comment, the commission added the words and phrases "for desalination," "for desalination solely for industrial purposes," "treated," and "subchapter" to adopted §295.300(a) and deleted the word "section" to clarify the scope and applicability of the subchapter. In response to comment the commission added the words and phrases "water" and "at the proposed diversion point" and deleted the word "seawater" from adopted §295.300(a)(2) to clarify that this adopted subsection applies to diversions of both seawater and marine seawater and to clarify that the determination of TDS concentration would occur at the proposed diversion point. In response to comment, the commission revised adopted §295.300(c) to clarify the requirements for an exemption for the permitting requirements in this subchapter. The commission revised §295.300(c)(1) by adding the words and phrases "data," "demonstrating, based on the location of each proposed diversion location, that subsection (a)(1) of this section does not apply and," "for each proposed diversion location," and "in accordance with the requirements set out in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration)." The commission revised §295.300(e) to clarify that marine seawater, as defined in this subchapter, cannot be diverted from bays and estuaries by adding the words and phrases "subchapter," "diversion," "solely," and "the purpose of desalination" and deleting the

words and phrases "section," "application," and "for diversion." The commission revised §295.300(f) to clarify how TWC, Chapter 11 applies to applications under this subchapter because diversions of seawater are already covered by TWC, §11.1405. The commission added the words and phrases "subchapter" and "which is not subject to this subchapter of the rules" and deleting the word "section." Finally, the commission adopted §295.300(g) to clarify that a person who seeks an amendment to add a use to a permit issued for diversion of seawater solely for industrial purposes would need to apply for the amendment under other provisions of TWC, Chapter 11. Adopted §295.300(g) states that "If a person seeks to utilize a facility that was constructed or permitted for the diversion of seawater solely for the purpose of desalination for industrial uses under this subchapter to divert seawater for another use, the person must first obtain a water right permit pursuant to provisions of TWC, Chapter 11, other than TWC, §11.1405."

§295.301, Definitions

The commission adopts new §295.301. The adopted section has definitions of terms that only apply to Chapter 295, Subchapter G. 30 TAC Chapter 55 does not apply to applications to divert marine seawater from the Gulf of Mexico or to take seawater from a bay or arm of the Gulf of Mexico for industrial purposes, except for Chapter 55, Subchapter G. In §295.301(1) the commission adopts the definition of "Affected person." In §295.301(2) the commission adopts the definition of "Marine seawater" consistent with TWC, §18.001(2). In response to comment, the commission added the phrase "for desalination" to the definition of "Marine seawater" to clarify the

applicability of this subchapter. In §295.301(3) the commission adopts the definition of "Seawater" as water that is derived from a bay or arm of the Gulf of Mexico. In response to comment, the commission added the phrase "for desalination and use solely for industrial purposes" to clarify that only water diverted solely for industrial purposes can be diverted from a bay or arm of the Gulf of Mexico. In response to comment, the commission adopted §295.301(4) to provide a definition of "Three-mile seaward boundary." Adopted §295.301(4) defines the three-mile boundary as "Three-mile seaward boundary--The three nautical mile boundary developed by the Texas General Land Office for the Dispersant Use Pre-Approval Zone."

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

The commission adopts new §295.302. The adopted 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 response to comment, the commission added the words "Application for" to the title of this section because the section includes the requirements for an application under this subchapter. In §295.302(a) and (b), the commission adopts the requirement 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 response to comment, the commission clarified §295.302(a) by adding the phrase "or for the diversion of marine seawater" and deleting the phrase "diversion of marine seawater." In §295.302(c) and (d) the

commission adopts 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 response to comment, the commission added the phrase "for each diversion point" to adopted §295.302(d) to clarify that an applicant must provide the maximum diversion rate for each point requested in an application under this subchapter. In §295.302(e) the commission adopts the requirement 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 adopts 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. In response to comment, the commission added the word "each" before "purpose of use" and deleted the words "the," "or purposes," "each," and the sentence "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." for clarity and because the deleted sentence was redundant. The commission further adopts 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 adopts 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 response to comment, the commission added the word "The" and deleted the word "an" in adopted §295.302(h) to be consistent with the other requirements in the subsection. In §295.302(i), the commission adopts a requirement that an application include a determination of the TDS concentration of the water source in accordance with TWC, §18.003(c). In response to comment, the commission added the phrase "as described in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration)" to provide a cross-reference to the substantive requirements for TDS in adopted 30 TAC §297.205. Adopted §295.302(j) includes a requirement relating to measures to minimize impingement and entrainment associated with the requested diversion as prescribed by TWC, §18.003(h). In response to comment, the commission added the phrase "as described in §297.209 of this title (relating to Impingement and Entrainment)" to provide a cross-reference to the substantive requirements for impingement and entrainment in adopted 30 TAC §297.209. Finally, in §295.302(k) the commission adopts 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 adopts 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. In response to comment the commission added the word and phrase "and" and "documentation of the results of the" and deleted the "&" in the name of the Texas Parks and Wildlife Department and deleted the phrases

"evidence of" and "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." The commission made these changes to clarify that an applicant must provide the results of its consultation with its application.

§295.303, Review Timeframes

The commission adopts 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 adopts 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 adopts the requirement 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 response to comment, the commission added the phrase "except as extended pursuant to subsection (d) of this section" to clarify that the time for the executive director to review an application is extended by the amount of time an applicant is given to submit additional documentation. In §295.303(d) the commission adopts requirements and timeframes that 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 adopts 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 adopts this requirement to expedite processing of water right applications to divert marine seawater and seawater. In response to comment the commission added the words and phrases "technical review," "taken by the applicant to provide," "original," and "the application" and the sentence "And, in no event shall the executive director have less than 60 working days, exclusive of any time spent waiting for submission of additional information, to complete the technical review." The commission also deleted the words and phrases "of time," "required for," and "material." The commission made these changes to adopted §295.302(d) to clarify that the executive director shall always have 60 working days to complete his technical review.

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

The commission adopts 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 adopts the requirement that emailed 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 response to comment the

commission added additional notice to county judges for the county in which the facility is to be located and to other persons who request to receive notice by adding "the county judge for each county in which the proposed facility is proposed to be located" and "any person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notice of applications filed under this subchapter. The notice shall also be posted on the commission's website." In §295.304(b)(1) - (8) the commission adopts the requirement 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 adopts the requirement 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 response to comment the commission added the phrase "and indicate the deadline for doing so" to adopted §295.304(b)(9) to clarify that the notice of an application under this subchapter would include a time period for persons receiving notice to respond to the notice. In §295.304(b)(11) the commission adopts the requirement 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 adopts the requirement 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.

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

Bed and Banks

The commission adopts new §295.305. The adopted 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 adopts the requirement 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 response to comment the commission added the sentence "More stringent treatment may be required if the commission determines it is necessary to protect water quality" to clarify that the commission retains the authority to require appropriate treatment of treated marine seawater conveyed in the bed and banks of a watercourse to protect water quality in this state. In §295.305(b) the commission adopts 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 adopts §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 adopts §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 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 adopted application requirement in §295.305(d)(5), relating to consistency with environmental flow standards, implements TWC, §11.1405(f) and (g). The commission's 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 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 adopts 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 adopts 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 adopted 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 response to comment, the commission added the sentences "Notice shall also be provided to any person who has submitted a written request to

the Office of the Chief Clerk providing a valid email address and asking to receive notice of applications filed under this subchapter. The notice shall be posted on the commission's website" to clarify that a person can request to receive notice of an application under this subchapter. In §295.306(d)(1) - (7) and (10), the commission adopts that the 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 adopts 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 adopts the requirement 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.

Final 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 adopted 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 adopted under the TCEQ's general rulemaking authority. This rulemaking is adopted under specific state statutes enacted in HB 2031 and HB

4097.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated these adopted rules and performed analysis of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these adopted 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 adopted rules 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 adopted 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 adopted rulemaking and found that the adoption 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 adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted 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 adopted rules include those contained in 31 TAC §501.33(a). The adopted 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 adopted 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 adopted 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 adopted rules is to protect coastal and natural resources.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on June 21, 2016, in Austin. The comment period closed on July 5, 2016. The commission received comments from AEM the Woodlands (AEM); Asociacion Amiga; Clean Water Action (CWA); Coastal Conservation Association Texas (CCA-Texas); EV Houston Newspaper (EVHN); Glenrose Engineering,

Inc. (GEI); the Honorable A. R. Senac, Chambers County Commissioner, Precinct 4 (Commissioner Senac); San Marcos River Foundation (SMRF); Save Our Springs Alliance (SOS); Texas Conservation Alliance (TCA); Texas Desalination Association's Marine Subcommittee (TDA Marine Subcommittee); TPWD; Viva! The Woodlands Magazine (Viva!); joint comments submitted by the Galveston Bay Foundation (GBF), National Wildlife Federation (NWF), and the Sierra Club Lone Star Chapter (Sierra Club); 41 individuals who submitted personalized comments through NWF; 940 individuals who submitted identical comments through NWF; 32 individuals who submitted personalized comments through the Sierra Club; and 1,299 individuals who submitted identical comments through the Sierra Club. The comments submitted by Commissioner Senac do not in any manner necessarily reflect the opinion of Chambers County Commissioners Court or Chambers County.

TDA Marine Subcommittee and one individual supported the rules. Generally, AEM, Asociacion Amiga, CWA, CCA-Texas, EVHN, GEI, Commissioner Senac, SMRF, SOS, TCA, TPWD, Viva!, GBF, NWF, Sierra Club, and 2,310 individuals supported the rules but were concerned that the rules were not sufficiently protective. One individual was against the rule. TPWD, GBF, NWF, and Sierra Club suggested specific changes to the rulemaking as noted in the Response to Comments section of this preamble.

Response to Comments

General

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and Viva! commented that it is critically important that the streamlined process does not unduly compromise environmental protections and that the worst thing for the Texas coast would be to create an authorization process that results in desalination diversions or discharges being located in sensitive environments without adequate protections. These commenters further stated that this would harm our natural heritage and risk creating a backlash against future desalination proposals.

Response

The commission acknowledges these comments. The commission believes that implementation of the legislation and these rules will not result in harm to the environment. No changes were made in response to these comments.

Comment

TCA commented that the rules should not allow desalination diversions to be located in sensitive environments without adequate protections because this would be devastating for the Gulf Coast's stunning natural resources but also for the billions of dollars in economic activity based on these resources. SOS commented that more stringent requirements should apply for facilities located in sensitive environments like bays and estuaries to protect these areas and encourage facilities to locate elsewhere.

Response

The commission acknowledges these comments. The commission notes that the TPWD and the GLO will make decisions on what areas are appropriate for the diversion of marine seawater under this legislation and the rules. No changes were made in response to these comments.

Comment

TPWD commented that desalination of seawater is critically important due to its potential, if carefully implemented, to provide a viable water supply option that could delay or replace the need for water supply strategies with more severe environmental impacts. SOS commented that it is important for the success of seawater desalination in Texas that a new process does not result in desalination diversions harming sensitive environments, and that the public be provided a meaningful way to participate. GBF, NWF, Sierra Club, and Viva! commented that it is critically important that, even as the rules establish a streamlined process, environmental protections are not unduly compromised. The worst thing for the Texas coast and for the future of seawater desalination in Texas would be to create an authorization process that results in desalination diversions or discharges being located in sensitive environments and without adequate protections. That would harm our natural heritage and risk creating a backlash against all future desalination proposals. One individual commented that caution and planning now will assure a safe process that will do no further damage to our already threatened ecosystem. One individual commented that the facilities should be built right from the beginning. One individual commented that they support desalination while protecting the environment.

Response

The commission acknowledges these comments.

Comment

GBF, NWF, and Sierra Club commented that they very much appreciate the work of the executive director and staff in developing this complex set of rules. Finding the right path forward for implementing the two statutory approaches is quite challenging and these commenters appreciated the obvious effort that has gone into developing the proposed rules.

Response

The commission acknowledges these comments.

Comment

TCA commented that it is pleased with the TCEQ's and the Texas Legislature's interest in desalination of seawater as a future source of water supply that takes pressure off of strained freshwater resources. TCA supports desalination projects within an economically reasonable distance of the saltwater source, provided adequate environmental protections are in place. Along with promoting increased desalination comes the need to promulgate rules that ensure that the environmental impacts of desalination will be minimized.

Response

The commission acknowledges these comments.

Comment

TDA Marine Subcommittee commented that the rules are well written and in good alignment with HB 2031 and HB 4097 and that the combined experience of TDA Marine Subcommittee's members shows that marine intakes and outfalls can be and will be installed so as to do no harm to either public health or the environment.

Response

The commission acknowledges the comment.

Comment

Two thousand, three hundred and seven individuals commented that the proposed rules to streamline the process to authorize diversions for desalination facilities along the coast are not adequately protective and must be strengthened to protect our bays and estuaries.

Response

The commission disagrees with these comments. Without knowing more specific concerns the commission cannot address this further in this response. No changes were made in response to these comments.

Comment

One thousand, three hundred and twenty-nine individuals commented that TCEQ's desalination rules should ensure that desalination diversions that seek to rely on salinity levels of greater than 20 parts per thousand to support an exemption from permitting must document compliance with clearly prescribed sampling procedures.

Response

The commission acknowledges these comments. The rules were not changed in response to these comments, although the commission notes that §295.302(i) and §297.205 were modified to include sampling procedures to show the facility has met the salinity requirement in response to other comments.

Comment

Two thousand, three hundred and eight individuals commented that TCEQ has full authority to deny applications for poorly located facilities and to place any needed environmental conditions in any permit issued.

Response

The commission acknowledges these comments. However, the commission responds that it is required to follow the law regarding these issues.

Comment

Twenty-one individuals were concerned about fish and wildlife; two individuals were

concerned about wetlands; one individual commented that bays and estuaries must be protected because they provide services to the state for water, sea life, recreational and commercial fisheries, and as a buffer that reduces storm damage to the coast; five individuals were concerned about impacts to future generations; and one individual commented that desalination must respect the environment.

Response

The commission acknowledges these comments. Without knowing more specific concerns the commission cannot address this further in this response.

Comment

Two individuals were concerned about pollution and litter in the bays and one individual commented that Texas was rated the United States of America's largest worst government for poorly cleaned and protected public properties.

Response

The commission responds that this specific rulemaking does not address pollution and litter. No changes were made in response to these comment.

Comment

One individual commented that the bays need to be protected from economic development in coastal areas, three individuals commented that the seafood industry should be protected, and one individual commented that bays and estuaries must be

protected because ecotourism is important to local economies.

Response

The commission acknowledges these concerns and responds that the fiscal note in the rule proposal preamble addressed economic impacts and found no impacts from this rulemaking.

Comment

One individual commented that Watershed Steward programs should be supported.

Response

The commission acknowledges this comment.

Comment

One individual commented about the corrupting influence of money in the political system and wants to amend the United State Constitution to state that corporations are not people and money is not speech.

Response

The commission responds that this comment is beyond the scope of this rulemaking. No change has been made in response to this comment.

Comment

One individual commented that TCEQ should not streamline the process.

Response

The commission responds that, in Section 1(e) of HB 2031, the Texas Legislature found that it is necessary and appropriate to provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water rights protections, in order to avoid unnecessary costs, delays, and uncertainty and thereby help justify the investment of significant resources in the development of such facilities. The rules track the procedural language of HB 2031 and HB 4097 as much as is practicable. No changes were made in response to this comment.

Comment

One individual commented that the rules should encourage only natural sediment to be deposited in bays and estuaries and one individual commented that climate change and changing water levels should be considered.

Response

The commission responds that this specific rulemaking addresses the requirements for water rights applications for desalination. No changes were made in response to these comments.

Comment

One individual commented that if the rules are not made more protective TCEQ should explain why stronger protections should not be required and explain the impact on humans.

Response

The commission acknowledges this comment. The rules track the procedural language of HB 2031 and HB 4097 as much as is practicable. The explanation of changes to the rule can be found in the Section by Section Discussion for each rule section in this preamble. Without knowing more specific concerns the commission cannot address this further. No changes were made in response to this comment.

Comment

One individual commented that they support desalination.

Response

The commission acknowledges the comment.

Comment

One individual commented that there should be a membership sign-up to receive notice of rule changes.

Response

The commission acknowledges the comment and notes that proposed rule changes

and information on the rulemaking process are available on TCEQ's website.

§295.300, Applicability

Comment

AEM, Asociacion Amiga, CCA-Texas, Commissioner Senac, CWA, EVHN, GEI, SMRF, and Viva! commented that the rules must establish a clear limitation ensuring that no desalination diversion will be exempt from obtaining a water diversion permit unless it is located at least three miles off-shore of any point on the Texas coast. AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, and Viva! commented that the rules should expressly acknowledge that to qualify for an exemption such diversions facilities must be located at least three miles seaward from any point on a barrier island and from any cut or pass between barrier islands. Two thousand, three hundred and eight individuals commented that TCEQ's rules for saltwater diversions should explicitly ensure that no diversion will be exempt from permit or hearing requirements unless the proposed site is proven to be located at least three miles seaward from the coast, including all barrier islands and any cuts or passes between islands.

Response

The commission agrees that a diversion of water for desalination under this rulemaking would not be exempt unless it is more than three miles off-shore. It also must meet the salinity requirement. Both TWC, §11.1405 and §18.003 include these requirements. The rules track the procedural language of HB 2031 and HB 4097 as

much as is practicable. No changes were made in response to these comments.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, and Viva! commented that the rules should specifically state that both the three-mile limit and the salinity exemption must be satisfied before a diversion can be considered to be exempt. TCA commented that the adopted rules should clearly establish that no exemption will be given for obtaining a water diversion permit unless it is located at least three miles offshore and no exemption will be given for a location that is less than 20 parts per thousand.

Response

The commission agrees both the salinity requirement and the three-mile requirement must be satisfied before a diversion for desalination under these rules would be exempt from permitting. Both TWC, §11.1405 and §18.003 include this requirement. The rules track the procedural language of HB 2031 and HB 4097 as much as is practicable. No changes were made in response to these comments.

Comment

TPWD commented that §295.300(a) should be revised for clarity and consistency with TWC, §11.405 and §18.003 as follows:

"(a) This subchapter only applies to diversion and use of marine seawater for

desalination, diversion of seawater from a bay or arm of the Gulf of Mexico for desalination solely for industrial purposes, and conveyance of treated 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 at the proposed diversion point 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."

Response

The commission agrees that the rule could be clarified and §295.300(a) has been modified to reflect these changes.

Comment

GBF, NWF, and Sierra Club commented that the limitation on the scope of this subchapter as applying only to diversions for desalination should be expressly noted in subsection (a) in order to accurately define the applicability of this subchapter. Consistent with the approach in proposed §295.301, the distinction between "marine seawater" and "seawater" should be clarified by expressly noting that "seawater" refers

solely to desalination for industrial purposes, which is the universe of projects to which HB 4097 applies. If an application requests authorization for desalination for another type of use, the application would either need to follow the traditional TWC, Chapter 11 water rights application procedures or comply with HB 2031 requirements. As currently drafted, the distinction between those two definitions as well as the references in the rules are unduly ambiguous. The reference in the second sentence of proposed subsection (a) to "this section" appears to be inadvertent and should, instead, refer to "this subchapter," because the subsection is referring to the scope of the entire subchapter and issuance of permits under the subchapter. The determination of the three-mile line that governs exemptions from permitting is a critical issue and the rules should minimize ambiguity and uncertainty about that determination. The inclusion of, or reference to, a map delineating the line would be very helpful. At minimum, further refinement of the rule language is needed to better define the starting point for the three-mile determination, including when dealing with a cut or pass between barrier islands. These commenters recommended §295.300(a) be revised as follows:

"(a) This subchapter only applies to diversion and use of marine seawater for desalination, diversion of seawater from a bay or arm of the Gulf of Mexico for desalination solely for industrial purposes, and conveyance of treated marine seawater through the bed and banks of a flowing stream. The commission may issue a permit under this subchapter 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, which includes any point located on a barrier island and any point located on an imaginary line drawn between the most seaward points of land on either end of a pass or cut between barrier islands; or

"(2) the source water at the proposed diversion site 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."

Response

The commission responds that it has modified §295.300(a) to clarify that the adopted rules only apply to diversions for desalination, to clarify the distinction between "marine seawater" and "seawater," and to correct the reference to the subchapter. The commission also responds that it has addressed how the three-mile boundary will be determined by adding a new definition describing the three-mile boundary to §295.301.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, and Viva! commented that nothing in HB 2031 indicates that facilities that are exempt from permit requirements are exempt from the statutory requirements to minimize impingement and entrainment. AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and

Viva! commented that TWC, §18.003(h) avoids any language limiting its applicability only to facilities requiring a permit. That provision applies to all diversions of marine seawater. The proposed rules are unacceptably narrow in proposing to require measures to avoid impingement and entrainment only as part of permit applications. Proposed §295.300(b) should make clear that exempt facilities must comply with requirements to minimize impingement and entrainment and include a cross-reference to minimum requirements set out in §297.209.

Response

The commission acknowledges the comment. The commission does not agree that a reference to requirements for impingement and entrainment should be included in §295.300(b) and did not revise §295.300(b) in response to this comment. The legislation does not include requirements for exempt facilities.

Comment

TPWD commented that §295.300(b) should be revised for clarity and consistency with TWC, §11.405 and §18.003 as follows:

"(b) A person may divert and use state water that consists of marine seawater or seawater without obtaining a permit if the person demonstrates that subsection (a)(1) and subsection (a)(2) of this section does not apply. To divert state water under this subsection, a person must comply with requirements under Section 295.302 (j) of this title relating to minimizing impingement and entrainment."

Response

The commission agrees that a facility is exempt only if both §295.300(a)(1) and (2) do not apply. The commission notes that adopted §295.300(b) exactly follows the language in TWC, §18.003(b). The rule was not changed in response to this comment. The commission does not agree that a reference to requirements for impingement and entrainment should be included in §295.300(b) and did not revise the rule in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that proposed §295.300(b) should be clarified to explicitly state that an exemption applies only if neither subsection (a)(1) nor (2) is satisfied. A general reference to the inapplicability of subsection (a) is unnecessarily ambiguous. Because of the significance of granting an exemption from permitting, potential ambiguity should be minimized. In addition, HB 2031 directs the commission to prescribe by rule reasonable measures to minimize impingement and entrainment. That directive is not limited to diversions pursuant to permits. Accordingly, the rules must prescribe such measures for all desalination diversions under this subchapter, regardless of whether they are exempt from permit requirements. Because nothing in HB 4097 suggests an intent that the requirement for measures to minimize impingement and entrainment should not apply for the limited subset of desalination applications subject to HB 4097, the requirement in the more broadly applicable HB

2031 must be respected when a diversion is not otherwise authorized pursuant to TWC, Chapter 11. These commenters recommended that §295.302(b) be revised as follows:

"(b) A person may divert and use state water that consists of marine seawater or seawater without obtaining a permit if the project owner or operator demonstrates that neither subsection (a)(1) nor subsection (a)(2) of this section applies. In order to operate pursuant to this subsection, a diversion facility also must comply with requirements for minimizing impingement and entrainment as set out in Section 295.302 (j) of this title."

Response

The commission agrees that a facility is exempt only if both §295.300(a)(1) and (2) do not apply. The commission notes that adopted §295.300(b) exactly follows the language in TWC, §18.003(b). The rule was not changed in response to this comment. The commission does not concur that in order to receive an exemption a facility has to demonstrate to the commission that it has talked to TPWD about diversion points and minimization of entrainment and impingement. It also does not agree that a showing of entrainment and impingement minimization applies to exempt diversions. Minimization of entrainment and impingement is a factor for an application to divert water under this subchapter.

Comment

TCA commented that the provisions for consultation should be strengthened.

Response

The commission acknowledges the comment. The rule was not changed in response to this comment. The rules are clear that consultation with the TPWD and the GLO is required for an application to divert water under this subchapter.

Comment

TPWD commented that §295.300(c) should be revised for clarity and consistency with TWC, §11.405 and §18.003 as follows:

"(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:

"(1) data to the commission demonstrating for each proposed diversion point, that subsection (a)(1) of this section does not apply and, based on the analysis of samples taken at the water source for each proposed diversion point over a period of at least one year, that subsection (a)(2) of this section does not apply; and

"(2) a report documenting the results of the persons completed consultation with the Texas Parks and 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."

Response

The commission does not agree that the commission should require that a facility demonstrate that it has corresponded with the TPWD and the GLO in order to demonstrate that it is exempt from permitting under this subchapter. Consultation is a requirement for the application to divert, not the applicability of the rules. No changes were made in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that proposed §295.300(c) only requires the submission of data regarding salinity levels at the source as a prerequisite for beginning construction of a diversion facility relying on an exemption from permitting. Although that is a good start, in order to provide certainty for all involved, the rules should also require the submission of documentation that all proposed diversion facilities are beyond the three-mile line set out in §295.300(a)(1). In addition, TWC, §18.003(j), as added by HB 2031, requires consultation with the TPWD and the GLO before beginning construction of an exempt diversion facility. Nothing in HB 4097 is inconsistent with that requirement. The rules should require the filing of a report on the consultation process in order to establish a mechanism for documentation of compliance and in order to ensure that the commission has information that may be relevant to a determination about specific requirements for minimizing impingement and entrainment. Because compliance with measures to minimize impingement and entrainment is required for exempt diversion facilities, the proposed rule should also

require the filing of design and specification information for those measures. These commenters recommended that §295.300(c) be revised as follows:

"(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:

"(1) data to the commission demonstrating, based on the location of each proposed diversion location, that subsection (a)(1) of this section does not apply and, based on the analysis of samples taken at the water source for each proposed diversion location over a period of at least one year, that subsection (a)(2) of this section does not apply;

"(2) a report to the commission on the consultation with the 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; and

"(3) technical design and specification information to the commission for measures to be used to minimize impingement and entrainment in compliance with the requirements set out in Section 295.302(j)."

Response

The commission does not agree that it should require facilities that are seeking to demonstrate that they are exempt from permitting to submit information on their

required consultation. The commission agrees that an entity should provide evidence to the commission that the facility is exempt; however, a demonstration of consultation with the TPWD is not required for this exemption showing. The commission does not want to unduly prescribe how consultation with other agencies should occur.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, and Viva! commented that consultation with the TPWD and the GLO is required for diversion facilities that are exempt from permitting requirements. Section 295.300(c) should be revised to require documentation of the results of the consultation process before a person is allowed to begin construction of an exempt diversion facility.

Response

The commission disagrees for the reasons stated in the previous response. Consultation with the TPWD is required for an application for a permit, but it is not part of a facility's demonstration that it is exempt from permitting. As a result, consultation is not required for an exempt facility. No changes were made in response to this comment.

Comment

TPWD commented that §295.300(e) should be revised for clarity and consistency with TWC, §11.405 and §18.003 as follows:

"(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 diversion is solely for desalination and used for industrial purposes under Texas Water Code (TWC), §11.1405."

Response

The commission agrees that §295.300(e) could be revised for clarity. The commission revised this subsection in response to other comments.

Comment

GBF, NWF, and Sierra Club commented that proposed §295.300(e) refers to the inapplicability of §295.300 for most diversions located in a bay or estuary but the reference should be to the entire subchapter. In addition, the proposed exception for when a diversion proposed to be located in a bay or estuary may rely on the subchapter is overbroad. HB 2031, which applies to all types of desalination diversions from the Gulf of Mexico under the alternative permitting procedures, makes facilities located in a bay or estuary ineligible for those procedures. However, HB 4097, which applies only to desalination diversions for industrial uses, does not include a comparable provision. As a result, only diversions solely for industrial uses located in a bay or estuary may rely on the subchapter. These commenters recommended that §295.300(e) be revised as follows:

"(e) This subchapter does not apply to a diversion of marine seawater from a point of

diversion located in a bay or estuary unless the diversion is solely for the purpose of desalination of seawater for industrial use under Texas Water Code (TWC), §11.1405."

Response

The commission agrees and §295.300(e) was revised to reflect this comment.

Comment

GBF, NWF, and Sierra Club commented that proposed §295.300(f) should reference a permit or authorization under the new subchapter rather than just referring to the section. In addition, the proposed language is unnecessarily confusing because some applications under the new subchapter of the rules are applications under TWC, Chapter 11, specifically under TWC, §11.1405. These commenters recommended that the subsection be clarified as follows:

"(f) TWC, Chapter 11, applies to a permit or authorization under this subchapter in the same manner as that chapter applies to a permit or authorization under that chapter which is not subject to this subchapter of the rules."

Response

The commission agrees that §295.300(f) should reference the subchapter. The commission also agrees that §295.300(f) could be clarified and has revised the adopted rule to reflect this comment.

Comment

GBF, NWF, and Sierra Club commented that a new subsection (g) should be added to deal with the situation where a person who has obtained a permit under TWC, §11.1405 for a diversion facility located in a bay or estuary solely for industrial use seeks to change the use or add another use. TWC, §11.1405 could not be relied upon to authorize the diversion because it is limited to a diversion for industrial use. Because this subchapter could not authorize an additional use in that location without violating TWC, §18.003(f), the rules should make clear that a person must seek a permit pursuant to TWC, Chapter 11, other than TWC, §11.1405, before adding such a use or changing the use. TWC, §11.122(b) would not apply to authorize the diversion because none of the exceptions to the permit requirement under TWC, §11.121 would apply and, in the absence of a TWC, §11.121 permit, the other applicable requirements of TWC, Chapter 11 would not be met. These commenters recommended that a new subsection (g) be added as follows:

"(g) If a person seeks to utilize a facility that was constructed or permitted for the diversion of seawater solely for the purpose of desalination for industrial use under this subchapter to divert water for another use, the person must, if the diversion is located in a bay or estuary, first obtain a water right permit pursuant to provisions of TWC, Chapter 11 other than Section 11.1405, because neither Section 11.1405 nor this subchapter authorize the diversion."

Response

The commission agrees and has added §295.300(g) in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that a new subsection (h) should be added to incorporate requirements for documentation in support of an exemption in order to demonstrate that salinity levels in the source water at the location of the proposed diversion facility are not less than 20,000 mg/L. There must be some specification of standard practices for collection of salinity data in order to ensure that conditions at the diversion location are properly characterized. For example, depending on the location, collecting data at different depths could produce widely varying results. Similarly, if the collection of data is not evenly distributed within months across the sampling period, the data is not likely to provide an accurate characterization. The most-straightforward way of incorporating such data collection practices likely is to add a cross-reference to the documentation requirements in proposed §295.302 and add specificity to that provision. Alternatively, the documentation requirements recommended for inclusion in §295.302(i) could be incorporated directly into a new §295.300(h). These commenters recommended that a new subsection (h) be added as follows:

"(h) To demonstrate that subsection (a)(2) does not apply, a person must comply with the documentation requirements of subsection (i) of Section 295.302 in the same manner as if the person were filing an application."

Response

The commission agrees that information regarding the collection of data relating to salinity levels for facilities claiming exempt status could be clarified. However, a reference to requirements for water quality data for exempt facilities is better addressed in the subsection relating to facilities claiming to be exempt. The commission has revised §295.300(c) to include more specific requirements for the demonstration of salinity levels for an exempt facility claim.

§295.301, Definitions

Comment

GBF, NWF, Sierra Club, and TPWD commented that the definition of "Marine seawater" should be revised for clarity as follows:

"(2) Marine Seawater - Water that is derived from the Gulf of Mexico for desalination."

Response

The commission agrees and the rule has been changed to reflect this comment.

Comment

GBF, NWF, Sierra Club, and TPWD commented that the definition of "Seawater" should be revised for clarity as follows:

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

desalination and use solely for industrial purposes."

Response

The commission agrees and the rule has been changed to reflect this comment.

Comment

GBF, NWF, Sierra Club, and TPWD commented that a definition of "Bay or arm of the Gulf of Mexico" should be included in the rule and proposes that the definition follow the definition in Appendix C of TCEQ's Chapter 307 rules. These commenters recommended that the rule should be revised as follows:

"(4) Bay or arm of the Gulf of Mexico--The landward boundary of an arm of the Gulf of Mexico is defined by the downstream boundary of the most downstream segment of a river or stream as set out in Appendix C of Chapter 307 of Title 30 of the Texas Administrative Code. A bay of the Gulf of Mexico is considered any portion of the Gulf of Mexico that is not seaward of any point of land along the Texas coast, which includes any point on a barrier island and any point on an imaginary line drawn between the most seaward points of land on either end of a pass or cut between barrier islands."

Response

The commission declines to adopt this definition because, under 30 TAC Chapter 307, boundaries of bay and estuary segments have not been precisely defined,

some smaller bays and arms do not have a classified segment as described in Appendix C, and the proposed definition would include portions of tidal streams that are located in river or coastal basins. The commission further notes that this determination would best be addressed during the studies to identify zones that are appropriate for diversion of marine seawater as set out in TWC, §18.003(i).

Comment

TPWD commented that it supports the use of the three-mile nautical line demarcation developed by the GLO to identify the boundary of the oil spill dispersant pre-approval zone as a common reference for applicants in determining the location of their point and comments that the rule should be revised as follows:

"(5) Three-mile seaward boundary - The three nautical mile demarcation developed by the Texas General Land Office and is the seaward boundary of pre-approved area for use of dispersant in relation to spill response. The boundary is published in downloadable electronic format on the General Land Office website and also on the Texas Natural Resource Information System website: www.tnris.org/data-catalog/entry/glo-dispersant-use-pre-approval-zone/."

Response

The commission notes that adding the website to the rule may cause confusion because website addresses can change over time. Otherwise, the commission agrees that a common reference for determining the location of the three-mile boundary

would be helpful and agrees with TPWD's proposed boundary and the commission has added a new §295.301(4) to provide a definition of the three-mile boundary. The new definition is "(4) Three-mile seaward boundary--The three nautical mile boundary developed by the Texas General Land Office for the Dispersant Use Pre-Approval Zone."

*§295.302, Requirements for Diversion of Marine Seawater and Diversion of Seawater
Comment*

GBF, NWF, Sierra Club, and TPWD commented that the title of §295.302 should be changed as follows: "§295.302. Requirements for Application for Diversion of Marine Seawater and Diversion of Seawater."

Response

The commission agrees and revised the title of §295.302.

Comment

GBF, NWF, and Sierra Club commented that the phrasing of the first sentence of proposed subsection (a) is somewhat confusing because it isn't clear what the prepositional phrase "for industrial purposes" modifies. That is, it could be read as qualifying both the "diversion of marine seawater" and the "diversion of seawater from a bay or arm of the Gulf of Mexico for industrial purposes." If the changes to definitions in §295.301 are made, that phrase could be eliminated and the sentence could just refer to applications for diversion of marine seawater or diversion of

seawater. Alternatively, even without the change to the definitions, by reversing the order in the first sentence, the potential ambiguity could be lessened. These commenters recommended that §295.302(a) be revised as follows:

"(a) An application for diversion of seawater from a bay or arm of the Gulf of Mexico for industrial purposes or for diversion of marine seawater 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."

Response

The commission agrees and the rule was changed in response to this comment.

Comment

TPWD commented that §295.302(a) should be revised for clarity and consistency as follows:

"(a) An application for diversion of marine seawater or diversion of seawater from a bay or arm of the Gulf of Mexico 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."

Response

The commission agrees that §295.302(a) could be revised for clarity and has revised this subsection in response to another comment.

Comment

GBF, NWF, and Sierra Club commented that in order to assess the potential for adverse impacts for individual diversion locations, the commission will need information about diversion rate for each individual proposed diversion facility. That information will also be needed in assessing appropriate measures to minimize entrainment and impingement. Accordingly, the application should be required to include diversion rate information for each diversion point. These commenters recommended that §295.302(d) be revised as follows:

"(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 by diversion point."

Response

The commission agrees that §295.302(d) could be revised for clarity and has revised this subsection in response to another comment.

Comment

TPWD commented that §295.302(d) should be revised for clarity and consistency as follows:

"(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 for each diversion point."

Response

The commission agrees and the rule was changed in response to this comment.

Comment

TPWD commented that to better describe monthly sampling and for clarity and consistency with TWC, §11.1405 and §18.003, §295.302(e) should be revised as follows and that §295.302(k) should be deleted:

"(e) The application shall state the purpose or purposes of use in definite terms. 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.

Response

The commission agrees that §295.302(e) could be revised for clarity and has revised this subsection in response to another comment.

Comment

GBF, NWF, and Sierra Club commented that the proposed language for §295.302(e) is somewhat confusing. In particular, the second and third sentences appear to be redundant. Because, by statute, seawater can only be diverted for a single use under these rules establishing an alternative permitting process, the subsection only needs to require explanation of multiple uses for diversions of marine seawater and the third sentence of the rule as proposed appears to state that requirement clearly. These commenters recommended that §295.302(e) be revised as follows:

"(e) The application shall state each purpose of use in definite terms. 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."

Response

The commission agrees and the rule was changed in response to this comment.

Comment

TPWD commented that §295.302(h) be revised for clarity as follows:

"(h) The 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."

Response

The commission agrees and has revised this subsection to be consistent with the rest of the section.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and Viva! commented that the rules should ensure that entities follow a reasonable protocol for sampling in

establishing the yearly average of salinity samples taken monthly. The measurements must be collected evenly across a year to avoid concentrating samples in a non-representative manner. Standard sampling protocols should be mandated to ensure that samples are collected at an appropriate depth, or depths, to accurately characterize conditions at the location.

TPWD commented that §295.302(i) be revised as follows to better describe monthly sampling as follows:

"(i) The application must include documentation determining the total dissolved solids concentration of the marine seawater or seawater at the water source for each proposed diversion point based on analysis of monthly sampling from a period of at least one year and provide the data collected to the commission. The monthly samples shall cover a continuous period of not less than one year with samples taken at approximately the same time in each month in order to provide a representative characterization and shall be collected using protocols for sample collection, including for depth of collection, that are consistent with best practices as reasonably determined by commission staff."

GBF, NWF, and Sierra Club commented that the determination of TDS concentration must be specific for each proposed diversion location and the rule should make that requirement explicit. In addition, in order to ensure that the data accurately characterize conditions at each diversion point, the rules should provide additional

direction about data collection. The measurements must be collected evenly across a year to avoid concentrating samples in a non-representative manner. The legislation specifies that data must be collected monthly. However, additional direction about data collection is needed in order to ensure an accurate characterization. The legislation makes clear that the data presented to the commission must demonstrate that the TDS concentration is less than 20 parts per thousand. Accordingly, the commission should provide specific guidance for how to make that demonstration. For example, in the absence of a clear protocol, taking samples at the end of June, end of July, end of August, in early September, and early October could result in maximizing collections when salinity is most likely to be elevated rather than reasonably documenting average conditions across those higher salinity months. Similarly, standard sampling protocols should be mandated to ensure that samples are collected at an appropriate depth, or depths, to accurately characterize conditions at the location. That will be especially important for locations where stratification is likely. The accuracy of salinity determinations is particularly important for purposes of determining if permit exemptions under §295.300(b) apply. These commenters recommended that a cross-reference from §295.300 to this subsection be added so that documentation requirements can be addressed in a single location in the rules. It is essential that the rules establish meaningful minimum requirements for data collection for salinity determinations, particularly for ensuring that the commission receives the information needed for assessing qualification for exemptions. These commenters recommended that §295.302(i) be revised as follows:

"(i) The application must include a determination of the total dissolved solids concentration of the marine seawater or seawater at the water source for each proposed diversion location based on monthly sampling and analysis and provide the data collected to the commission. The monthly samples shall cover a continuous period of not less than one year with samples taken at approximately the same time in each month in order to provide a representative characterization and shall be collected using protocols for sample collection, including for depth of collection, that are consistent with best practices as reasonably determined by commission staff through publicly available guidance."

Response

The commission responds that Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the substantive requirements for these applications. The commission has modified §297.205 to include more specificity related to sampling and has revised §295.302(i) to include a reference to §297.205. No changes were made in response to this comment.

Comment

TPWD commented that TWC, §18.003(h) directs the TCEQ to prescribe reasonable measures to minimize impingement and entrainment and recommends that §295.302(j) be revised as follows:

"(j) The application shall provide documentation that the applicant will implement reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater or seawater. At a minimum, such measures shall include an intake diversion designed and operated to result in a maximum flow-through screen velocity of 0.5 feet per second. At all times that diversions are occurring, the intake diversion facilities shall be equipped with screens resulting in individual openings no larger than 0.25 square inches in size unless a combination of technologies, management practices, and operational measures representing the best technology available for impingement reduction are used to meet a specified impingement mortality standard."

Response

The commission responds that Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the substantive requirements for these applications. The commission has modified §297.209 to include additional requirements for impingement and entrainment for an application. No changes were made in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that TWC, §18.003(h) directs the commission to prescribe by rule reasonable measures to minimize impingement and entrainment.

That requirement applies for both exempt and non-exempt facilities. The proposed rules fail to follow that specific requirement. These commenters recommended minimum measures for inclusion in proposed §297.209 and have a cross-reference in §295.302(j) to those substantive requirements as follows:

"(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 as required by Section 297.209 of this title (relating to Impingement and Entrainment)."

Response

The commission agrees and the rule has been revised in response to this comment.

Comment

TDA Marine Subcommittee commented that marine desalination facilities intakes will undoubtedly comply with the United States Environmental Protection Agency's (EPA's) 316(b) rules which specify screen size and low velocity intake speeds. Thus, by definition, if an intake uses a 316(b) compliant design or technology, it is using the "best available technology." TDA Marine Subcommittee asks the commission to consider referencing this EPA publication in §295.302(j).

Response

The commission responds that Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the substantive requirements for these applications. The commission has modified §297.209 to include additional requirements for impingement and entrainment for an application. No changes were made in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that the consultation process should provide useful information for consideration by the commission in determining compliance with applicable requirements. These commenters recommended that the rules require submission of a report on the results of the consultation rather than just evidence that it occurred. The rules should encourage making the consultation process as meaningful as possible. The rationale for differentiating when evidence of consultation must be filed based on whether proposed §295.300(a)(1) or (2) applies is not clear. In either instance, the consultation process should have occurred prior to filing an application and should be required for inclusion in the application. If the reference to §295.300(a)(2) was intended to refer to the required filing of a consultation report as part of the exemption documentation process, as required pursuant to TWC, §18.003(j) proposed §295.302(k) does not appear appropriate for that purpose because that section and this subsection deal only with permit applications. These commenters recommended that §295.302(k) be revised as follows:

"(k) The application shall include a report on the results of prior consultation with the 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."

Response

The commission agrees that the consultation process should be meaningful. However, the commission does not want to unduly prescribe how consultation with other agencies should occur. The commission would instead require that an entity provide documentation of the results of the consultation required by TWC, §18.003(j) as part of its application for the permit to divert. The commission also revised §295.302(k) to remove the references to §295.300(a)(1) and (2).

Comment

TPWD commented that §295.302(k) be deleted.

Response

The commission does not agree that this subsection should be removed because §295.302 addresses application requirements and an applicant must submit evidence of the required consultation with its application. The commission notes that §295.302(k) was revised in response to other comments.

§295.303, Review Timeframes

Comment

GBF, NWF, and Sierra Club commented that the proposed rule does not make clear that the time for the executive director to complete his technical review is extended by the amount of time that the applicant is given to submit additional documentation. These commenters believe it is important to ensure that the executive director has sufficient time to complete a comprehensive technical review, they believe language should be added to make clear that the review time available for technical review is extended by the period of time the applicant takes in providing the required information. The commenters are concerned that 60 days may be an inadequate amount of time for completing technical review and believe the rules must, at least, clearly ensure that minimum amount of time is available to commission staff. These commenters recommended that §295.303(c) be revised as follows:

"(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, except as extended pursuant to subsection (d) of this section."

GBF, NWF, and Sierra Club commented that the proposed rule does not make clear that the time for the executive director to complete his technical review is extended by the amount of time that the applicant is given to submit additional documentation. It is

important to ensure that the executive director has sufficient time to complete a comprehensive technical review and language should be added to make clear that the review time available for technical review is extended by the period of time the applicant takes in providing the required information. These commenters stated that the meaning of the language as proposed is less clear than is ideal. The commenters are concerned that 60 days may be an inadequate amount of time for completing technical review and believe the rules must, at least, clearly ensure that minimum amount of time is available to commission staff. These commenters recommended that §295.303(d) be revised as follows:

"(d) The applicant shall be promptly notified of any additional technical material necessary for a complete review. If the applicant provides the information within the technical review period prescribed by subsection (c) of this section, the executive director will complete processing of the application within the technical review period plus the number of days taken by the applicant to provide the additional data. If the necessary additional information is not received by the executive director prior to expiration of the original 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. And, in no event shall the executive director have less than 60 working days, exclusive of the time spent waiting for submission of additional information, to complete the technical review. Decisions to return the

application 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."

Response

The commission agrees and the rule has been revised to reflect these comments.

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

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and Viva! commented that the proposed rule unduly limits notice of applications for permits for diversions of marine seawater. These commenters stated the rules should provide opportunities for additional persons to receive notice, at least via email, of pending applications. County judges and county commissioners for counties in which a facility is located should receive notice. Notice should also be sent to interested persons who file a written request with the Office of the Chief Clerk to receive notices under this chapter. Wider notice is needed to have a meaningful public participation process. Just providing notice to the TPWD and the GLO - agencies that are not allowed to file hearing requests under commission rules - does not provide for a meaningful public notice process. Improvements are needed in proposed §295.304 and §295.306.

SOS commented that the proposed rules go too far in limiting public notice and that

the rules should provide opportunities for additional persons to receive notice and should provide an opportunity for interested persons who file a written request with the Office of the Chief Clerk to receive notice. Just providing notice to the TPWD and the GLO does not provide for a meaningful public notice process.

One thousand, three hundred and twenty-nine individuals commented that notice of permit applications must be provided to county judges and commissioners for counties in which any part of the facility will be located as well as persons who request to receive notice of seawater desalination applications and provide an email address. One individual commented that notice should be given to all state legislators and all local governments that will be the intended beneficiaries of the desalination plant and to all media outlets.

TPWD commented that additional notice to the public should be given for applications to divert marine seawater and recommends that §295.304(a) be revised as follows:

"(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 state senator and representative who represent the general area in which the facility is or will be located, the county judge and county commissioners for each county in which part of the facility is proposed to be located, the Texas Parks and Wildlife Department, the Texas General Land Office, and any

person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notices of applications filed under this subchapter, at the email address on file for these individuals and agencies. The notice shall also be posted for public review on the commission's website and made available for public inspection by providing a copy in the county courthouse and to a least one public library in each county where the diversion or diversions will be located."

GBF, NWF, and Sierra Club commented that the proposed notice of applications is unduly constrained. Particularly for diversion facilities proposed to be located in a bay or estuary or facilities proposed to be located in a fish pass or a navigation corridor, many persons, including those involved in recreational and commercial fishing and tourism, may be adversely affected. The proposed notice procedures simply are not adequate to provide reasonable notice. Sending a notice to the TPWD and the GLO informing them of the opportunity to file a contested case hearing request does not constitute meaningful notice, particularly in light of the commission's rule providing that neither agency may file a hearing request. At an absolute minimum, email notice should be sent to the state senator and representative for the area in which all or part of the facility is proposed to be located, to the county judge and county commissioners for each county in which a part of the facility is proposed to be located, and to persons who have submitted a request to the Office of the Chief Clerk requesting to receive notice of applications under this subchapter and providing an email address. Elected officials representing the area at least have the potential to spread the word about the application to those who might be interested. Providing that

level of notice does not constitute an undue burden and email notice can be sent with minimal expense and delay. The notice also should be posted prominently on the commissions' website. These commenters recommended that §295.304(a) and (b)(8) and (9) should be revised to include enhanced notice requirements, a summary of proposed permit conditions in order to allow informed consideration of potential adverse impacts by those receiving notice, and that the deadline for submitting comments or requesting a hearing is described in the notice as follows:

"(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 state senator and representative who represent the general area in which the facility is or will be located, the county judge and county commissioners for each county in which part of the facility is proposed to be located, the Texas Parks & Wildlife Department, the Texas General Land Office, and any person who has submitted a written request to the Office of the Chief Clerk providing an email address and asking to receive notices of applications filed under this subchapter, at the email address on file for these individuals and agencies. The notice shall also be posted concurrently for public review on the commission's website.

"(b) ... (8) state the executive director's recommendation regarding the application, including a summary of any proposed permit conditions if issuance of a permit is recommended;

"(b) ... (9) state that an affected person may submit written comments and request a contested case hearing and indicate the deadlines for doing so."

Response

The commission agrees that §295.304 related to notice of an application should be revised to add additional notice to the county judge for the county in which the facility is located and to other individuals who submit requests to be notified of these types of applications. The commission also agrees that notice of these applications should be posted on its website, consistent with posting of notices for all other water rights applications that require notice. The commission responds that §295.304(b)(8) already requires the notice to include the executive director's recommendation; therefore additional language related to a summary of permit conditions is not needed. The commission agrees that the notice should include deadlines and has added that requirement.

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

Comment

TPWD commented that there are numerous constituents that make up fresh surface water that are critical to maintaining the ecological condition of that water body but that do not have associated water quality standards. While seawater may be treated to a level where it can be used for specific purposes such as industrial uses or public

drinking water supply, the treated water will likely have a composition very different from the receiving stream. Fish and other aquatic life are adapted to the specific composition of the stream water, including the composition of ions such as calcium, sodium, and potassium. Because aquatic organisms are adapted to the ion composition of ambient waters, a discharge into a freshwater stream with a different ion concentration water may cause a fish kill, or at the least, physiological distress to the aquatic life in the stream. To address this concern, TPWD recommends consideration of parameters unique to each receiving stream and appropriate treatment to ensure that treated water transported in designated rivers and streams falls within a designated range of the natural condition along that water course. TPWD comments that the rule should be revised to be consistent with 30 TAC §297.16 and TWC, §11.042(c) as follows:

"(a) An application for authorization to convey treated marine seawater pursuant to Section 18.004 of the Texas Water Code shall include evidence that the marine seawater conveyed under a permit subject to the requirement in this section will be treated to meet standards that are at least as stringent as the water quality standards adopted by the commission and applicable to each receiving stream or impoundment proposed for conveyance of the treated marine seawater. Additional treatment to alter constituents not addressed by the water quality standards may be required if the executive director, in consultation with TPWD, determines that such treatment is necessary to protect fish and wildlife in each affected receiving stream or impoundment.

"(e) The commission in issuing an authorization to convey treated marine seawater shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions to protect water quality and that may address the impact of the discharge, conveyance, and diversion of treated marine seawater on existing water rights, instream uses, and freshwater inflows to bays and estuaries."

Response

The commission responds that adopted §295.305(a) already requires that an application to convey treated marine seawater be treated to meet the requirements of the receiving stream as required by TWC, §18.004(a). The commission agrees that it is possible more stringent treatment could be required and has revised §295.305(a) in response to other comments. Regarding the proposed addition of a new §295.305(e), Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the substantive requirements for these applications. The commission did not revise the rule to add a new provision as requested by this and other commenters because TWC, §18.004(e) requires that applications under this subchapter be subject to the requirements in TWC, §11.042(c).

Comment

GBF, NWF, and Sierra Club commented that, although rare, there may be instances where water quality standards adopted by the EPA could apply. Because HB 2031 only establishes minimum requirements, including a reference to compliance with applicable water quality standards without a specific reference to commission adoption ensures coverage in case that unusual circumstance were to occur. In addition, because treated marine seawater may flow through a number of streams or impoundments, the rule should acknowledge that treatment levels must comply with applicable standards for all water bodies through which the treated marine seawater is proposed to be conveyed. The rule should also include an acknowledgement that the commission retains authority to require more stringent treatment if it is necessary to protect water quality. Although it may be unlikely that it will be needed, because the state does not have experience with the impacts of conveying treated marine seawater on water quality, the potential authority for requiring additional treatment, beyond the minimum levels required by statute, should be retained. These commenters recommended that §295.305(a) be revised as follows:

"(a) An application for authorization to convey treated marine seawater pursuant to Section 18.004 of the Water Code shall include evidence that the marine seawater conveyed will be treated to meet standards that are at least as stringent as the water quality standards applicable to each stream or impoundment through which the treated marine seawater is proposed to be conveyed. More stringent treatment may be required if the commission determines it is necessary to protect water quality."

Response

The commission responds that adopted §295.305(a) already requires that an application to convey treated marine seawater be treated to meet the requirements of the receiving stream as required by TWC, §18.004(a). The commission agrees that it is possible more stringent treatment could be required and has revised §295.305(a) in response to other comments.

Comment

GBF, NWF, and Sierra Club commented that the rules should incorporate the basic requirements for issuance of a bed and banks authorization under TWC, §11.042(c) as directed by TWC, §18.004 (e) and recommend that a new §295.305(e) be added as follows:

"(e) The commission in issuing an authorization to convey treated marine seawater shall ensure that:

"(1) the amount authorized to be diverted does not exceed the amount put into the stream minus the amount lost between the point of discharge and the point of diversion;

"(2) appropriate special conditions are included to address the impact of the discharge, conveyance, and diversion of treated marine seawater on existing water rights, instream uses, and freshwater inflows to bays and estuaries; and

"(3) water quality is protected."

Response

The commission responds that Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the substantive requirements for these applications. The commission did not revise the rule to add a new provision as requested by this and other commenters because TWC, §18.004(e) already requires that applications under this subchapter be subject to the requirements in TWC, §11.042(c).

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

Comment

TPWD commented that additional notice should be given to the public and recommends §295.306(a) be revised as follows:

"(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. The commission shall concurrently post the notice on the commission's website and shall email the notice to any person who has submitted a written request to the Office of the Chief

Clerk providing a valid email address and asking to receive notices of applications filed under this subchapter at the email address on file for these individuals and agencies. In addition, the notice of an application shall be made available by providing a copy in the county courthouse and in at least one public library of each county where the diversion or diversions will be located."

GBF, NWF, and Sierra Club commented that the proposed notice of applications is unduly constrained. The rules should provide for email notice to those who have requested notice of applications under this subchapter and for posting of the notice on the commission's website. That would allow persons concerned about potential impacts to follow the various phases of a desalination project while minimizing expense and delay. These commenters recommended that §295.306(a) and (b)(8) be revised to include enhanced notice requirements, and to remove the limitation on filing of comments to affected persons as follows:

"(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. In addition, the commission shall concurrently post the notice on the commission's website and provide email notice to those persons who have submitted a written request to the Office of the Chief Clerk asking to receive notices of applications filed under this subchapter and providing a valid email address.

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

Response

The commission agrees that §295.306 related to notice of an application to convey treated marine seawater should be revised to add additional notice to other individuals who submit requests to be notified of these types of applications. The commission also agrees that notice of these applications should be posted on its website, consistent with posting of notices for all other water rights applications that require notice. The commission declines to further provide for comments from other than affected persons as defined in adopted §295.301.

SUBCHAPTER G: DESALINATION, PROCEDURAL

§§295.300 - 295.306

Statutory Authority

The rules are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §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 adopted 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 for desalination, diversion of seawater from a bay or arm of the Gulf of Mexico for desalination solely for industrial purposes, and conveyance of treated marine seawater through the bed and banks of a flowing stream. The commission may issue a permit under this subchapter 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 **water at the proposed diversion point** ~~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 **demonstrating, based on the location of each proposed diversion location, that subsection (a)(1) of this section does not apply and,** based on the analysis of samples taken at the water source **for each proposed diversion location** over a period of at least one year, **in accordance with the requirements set out in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration)** 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 **subchapter** ~~section~~ does not apply to a diversion of marine seawater from a point of diversion located in a bay or estuary unless the **diversion** ~~application~~ is **solely** for the purpose of desalination ~~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 **subchapter** ~~section~~ in the same manner as that chapter applies to a permit or authorization under that chapter **which is not subject to this subchapter.**

(g) If a person seeks to utilize a facility that was constructed or permitted for the diversion of seawater solely for the purpose of desalination for industrial use under this subchapter to divert seawater for another use, the person must first obtain a water right permit pursuant to provisions of TWC, Chapter 11, other than TWC, §11.1405.

§295.301. Definitions.

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

(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 §55.256 of this title (relating to Determination of Affected Person).

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

(3) Seawater--Water that is derived from a bay or arm of the Gulf of Mexico for desalination and use solely for industrial purposes.

(4) Three-mile seaward boundary--The three nautical mile boundary developed by the Texas General Land Office for the Dispersant Use Pre-Approval Zone.

§295.302. Requirements for Application 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 or for diversion of marine seawater 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 for each diversion point.

(e) The application shall state each 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) **The** 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, **as described in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration)**, 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 as described in §297.209 of this title (relating to Impingement and Entrainment).

(k) The application shall include documentation of the results of the ~~evidence of~~ consultation with the Texas Parks and 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, except as extended pursuant to subsection (d) of this section.

(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 technical review 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 taken by the applicant to provide required for the additional data. If the necessary additional information is not received by the executive director prior to expiration of the original 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. And, in no event shall the executive director have less than 60 working days, exclusive of any time spent waiting for submission of additional information, to complete the technical review. Decisions to return the application 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 county judge for each county in which the proposed facility is proposed to be located, the Texas Parks and Wildlife Department, and the Texas General Land Office, and any person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notice of applications filed under this subchapter. The notice shall also be posted on the commission's website.

(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 and indicate the deadlines for doing so;

(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. More stringent treatment may be required if the commission determines it is necessary to protect water quality.

(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. Notice shall also be provided to any person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notice of applications filed under this subchapter. The notice shall be posted on the commission's website.

(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) adopts new §§297.200 - 297.210.

Sections 297.200 - 297.202 and §§297.205 - 297.210 are adopted *with changes* to the proposed text as published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3852). Section 297.203 and §297.204 are adopted *without changes* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted 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."

These rules allow the regulatory process for the diversion of seawater or marine seawater and conveyance of treated marine seawater in the bed and banks to be expedited. These applications can be expedited because they do not require a determination of water availability and; consequently, do not require the extensive technical review associated with a water availability determination nor do they have to be processed in priority date order. Additionally, the statute requires the Texas Parks and Wildlife Department (TPWD) and the Texas General Land Office (GLO) to conduct a study to develop zones appropriate for the diversion of marine seawater. HB 2031 requires the TPWD and the GLO to submit a report to the commission that "must include recommended diversion zones for designation by the commission and recommendations for the number of points from which, and the rate at which, a facility may divert marine seawater." HB 2031 then requires the commission to adopt rules to designate appropriate diversion zones. The designation of diversion zones will also expedite the review of these applications.

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 TPWD and the 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 adopted 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 adopts 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 adopts 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 invited 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 commission invited comments on all aspects of the rules as they were proposed. The commission made various revisions to the proposed rules and added language in response to comments as noted in this preamble.

§297.200, Applicability

The commission adopts 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. In response to comment, the commission added the phrases "for desalination," "diversion for desalination," and "solely for industrial use" to adopted §297.200 to clarify the scope and applicability of the subchapter.

§297.201, Definitions

The commission adopts new §297.201. The adopted section has definitions of terms that only apply to Subchapter K. In §297.201(1) the commission adopts a definition of "Marine seawater" consistent with TWC, §18.001(2). In response to comment the commission added the phrase "for desalination" to clarify the applicability of this subchapter. In §297.201(2) the commission adopts a definition of "Seawater" as water that is derived from a bay or arm of the Gulf of Mexico. In response to comment the commission added the phrase "for desalination and use solely for industrial purposes" to clarify that only water diverted solely for industrial purposes can be diverted from a bay or arm of the Gulf of Mexico.

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

The commission adopts new §297.202. The adopted 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 adopts 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). In response to comment the commission added the phrase "for desalination under this subchapter" to clarify that Subchapter K relates to desalination of marine seawater or seawater. In response to comment the commission added the word "water" and deleted the phrase "marine seawater," and also added the phrase "in accordance with the requirements set out in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration)" to adopted §297.202(2) to provide a cross-reference to the requirements to determine TDS for an application to which this subchapter applies. In response to comment the commission deleted the word "consulted" and added the phrase "provided documentation of the results of the consultation" to adopted §297.202(5) to clarify the information an applicant for a permit under this subchapter would need to provide regarding the applicant's consultation with the TPWD and the GLO.

§297.203, Water Availability

The commission adopts 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 adopts 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 Chapter 298. 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 adopts 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). In response to comment the commission added a new §297.205(b) to provide more specific requirements for water quality information submitted by an applicant. The new subsection states:

"(b) The monthly samples must be taken at the water source for each proposed diversion location over a period of at least one year, in accordance with applicable TCEQ Surface Water Quality Monitoring Procedures as amended. Procedures for analysis must be in accordance with the most recently published edition of the *Standard Methods for the Examination of Water and Wastewater*, 40 Code of Federal Regulations Part 136, or other reliable sources acceptable to the commission for total dissolved solids. Laboratory accreditation requirements are specified in Chapter 25 of this title (relating to Environmental Testing Laboratory Accreditation and Certification)."

The commission also re-lettered proposed subsection (b) to (c). The commission adopts

§297.205(c) 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 adopts new §297.206 to ensure that any permit issued under Chapter 295, Subchapter G, complies with TWC, §18.003(d).

§297.207, Diversion of Marine Seawater and Seawater

The commission adopts 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. In response to comment the commission added the words and phrases "desalination solely for" and "purposes" and deleted the word "use" to clarify that the only water that can be diverted from a bay or estuary under this subchapter is seawater for desalination solely for industrial purposes.

§297.208, Consideration of Water Conservation

The commission adopts 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 adopts 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 adopts 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. In response to comment the commission added §297.208(b)(4) stating:

"(4) demonstrates compliance with applicable provisions, based on the proposed use, in §295.9 of this title (relating to Water Conservation and Drought Contingency Plans)."

The commission added this new paragraph because the water conservation requirements for specific uses in §295.9 apply to permit applications under this section.

§297.209, Impingement and Entrainment

The commission adopts 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). In response to comment the commission added the sentence "The written statement shall include the maximum flow-through screen velocity; the size of the screen openings; documentation that the proposed combination of technologies, management practices, and operational measures represent the best technology available for impingement

reduction; the depth of the intake; the timing of the diversions; and documentation of the specifications of the proposed physical screen barriers and diversion systems" to clarify the type of information an applicant would need to submit to document the measures used to avoid impingement and entrainment.

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

The commission adopts new §297.210. The adopted 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 adopts 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 adopts 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 adopts in §297.210(6).

Final 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 adopted 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 adopted under the TCEQ's general rulemaking authority. This rulemaking is adopted under specific state statutes enacted in HB 2031 and HB 4097.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated these adopted rules and performed an analysis of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these adopted 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 adopted 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 adopted 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 adopted rulemaking and found that the adoption 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 adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted 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 adopted rules include those contained in 31 TAC §501.33(a). The adopted 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 adopted 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 adopted 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 adopted rules is to protect coastal and natural resources.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the

consistency with the CMP.

Public Comment

The commission held a public hearing on June 21, 2016, in Austin. The comment period closed on July 5, 2016. The commission received comments from AEM the Woodlands (AEM); Asociacion Amiga; Clean Water Action (CWA); Coastal Conservation Association Texas (CCA-Texas); EV Houston Newspaper (EVHN); Glenrose Engineering, Inc. (GEI); the Honorable A. R. Senac, Chambers County Commissioner, Precinct 4 (Commissioner Senac); San Marcos River Foundation (SMRF); Save Our Springs Alliance (SOS); Texas Conservation Alliance (TCA); TPWD; Viva! The Woodlands Magazine (Viva!); joint comments submitted by the Galveston Bay Foundation (GBF), National Wildlife Federation (NWF), and the Sierra Club Lone Star Chapter (Sierra Club); 41 individuals who submitted personalized comments through NWF; 940 individuals who submitted identical comments through NWF; 32 individuals who submitted personalized comments through the Sierra Club; and 1,299 individuals who submitted identical comments through the Sierra Club. The comments submitted by Commissioner Senac do not in any manner necessarily reflect the opinion of Chambers County Commissioners Court or Chambers County.

TDA Marine Subcommittee and one individual supported the rules. Generally, AEM, Asociacion Amiga, CWA, CCA-Texas, EVHN, GEI, Commissioner Senac, SMRF, SOS, TCA, TPWD, Viva!, GBF, NWF, Sierra Club and 2,310 individuals supported the rules, but were concerned that the rules were not sufficiently protective. One individual was

against the rule. TPWD, GBF, NWF, and Sierra Club suggested specific changes to the rulemaking as noted in the Response to Comments section of this preamble.

Response to Comments

General

Comment

AEM, Asociacion Amiga, CCA-Texas, Commissioner Senac, CWA, EVHN, GEI, SMRF, SOS, and Viva! commented that the rules should make explicitly clear that the commission has discretion to deny permit applications for facilities proposed to be located in inappropriate locations that would harm instream uses, water quality, or fish and wildlife habitats.

Response

The commission responds that if an application for diversion for desalination and use of marine seawater or diversion for desalination of seawater solely for industrial use complies with the procedural requirements in Chapter 295, Subchapter G and meets the substantive requirements in Chapter 297, Subchapter K the proposed locations of the facilities would be considered to be appropriate. No changes were made in response to this comment.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and Viva! commented that TWC, Chapter 11 is fully applicable to permits issued under the proposed rules,

provides clear direction to the commission to assess impacts to instream uses, fish and wildlife habitats, and water quality. TWC, §§11.134(b)(3)(D), 11.147(b) and (e), 11.150, and 11.152 requires those assessments and provide discretion and broad authority for the commission to propose permit conditions to protect instream uses, fish and wildlife habitats, and water quality. Chapter 297, Subchapter K should expressly acknowledge that direction and authority.

Response

The commission responds that the commission does not have broad authority under these statutes beyond the consideration of any applicable environmental flow standards established under TWC, §11.1471. No changes were made in response to this comment.

Comment

SOS commented that TWC, Chapter 11 directs the commission to assess the effects on bays and estuaries and provides broad authority for the commission to impose permit conditions to protect instream uses, fish and wildlife habitat, and water quality. The proposed rules should be amended to expressly acknowledge that authority.

Response

The commission responds that the commission does not have broad authority under these statutes beyond the consideration of any applicable environmental

flow standards established under TWC, §11.1471. No changes were made in response to this comment.

Comment

TPWD commented that it is essential that fish and wildlife are protected from any detrimental effects of diversions and transport of developed waters associated with desalination projects.

Response

The commission acknowledges the comment. No changes were made in response to this comment.

Comment

One thousand, three hundred and twenty-nine individuals commented that water right permit applications for desalination must demonstrate compliance with all permitting requirements, including environmental rules and protections, other than requirements expressly made inapplicable by legislation passed in 2015.

Response

The commission acknowledges the comment. However, the commission responds that if the diversion is from a bay and environmental flow standards have been adopted for a bay, TWC, Chapter 11 only requires consideration of those standards. No changes were made in response to this comment.

§297.200, Applicability

Comment

TPWD commented that §297.200 should be clarified as follows: "This subchapter only applies to diversion and use of seawater for desalination solely for industrial purposes, diversion for desalination and use of marine 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)."

GBF, NWF, and Sierra Club commented that the limitation on the scope of this subchapter as applying only to diversions for desalination should be expressly noted in the rule language in order to accurately define the applicability of this subchapter. Similarly, the limited scope of authorizations of diversions of seawater pursuant to HB 4097 also should be acknowledged. These commenters recommended that §297.200 be revised as follows: "This subchapter only applies to diversion and use of seawater for desalination solely for industrial use, diversion for desalination and use of marine 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)."

Response

The commission agrees that the rule could be clarified and revised §297.200 in response to these comments.

§297.201, Definitions

Comment

GBF, NWF, Sierra Club, and TPWD commented that the definitions in §297.201 should be clarified. GBF, NWF, and Sierra Club commented that because of the differences between HB 2031, which applies to all diversions for desalination from the Gulf of Mexico, and HB 4097, which applies only to diversions for desalination for industrial use from a bay or arm of the Gulf of Mexico, a careful distinction is necessary in the rules. That distinction is not sufficiently clear in the proposed rules. First, the definitions of "Marine seawater" and "Seawater" should be expressly limited by referring to diversions for desalination. By including that limitation in the definitions, it is not necessary to repeat it throughout the rule text. Second, because the term "Marine seawater" is used to refer to diversions subject to HB 2031, that definition should include water from the Gulf diverted for desalination. By contrast, because the term "Seawater" is used to refer to diversions subject to HB 4097, which has limited applicability, that definition should only include water from a bay or arm of the Gulf of Mexico diverted for desalination solely for industrial use. By limiting the definitions in this way, both pieces of legislation can be given effect and the rules will be easier to interpret. GBF, NWF, Sierra Club, and TPWD recommend that the definitions be revised as follows:

"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 for desalination.

"(2) Seawater--Water that is derived from a bay or arm of the Gulf of Mexico for desalination and use solely for industrial purposes."

Response

The commission agrees that the rule could be clarified and revised §297.201 in response to these comments.

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

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF and Viva! commented that §297.202(4) could be amended to acknowledge that the public welfare inquiry includes consideration of whether the proposed locations for diversion facilities are appropriate.

Response

The commission responds that if an application for diversion for desalination and use of marine seawater or diversion for desalination of seawater solely for

industrial use complies with the procedural requirements in Chapter 295, Subchapter G and meets the substantive requirements in Chapter 297, Subchapter K the proposed locations of the facilities would be considered to be appropriate until such time as the TPWD and the GLO submit their report on appropriate zones and the commission by rule designates such zones. No changes were made in response to this comment.

Comment

TPWD commented that §297.202 should be revised and clarified as follows:

"The commission may grant an application for a water right to divert marine seawater or seawater for desalination under this Subchapter only if:

"(2) for an application to divert seawater solely for use for industrial purposes, 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. The monthly samples shall cover a continuous period of not less than one year with samples taken at approximately the same time in each month in order to provide a representative characterization and shall be collected using protocols for sample collection, including for depth of collection, that are consistent with best practices as reasonably determined by commission staff.

"(5) the applicant has documented, in its application, the results of its completed consultation with the Texas Parks and Wildlife Department and the Texas General Land Office regarding the location of diversion facilities;"

GBF, NWF, and Sierra Club commented that because the commission has discretion on whether to grant a permit and because this section establishes limitations on that discretion rather than a directive, the rule should refer to when the commission "may" grant an application rather than to when the commission "shall" grant an application. There is an important distinction between HB 2031 and HB 4097 in terms of limitation on authority of the commission to grant a permit. Only HB 4097, in TWC, §11.1405, imposes a limitation on commission authority to grant a permit based on location less than three miles seaward of any point on the coast or on average salinity levels of less than 20 parts per thousand. That limitation applies only for applications for desalination for industrial use. By contrast, HB 2031, in TWC, §18.003, establishes locations where a permit is required and where an exemption can apply. However, it places no limitation on commission authority to issue a permit outside of a bay or estuary. Accordingly, the rule should not place such a limitation on commission authority. It seems unlikely that a person will apply for a permit instead of an exemption but the rules should not preclude that option when the statute does not. As discussed earlier, the rules should further clarify how the determination will be made of when a diversion or discharge three miles seaward of any point on the coast will be determined, either by including a map or by further refining the rule language. The rules should also ensure that the commission will have the benefit of the results of the

consultation process in its consideration of a permit application rather than just confirmation that the consultation occurred. Finally, the explicit limitation of TWC, §18.003(f) on diversions from a bay or estuary should be acknowledged for all applications that do not seek to divert seawater solely for industrial use. These commenters recommended that §297.202 be revised as follows and recommend a new §297.202(8):

"The commission may grant an application for a water right to divert marine seawater or seawater for desalination under this Subchapter only if:

"(2) for an application to divert seawater solely for industrial use, the point of diversion is located less than three miles seaward of any point located on the coast of this state, which includes any point located on a barrier island and any point located on an imaginary line drawn between the most seaward points of land on either end of a pass or cut between barrier islands; 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;

"(5) the applicant has documented, in its application, the results of its consultation with the Texas Parks & Wildlife Department and the Texas General Land Office regarding the location of diversion facilities;

"(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;

"(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); and

"(8) for an application other than an application to divert seawater solely for desalination for industrial use, only if no proposed point of diversion is located in a bay or estuary."

Response

The commission responds that if an application meets the requirements in Chapter 295, Subchapter G and Chapter 297, Subchapter K the application should be granted. Therefore, the commission declines to substitute "may" for "shall." Any permit issued under this subchapter, regardless of whether the permit is for diversion for desalination of marine seawater or diversion for desalination of seawater solely for industrial use would be for a location that is less than three miles seaward of any point located on the coast of this state as required by HB 2031 and HB 4097. In addition, any permit issued under this subchapter would be issued in locations where the TDS concentration based on a yearly average of samples

taken monthly at the water source of less than 20,000 mg/L. The commission intended for §297.202(2) to apply to both marine seawater and seawater and has changed the reference to marine seawater to water to clarify its intent. The commission has also revised this section to reference adopted §297.205, which includes the requirements for determining TDS concentration. The commission has also revised §297.202(5) to require documentation of the results of the consultation consistent with adopted §295.302(k). Finally, the commission responds that under HB 4097 and adopted §295.302(e), only seawater diverted for desalination solely for industrial use can be diverted from a bay or estuary. Therefore the commission declines to add a new §297.202(8).

§297.204, Applicability of Environmental Flow Standards

Comment

TPWD commented that it appreciates that the commission will evaluate whether the application is consistent with environmental flow standards. If the desalination projects are diverting from off-shore or near-shore marine or tidally influenced areas, the diversions will likely have no impact on the standards, which were developed to address impacts from freshwater riverine diversions. This is especially true due to the water availability model-based manner TCEQ currently uses to evaluate and measure compliance with freshwater inflow standards. Seawater diversions have the potential to alter localized salinities which could be exacerbated by riverine freshwater inflow patterns and diversions. Impacts of desalination projects on water physicochemical components, if located in bays and estuaries, should be determined and considered in

TCEQ's analyses of environmental impacts and compliance with the flow standards.

TPWD comments that the rule should be revised as follows for consistency with TWC, §§11.1405, 11.147, 11.150, and 11.152:

"(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 Texas Water Code Section 11.1471 and Chapter 298 of this title (relating to Environmental Flow Standards for Surface Water).

"(b) The commission shall include any provisions in a permit issued under Chapter 295, Subchapter G of this title that the commission considers necessary to comply with any applicable environmental flow standards established under Texas Water Code Section 11.1471 and Chapter 298 of this title. (c) Pursuant to the assessments required by Texas Water Code Sections 11.147 (b) and (e), 11.150, and 11.152, the commission shall include in the permit, to the extent practicable when considering all public interests, those conditions other than those addressing consistency or compliance with environmental flow standards considered by the commission necessary to maintain water quality, fish and wildlife habitats, and instream uses."

GBF, NWF, and Sierra Club commented that the requirements in TWC, Chapter 11 apply to applications under this subchapter except to the extent that either HB 2031 or HB 4097 explicitly make a requirement inapplicable. Nothing in either piece of legislation

makes environmental protection requirements inapplicable. HB 4097 includes a requirement for evaluation of consistency with applicable environmental flow standards. It is not clear that any environmental flow standards would be applicable in any strict sense because the flow standards establish flow requirements measured upstream of a bay or arm of the Gulf of Mexico. However, the commission could ensure that a diversion is not located or sized to deprive a bay of the benefit of inflows that flow standards are designed to protect by including permit conditions to achieve consistency with applicable flow standards since strict compliance would be extremely difficult, if not impossible, to assess. Regardless, however, TWC, §§11.147(b) and (e), 11.150, and 11.152 do apply to applications under this subchapter. Because permit conditions will not involve environmental flow conditions but rather other types of protections such as diversion location, directional orientation, depth, diversion rate, diversion timing, and the like, nothing in TWC, §11.147(e-3) limits the applicability of those statutory provisions. The rules should expressly acknowledge their applicability so that applications are aware that the issues must be addressed. These commenters recommended that §297.204(b) be revised and a new subsection (c) be added as follows:

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

"(c) After considering the assessments required by TWC Sections 11.147 (b) and (e), 11.150, and 11.152, the commission also shall include in the permit, to the extent practicable when considering all public interests, conditions other than those addressing consistency with environmental flow standards that are considered by the commission necessary to maintain water quality, fish and wildlife habitats, and instream uses. Permit conditions shall include requirements for measures to minimize impingement and entrainment consistent with Section 297.209 of this title (relating to Impingement and Entrainment)."

Response

The commission responds that adopted §297.204 specifically requires inclusion in the permit of any applicable environmental flow standards under Chapter 298. In addition, adopted §297.204 follows TWC, §11.1405 (f) and (g). No changes were made in response to these comments.

§297.205, Determination of Total Dissolved Solids Concentration

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, and SMRF commented that the rules should ensure that entities follow a reasonable protocol for sampling in establishing the yearly average of salinity samples taken monthly. The measurements must be collected evenly across a year to avoid concentrating samples in a non-representative manner. Standard sampling protocols should be mandated to ensure

that samples are collected at an appropriate depth, or depths, to accurately characterize conditions at the location.

Response

The commission agrees that more specificity in this section would be helpful and revised the rule in response to this and other comments.

Comment

GBF, NWF, and Sierra Club commented that only TWC, §11.1405(a), which applies only for diversions for desalination for industrial use, establishes a maximum salinity level as a prerequisite for permit issuance. TWC, §18.003(a) imposes a permit requirement, based on salinity level, but does not preclude a person from requesting and obtaining a permit even if a permit is not required based on salinity level. Accordingly, the rules should avoid establishing a maximum salinity criterion for permit issuance for diversions not limited solely to desalination for industrial use. These commenters recommended that §297.205(a) be revised as follows:

"(a) In its consideration of an application for a new or amended water right to divert 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)."

Response

The commission responds that it intends for all applicants for permits under this subchapter to provide water quality information as part of the application. The commission agrees that more specificity in this section would be helpful and revised the rule to include a new §297.205(b) to provide more specific requirements for water quality sampling.

§297.207, Diversion of Marine Seawater and Seawater

Comment

TPWD commented that §297.207 should be clarified as follows: "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 desalination solely for use for industrial purposes under Texas Water Code, §11.1405."

Response

The commission agrees that the rule could be clarified and revised §297.207 in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that because this section deals only with ensuring that a permit is not granted for diversion in a bay or estuary except under

limited circumstances, the section title should be clarified. In addition, because the exception under TWC, §11.1405 to the prohibition of granting a permit located in a bay or estuary is limited solely to desalination for industrial use, the rule language should reflect that specific limitation. A broader exception would violate TWC, §18.003(f).

These commenters recommended that the title of §297.207 be changed to: "Diversion of Marine Seawater and Seawater from Bay or Estuary." These commenters also recommended that §297.207 be revised as follows: "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 solely for industrial use under Texas Water Code, §11.1405."

Response

The commission agrees that §297.207 could be clarified and revised the rule in response to other comments; however the commission declines to change the title of the section.

§297.208, Consideration of Water Conservation

Comment

GBF, NWF, and Sierra Club commented that the requirements of §295.9 of the commission's rules should be incorporated to ensure that basic requirements for water conservation for each type of proposed use are met. These commenters recommended that subsection (b) be revised to include this requirement as follows: "demonstrates

compliance with applicable provisions, based on the proposed use, in §295.9 of this title (relating to Water Conservation and Drought Contingency Plans)."

Response

The commission agrees and added §297.208(b)(4) in response to this comment.

§297.209, Impingement and Entrainment

Comment

AEM, Asociacion Amiga, CCA-Texas, Commissioner Senac, CWA, EVHN, GEI, SMRF, and Viva! commented that the rules must prescribe minimum standards for impingement and entrainment that are required to be met for both permitted and exempt facilities. Minimum standards should include establishing a maximum allowable intake velocity. Stringent requirements should apply for facilities located in sensitive environments. AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, and SMRF also commented that less stringent, but still protective, requirements could apply to facilities located farther off-shore and in less sensitive areas and that the rules should include a requirement for installing a traveling screen that represents best technology available for reducing impingement.

Response

The commission disagrees that these standards apply to exempt facilities. The commission notes that §297.209 was revised in response to other comments to include a requirement that the applicant's written statement include documentation

that its proposed combination of technologies, management practices, and operational measures represent the best technology available for impingement reduction. No changes were made in response to this comment.

Comment

Two thousand, three hundred and eight individuals commented TCEQ's desalination rules should ensure that adequate minimum requirements for measures to protect fish, shellfish, and other animals, including early life stages, from being sucked against or into diversion facilities are defined in the rules for all facilities.

Response

The commission acknowledges the comment and notes that §297.209 was revised in response to other comments. No changes were made in response to this comment.

Comment

SOS commented that the proposed rules merely require applicants to propose measures for impingement and entrainment as part of a permit application and that the proposed rules should be revised to prescribe minimum standards for all permitted facilities and all exempt facilities.

Response

The commission disagrees that the requirements in the rule would apply to exempt facilities. The commission notes that §297.209 was revised in response to other comments to include more specific requirements for permitted facilities. No changes were made in response to this comment.

Comment

TCA commented that the rules should set standards for minimizing impingement and entrainment for all permitted facilities and for all exempt facilities, establishing a maximum allowable intake velocity, requiring installation of a high-tech traveling screen, and stringent requirements for facilities in or near sensitive environments such as estuaries and bays.

Response

The commission disagrees that the requirements in the rule would apply to exempt facilities. The commission notes that §297.209 was revised in response to other comments to include more specific requirements for permitted facilities. No changes were made in response to this comment.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and Viva! commented that the rules must prescribe minimum standards for impingement and entrainment that are required to be met for both permitted and exempt facilities. Minimum standards should include establishing a maximum allowable intake velocity, such as 0.5 feet per

second, along with a requirement for installing a traveling screen that represents best technology available for reducing impingement. Very stringent requirements should apply for facilities located in very sensitive environments like bays and estuaries, with less stringent, but still protective, requirements applying to facilities located farther off-shore and in less sensitive areas.

Response

The commission disagrees that these standards apply to exempt facilities. The commission notes that §297.209 was revised in response to other comments to include a requirement that the applicant's written statement include documentation that its proposed combination of technologies, management practices, and operational measures represent the best technology available for impingement reduction. No changes were made in response to this comment.

Comment

TPWD commented that it appreciates that an application to divert marine seawater or seawater is required to include a written statement of facility-specific, reasonable measures to minimize impingement and entrainment that will be implemented at the proposed desalination facility. TWC, §18.003(h) directs the TCEQ to prescribe reasonable measures to minimize impingement and entrainment. TPWD commented that the rule should be revised as follows: "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. At a minimum, such measures shall include an intake diversion designed and operated to result in a maximum flow-through screen velocity of 0.5 feet per second. At all times that diversions are occurring, the intake diversion facilities shall be equipped with screens resulting in individual openings no larger than 0.25 inches in size unless a combination of technologies, management practices, and operational measures representing the best technology available for impingement reduction are used to meet a specified impingement mortality standard. Measures to reduce entrainment include, but are not limited to, diversion from a suitable depth designed to avoid planktonic and larval organisms; timing of intake to coincide with periods of lower abundance of eggs and larvae in the water column; overall diversion of smaller quantities of water; and/or use of appropriate physical screen barriers and diversion systems employing a maximum screen mesh size of 0.04 in. Any permit issued shall prescribe measures to be implemented to minimize impingement and entrainment consistent with this section."

GBF, NWF, and Sierra Club commented that TWC, §18.003(h) directs the commission to prescribe by rule reasonable measures to minimize impingement and entrainment. That requirement applies for both exempt and non-exempt facilities. The proposed rules fail to follow that specific statutory directive. As widely reflected in available technical literature, such measures will include both a diversion velocity component and a screen component. In addition, considerations, particularly for the screen component, for what measures are needed may vary by location of the diversion point.

We have included that consideration in our recommended approach by providing that, when a diversion facility is proposed for a location that the TPWD and the GLO agree through the required consultation process is appropriate for a diversion, the project proponent can propose alternatives for the minimum screen component otherwise established in the rule. This recommended approach would comply with TWC, §18.003(h), would encourage permit applicants and proponents of exempt facilities to work with the consulting agencies to identify appropriate locations, and would help to protect the state's natural resources by imposing protective minimum requirements while retaining flexibility in appropriate circumstances. A person proposing an exempt facility would still be free to meet the minimum requirements of subsection (b) without obtaining any commission approval and subsection (d) would merely provide an additional option for proceeding. These commenters recommended that §297.209 be modified as follows:

"(a) 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 the applicant proposes to implement at the proposed desalination facility.

"(b) Except as otherwise provided in subsection (c) of this section, reasonable measures to minimize impingement and entrainment shall include:

"(1) a maximum diversion velocity of .5 feet per second; and

"(2) a fine-mesh traveling screen system, with no larger than an .04 inch mesh opening, designed to operate continuously at all times diversions are occurring with a low-pressure wash system incorporating a mechanism for returning impinged organisms to the water source with minimal potential for abrasion.

"(c) If a permit application establishes that a diversion facility will be placed at a location agreed upon as appropriate for that purpose by the Texas Parks and Wildlife Department and the General Land Office through the consultation process required under subsection (k) of §295.302 of this title, an alternative to the screen system requirement set out in subsection (b)(2) of this section may be considered and approved by the commission for that diversion facility if the applicant demonstrates that the alternative approach represents reasonable measures for minimizing impingement and entrainment for the specific diversion location.

"(d) If the documentation of the results of the consultation process submitted pursuant to subsection (c)(2) of §295.300 of this title establishes that a diversion facility will be placed in a location agreed upon as appropriate for that purpose by the Texas Parks and Wildlife Department and the General Land Office, an alternative to the screen system requirement set out in subsection (b)(2) of this section may be determined by the commission to represent reasonable measures for minimizing impingement and entrainment for that diversion facility based upon the submission by

the owner or operator of the exempt facility pursuant to subsection (c)(3) of §295.300 of this title.

"(e) Any permit issued shall prescribe reasonable measures to be implemented to minimize impingement and entrainment consistent with this section and appropriate for the location of each diversion."

Response

The commission disagrees that these requirements apply to exempt facilities. However, the commission agrees that more general requirements for an application can be included in §297.209 for impingement and entrainment and has revised §297.209 to include the type of information that would need to be submitted with an application. However, the commission also notes that the appropriate measures to be taken to avoid impingement and entrainment should be specific to the facility and its location and it would be difficult to prescribe requirements for locations throughout the Texas Gulf Coast in this rulemaking. TWC, §18.003(i) requires the TPWD and the GLO to conduct a study to identify appropriate diversion zones, taking into account the need to protect marine organisms and submit the results of that study to the commission. The report will include diversion zones, and the number of points and the rate at which a facility can divert marine seawater.

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

Comment

GBF, NWF, and Sierra Club commented that because the commission has discretion on whether to approve an application and because this section establishes limitations on that discretion rather than a directive, the rule should refer to when the commission "may" grant an application rather than to when the commission "shall" grant an application. Although rare, there may be instances where water quality standards adopted by the United States Environmental Protection Agency could apply. Because HB 2031 only establishes minimum requirements, including a reference to compliance with applicable water quality standards without a specific reference to commission adoption ensures coverage in case that unusual circumstance were to occur. In addition, because treated marine seawater may flow through a number of streams or impoundments, the rule should acknowledge that treatment levels must comply with applicable standards for all water bodies through which the treated marine seawater is proposed to be conveyed. The rule should also include an acknowledgement that the commission retains authority to require more stringent treatment if it is necessary to protect water quality. Although it may be unlikely that it will be needed, because the state does not have experience with the impacts of conveying treated marine seawater on water quality, the potential authority for requiring additional treatment, beyond the minimum levels required by statute, should be retained. These commenters recommended that §297.210 be revised as follows:

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

"(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 applicable to any receiving stream or impoundment through which the water is proposed to be conveyed."

Response

The commission responds that if an application meets the requirements in Chapter 295, Subchapter G and Chapter 297, Subchapter K, the application should be granted. Therefore, the commission declines to substitute "may" for "shall." The commission agrees that marine seawater conveyed through a stream or impoundment would need to meet the water quality standards of all streams through which the water is conveyed and has revised adopted §297.210(2) in response to this comment.

SUBCHAPTER K: DESALINATION, SUBSTANTIVE

§§297.200 - 297.210

Statutory Authority

The rules are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §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 adopted rules implement House Bill (HB) 2031 and HB 4097 (84th Texas Legislature, 2015).

§297.200. Applicability.

This subchapter only applies to diversion for desalination and use of marine seawater and diversion for desalination of seawater solely for industrial use 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 **for desalination.**

(2) Seawater--Water that is derived from a bay or arm of the Gulf of Mexico **for desalination and use solely for industrial purposes.**

§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 **for desalination under this subchapter** only if:

(1) the application conforms to the requirements prescribed by §295.302 of this title (relating to Requirements for **Application 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 **water** 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, in accordance with the requirements set out in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration);

(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 provided documentation of the results of the consultation consulted with the Texas Parks and 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 Application 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 monthly samples must be taken at the water source for each proposed diversion location over a period of at least one year, in accordance with applicable TCEQ Surface Water Quality Monitoring Procedures as amended. Procedures for analysis must be in accordance with the most recently published edition of the *Standard Methods for the Examination of Water and Wastewater*, 40 Code of Federal Regulations Part 136, or other reliable sources acceptable to the commission for total dissolved solids. Laboratory accreditation requirements are specified in Chapter 25 of this title (relating to Environmental Testing Laboratory Accreditation and Certification).

(c) ~~(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 Application 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 Application 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 desalination solely for industrial purposes 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; and:

(4) demonstrates compliance with applicable provisions, based on the proposed use, in §295.9 of this title (relating to Water Conservation and Drought Contingency Plans).

§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. The written

statement shall include the maximum flow-through screen velocity; the size of the screen openings; documentation that the proposed combination of technologies, management practices, and operational measures represent the best technology available for impingement reduction; the depth of the intake; the timing of the diversions; and documentation of the specifications of the proposed physical screen barriers and diversion systems.

§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 any ~~the~~ receiving stream or impoundment through which the water is proposed to be conveyed;

(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) adopts new §§318.1 - 318.9, 318.21 - 318.30, 318.40 - 318.43, 318.60, and 318.61.

Sections 318.1, 318.2, 318.5, 318.9, 318.22, 318.41, 318.42, and 318.61 are adopted *with changes* to the proposed text as published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3857). Sections 318.3, 318.4, 318.6 - 318.8, 318.21, 318.23 - 318.30, 318.40, 318.43, and 318.60 are adopted *without changes* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted 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 and 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 (TPDES) 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 adopted 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 adopts 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 adopted 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 adoption, 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 seaward 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 less than three miles seaward from any point located on the coast of Texas.

Subchapter A: General Requirements for Marine Seawater Desalination Discharges

§318.1, Applicability and Purpose

Adopted 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. Adopted new §318.1 also identifies which portions of the chapter apply to near-shore discharges. These types of discharges are governed by the TPDES 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, adopted new §318.1 states that this chapter does not apply to discharges of waste resulting from the desalination of marine seawater into a bay, estuary, or fresh waterbody. This provision complies with TWC, §18.005(f).

§318.2, Definitions

Adopted 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), with additional clarification related to determining the three-mile delineation between off-shore and near-shore discharges. 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 adopted 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 adopted 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 adopted rules because they are generated by the operation that desalinates marine seawater.

These definitions are crucial for limiting the applicability of the adopted 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

Adopted 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 adopted 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

Adopted 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 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

Adopted new §318.5, identifies other regulations that are applicable to these permits, including 30 TAC Chapter 307 (Texas Surface Water Quality Standards) as required by TWC, §18.005(d)(1).

§318.6, Amendment of a Permit

Adopted 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. Adopted 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

Adopted 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

Adopted 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

Adopted new §318.9, requires an applicant to include documentation of the results 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

Adopted 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

Adopted 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 adopted 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 adopted in new 30 TAC §39.902.

§318.23, Public Meeting

Adopted new §318.23, specifies that public meetings held on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §55.154. Notice of a public meeting must comply with the requirements in adopted new §39.902.

§318.24, Public Comment Processing

Adopted 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

Adopted new §318.25, specifies that actions by the executive director on applications under this subchapter are subject to the provisions outlined in 30 TAC §§50.133, 50.135, and 50.137.

§318.26, Motion to Overturn Executive Director's Decision

Adopted new §318.26, specifies that Motions to Overturn the Executive Director's decision on applications under this subchapter are subject to the provisions outlined in 30 TAC §50.139.

§318.27, Request for Contested Case Hearing on an Application

Adopted new §318.27, identifies the application actions that are subject to contested

case hearings and specifies that requests for a contested case hearing on those applications under Chapter 318 are subject to the provisions outlined in 30 TAC §§55.201, 55.203, 55.205, and 55.209.

§318.28, Direct Referrals

Adopted new §318.28, specifies that direct referrals on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §55.210.

§318.29, Action by the Commission

Adopted new §318.29, specifies that actions by the commission on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §§50.113, 50.115, 50.117, 50.119, and 55.211.

§318.30, Contested Case Hearing Proceedings

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

Subchapter C: Off-Shore Discharges

§318.40, Applicability

Adopted new §318.40, specifies that this subchapter applies to applications seeking authorization for off-shore discharges. However, as noted in adopted 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 adopted new Subchapter B.

§318.41, Application Review for Off-Shore Discharges

Adopted 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 adopted 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 adopted in new 30 TAC §39.903.

§318.42, Action by the Executive Director

Adopted new §318.42, specifies that actions by the executive director on applications under this subchapter are subject to the provisions outlined in §§50.133, 50.135, and 50.137.

§318.43, Motion to Overturn Executive Director's Decision

Adopted new §318.43, specifies that Motions to Overturn the Executive Director's decision on applications under this subchapter are subject to the provisions outlined

in §50.139.

Subchapter D: Near-Shore Discharges

§318.60, Applicability

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

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

Adopted 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.

Final Regulatory Impact Analysis Determination

The commission has reviewed the adopted 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 adopted 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 adopted 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 adopted new rules will protect the health and safety of aquatic and wildlife resources, as well as water quality, however, the adopted 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 adopted 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 adopted under the TCEQ's general rulemaking authority. This rulemaking is adopted under specific state statutes enacted in HB 2031. Therefore, the commission does not adopt the rule solely under the commission's general powers.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated the adopted 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 adopted 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 adopted rulemaking will substantially advance this stated purpose by adopting 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 adopted 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 adopted 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 adopted 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 adopted rulemaking and found that the adoption 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 adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted 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 adopted 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 adopted 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 adopted 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 adopted rules will include effluent limitations to ensure compliance with water quality standards. Further, the expedited permitting process in these adopted 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).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on June 21, 2016, in Austin. The comment period closed on July 5, 2016. The commission received comments from AEM the

Woodlands (AEM); Asociacion Amiga; Clean Water Action (CWA); Coastal Conservation Association Texas (CCA-Texas); EV Houston Newspaper (EVHN); Glenrose Engineering, Inc. (GEI); the Honorable A. R. Senac, Chambers County Commissioner, Precinct 4 (Commissioner Senac); San Marcos River Foundation (SMRF); Save Our Springs Alliance (SOS); Texas Conservation Alliance (TCA); Texas Desalination Association's Marine Subcommittee (TDA Marine Subcommittee); TPWD; Viva! The Woodlands Magazine (Viva!); joint comments submitted by the Galveston Bay Foundation (GBF), National Wildlife Federation (NWF), and the Sierra Club Lone Star Chapter (Sierra Club); 41 individuals who submitted personalized comments through NWF; 940 individuals who submitted identical comments through NWF; 32 individuals who submitted personalized comments through the Sierra Club; and 1,299 individuals who submitted identical comments through the Sierra Club. The comments submitted by Commissioner Senac do not in any manner necessarily reflect the opinion of Chambers County Commissioners Court or Chambers County.

TDA Marine Subcommittee and one individual supported the rules. Generally, AEM, Asociacion Amiga, CWA, CCA-Texas, EVHN, GEI, Commissioner Senac, SMRF, SOS, TCA, TPWD, Viva!, GBF, NWF, Sierra Club and 2,279 individuals supported the rules but were concerned that the rules were not sufficiently protective. Three individuals did not support the rules. TPWD, GBF, NWF, and Sierra Club suggested specific changes to the rulemaking.

Response to Comments

General Comments

Comment

TDA Marine Subcommittee and one individual commented in support of the rulemaking.

Response

The commission acknowledges this comment.

Comment

One individual commented that he is opposed to discharges from desalination facilities along the Texas coast. One individual commented that TCEQ should not take any action to streamline the authorization process for discharges from desalination facilities. One individual commented that wastewater discharges should not be exempt from permit or hearing requirements.

Response

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."

HB 2031, specifically TWC, §18.005(e), instructed the commission to develop rules to provide an expedited procedure for acting on an application for a permit. The bill also identified the procedural components of the permitting process for near-shore discharges, off-shore discharges, and treated marine seawater discharges. Near-shore discharges and treated marine seawater must include notice, public comment, and an opportunity for a public meeting and/or a contested case hearing. However, the process for off-shore discharges must include notice and public comment only. The adopted rulemaking complies with the requirements of HB 2031. No changes were made in response to the comments.

Comment

Two thousand, three-hundred and eleven individuals commented that the proposed rules are not adequately protective of bays and estuaries.

Response

Section 318.1(c) states that this chapter does not apply to discharges into a bay or estuary. A person that intends to discharge waste resulting from the desalination of

marine seawater into a bay or estuary would not be eligible to apply for a permit under the expedited procedures in the adopted rulemaking. In response to this comment, the commission clarified §318.1(c) to identify the types of discharges that are not allowed to be authorized under this chapter.

Comment

Asociacion Amiga, AEM, CCA-Texas, Commissioner Senac, CWA, EVHN, GBF, GEI, NWF, Sierra Club, SMRF, TCA, and Viva! commented that it is critically important that, even as the rules establish a streamlined process, environmental protections are not unduly compromised. Desalination discharges should not be located in sensitive environments without adequate protections.

Response

Although the technical review timeframes are considerably expedited, the reviews for applications processed under the adopted rules will be conducted consistent with existing TCEQ protocols to ensure that the discharge permits are protective of the environment. The expedited timeframes will be accomplished by prioritizing and coordinating staff workloads. The commission is confident that the timeframes can be achieved without sacrificing the quality and thoroughness of the technical review.

The legislature recognized the importance of the location for discharging waste

resulting from the desalination of marine seawater. HB 2031, in TWC, §18.005(f), (g) and (h), prohibits discharges into bays and estuaries and requires a multi-agency coordination to establish appropriate discharge locations in the Gulf of Mexico. Adopted §318.1(c) incorporates the discharge prohibition in bays and estuaries. Adopted §318.9 incorporates the requirement for the applicant to consult with the TPWD and GLO regarding the discharge location(s) until such time that the TPWD and GLO can complete a study to identify appropriate discharge zones and the TCEQ can adopt rules designating appropriate discharge zones. The TPWD and GLO are required to complete the study and provide a report on the results of the study to the TCEQ by September 1, 2018. The TCEQ must adopt rules to designate appropriate discharge zones by September 1, 2020. No changes were made in response to this comment.

Comment

TPWD recommended revising "Texas Parks & Wildlife Department" to "Texas Parks and Wildlife Department."

Response

The commission made the recommended change throughout this adopted chapter.

Comment

Asociacion Amiga, AEM, CCA-Texas, Commissioner Senac, CWA, EVHN, GEI, SMRF, SOS,

Viva! and 1,368 individuals commented that the rules should make explicitly clear that the commission has discretion to deny permit applications for facilities proposed to be located in inappropriate locations that would harm instream uses, water quality, or fish and wildlife habitats.

Response

The commission disagrees with this comment. The executive director's authority to act on an application on behalf of the commission is found in §50.133(a)(2) and is cross-referenced in §318.25 and §318.42. Those sections state that the executive director may act on an application if the application meets all relevant statutory and administrative criteria. If facilities are proposed to be located in inappropriate locations that would harm instream uses, water quality, or fish and wildlife habitats, the application would not meet relevant statutory criteria, and would therefore be technically incomplete and the executive director could not act on the application. Additionally, the process for returning applications because of technical deficiencies is located in §318.22(c) and (e) for treated marine seawater applications and in §318.41(c) and (e) for off-shore discharges. No changes were made in response to this comment.

Comment

EVHN, GBF, NWF, Sierra Club, and TPWD recommended that the requirement for consultation with TPWD and GLO regarding discharge locations be added to §318.3(f).

TPWD also recommended that the requirement be added to §318.61. Asociacion Amiga, AEM, CCA-Texas, CWA, GEI, SMRF, SOS, and Viva! commented that the requirement was not captured in the proposed rules for all proposed discharges.

Response

HB 2031 requires applicants for near-shore and off-shore discharges, but not treated marine seawater discharges, to coordinate with TPWD and GLO regarding the discharge location(s). The requirement in §318.9 for applications to include documentation demonstrating consultation with TPWD and GLO applies to near-shore and off-shore discharges, and is consistent with HB 2031. The commission disagrees that this requirement must be re-stated multiple times within the adopted rules. Having this requirement in only one section of the rule will allow the language to be revised more efficiently in the subsequent rulemaking required by TWC, §18.005(g) to designate appropriate discharge zones. No changes were made in response to these comments.

§318.2, Definitions

Comment

GBF, NWF, Sierra Club, and 2,307 individuals commented that the rule language should better define the starting point for determining the three-mile line that differentiates near-shore and off-shore discharges, specifically as it relates to barrier islands and cuts or passes between barrier islands. The commenters also recommended that the

definition of "Near-shore discharges" should read "less than three miles" instead of "within three miles."

Response

The commission agrees with this comment and revised the definition of "Near-shore discharges" and "Off-shore discharges" in §318.2(7) and (8).

Comment

GBF, NWF, Sierra Club, and TPWD were concerned about declaring in rule that treated marine seawater is not a pollutant discharge especially given that the rule does not require the level of salinity reduction required prior to discharging. The commenters recommended striking that sentence from the definition of "Treated marine seawater" in §318.2(14).

Response

The commission agrees with this comment. The commission did not remove the sentence stating that treated marine seawater is not a pollutant discharge, but instead revised §318.2(14) to include the treatment required by TWC, §18.005(d)(1) and a statement that more stringent treatment may be required by the commission to protect water quality.

§318.3, Application Requirements

Comment

GBF, NWF, and Sierra Club commented that the proximity of discharges to artificial reefs and critical areas, as defined by 31 TAC §501.3, is important information to evaluate potential impacts. The commenters recommended that §318.3(f)(4) be revised to require the map to show the locations of these areas.

Response

The commission disagrees that the proximity of discharges to artificial reefs and critical areas is needed in the discharge permit application. However, this information may be more appropriately provided to, and evaluated by, the TPWD and GLO during the consultation required by §318.9. Following consultation, the applicant is required to provide TCEQ with the results of the consultation. After TCEQ adopts rules designating appropriate discharge zones as required by TWC, §18.005(g), applicants will be required to locate discharges within the discharge zones. No changes were made in response to this comment.

§318.5, Permit Conditions

Comment

GBF, NWF, Sierra Club, and TPWD commented that the proposed rule did not contain the requirement in TWC, §18.005(d)(1) for a person to treat marine seawater so as to meet standards adopted by the commission applicable to the receiving stream or impoundment before discharging the seawater. The commenters recommended that

this requirement be added to the rule.

Response

The commission agrees with this comment and revised §318.5 to require a permit issued under Chapter 318 to meet the requirements of Chapter 307.

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

Comment

TPWD commented that §318.9 should require documentation demonstrating consultation with the TPWD and the GLO has been completed. GBF, NWF, and Sierra Club recommended that the rule language be revised to require the application to contain the results of consultation, not just documentation showing that consultation was completed. TCA recommended strengthening the provision for consultation with TPWD.

Response

The commission agrees that the application must include the results of the consultation with TPWD and GLO to ensure that the outfall locations in the application are consistent with the outcome of those consultations. In response to this comment, the commission revised §318.9 as follows: "An application for near-shore discharges or off-shore discharges must contain documentation of the results of consultation with the Texas Parks and Wildlife Department and the Texas

General Land Office..."

§318.22, Application Review for Treated Marine Seawater Discharges

Comment

GBF, NWF, and Sierra Club commented that the rules should make clear that the review period in §318.22(d) will be extended by the amount of time provided to the applicant in §318.22(e) to provide additional information.

Response

The commission disagrees that a revision is needed. The amount of time allotted in §318.22(d) for the technical review is the maximum amount of time for the executive director to review the application and notify the applicant if additional information is needed. The timeframe established by the technical review staff in §318.22(e) for the applicant to provide the additional information is in addition to the time used by the executive director to review the application.

Comment

GBF, NWF, and Sierra Club commented that the technical summary requirements in §318.22(g) should include the quality of treated marine seawater that is proposed to be discharged.

Response

The commission agrees with this comment and revised §318.22(g)(2) to require the technical summary to include information about the quality of treated marine seawater that is proposed to be discharged. The commission also revised §318.41(g)(2) similarly for consistency.

§318.23, Public Meeting

Comment

GBF, NWF, and Sierra Club commented that the county judge of a county in which a facility will be located should also be authorized to request a public meeting. The commenters recommended revising §318.23(c)(2) to include the county judge.

Response

The proposed rule did not contain §318.23(c)(2), therefore, no changes were made in response to this comment. However, the adopted rules allow anyone, including county judges, to request a public meeting on applications for a discharge permit for treated marine seawater. The commission will grant a public meeting in accordance with §55.154(c).

§318.41, Application Review for Off-Shore Discharges

Comment

GBF, NWF, and Sierra Club commented that the rules should make clear that the review period in §318.41(d) will be extended by the amount of time provided to the applicant

in §318.41(e) to provide additional information.

Response

The commission disagrees that a revision is needed. The amount of time allotted in §318.41(d) for the technical review is the maximum amount of time for the executive director to review the application and notify the applicant if additional information is needed. The timeframe established by the technical review staff in §318.41(e) for the applicant to provide the additional information is in addition to the time used by the executive director to review the application.

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

Comment

GBF, NWF, and Sierra Club commented that §318.61 should be very clear about how the three-mile determination will be made, especially regarding barrier islands and cuts or passes between barrier islands.

Response

The commission agrees with this comment and added the following sentence to the definitions for "Near-shore discharges" and "Off-shore discharges" in §318.2(7) and (8): "The three-mile boundary shall be determined based on the Texas General Land Office map for the Dispersant Use Pre-Approval Zone or based on a site-specific determination made by the executive director." Additionally, §318.61 was revised

to use the defined term "Near-shore discharges."

**SUBCHAPTER A: GENERAL REQUIREMENTS FOR MARINE SEAWATER
DESALINATION DISCHARGES**
§§318.1 - 318.9

Statutory Authority

The rules are adopted 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 adopted 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 of waste resulting from the desalination of marine seawater into a bay, estuary, or fresh waterbody 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 **less than** ~~within~~ three miles seaward **from** ~~of~~ any point located on the coast of Texas. **The three-mile boundary shall be determined based on the Texas General Land Office map for the Dispersant Use Pre-Approval Zone or based on a site-specific determination made by the executive director.**

(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. **The three-mile boundary shall be determined based on the Texas General Land Office map**

for the Dispersant Use Pre-Approval Zone or based on a site-specific determination made by the executive director.

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

(10) Outfall--The point or location where treated marine seawater or wastewater reject water is discharged from a marine seawater desalination project into or adjacent to water in the 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 so as to meet standards that are at least as stringent as the water quality standards adopted by the commission applicable to the receiving stream or impoundment. More stringent treatment may be required if the commission determines it is necessary to protect water quality. 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); and:

(6) Chapter 307 of this title (relating to Texas Surface Water Quality Standards).

(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 the results of consultation with the Texas Parks and 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 adopted 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 adopted 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 **quality and** 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) Applications for a discharge permit for treated marine seawater shall comply with the relevant public meeting provisions in §55.154 of this title (relating to Public Meetings), except as noted in this section.

(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) 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).

§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.

Actions by the executive director under this subchapter are subject to the provisions in §§50.133, 50.135, and 50.137 of this title (relating to Executive Director Action on Application or WQMP Update; Effective Date of Executive Director Action;

and Remand for Action by Executive Director, respectively).

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

A motion to overturn may be filed under this subchapter in accordance with the provisions in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

§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) Requests for a Contested Case Hearing are subject to the provisions in §§55.201, 55.203, 55.205, and 55.209 of this title (relating to Requests for Reconsideration or Contested Case Hearing; Determination of Affected Person; Request by Group or Association; and Processing Requests for Reconsideration and Contested Case Hearing, respectively).

§318.28. Direct Referrals.

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 for a hearing on the application, pursuant to the provisions in §55.210 of this title (relating to Direct Referrals).

§318.29. Action by the Commission.

Commission consideration of the following items are subject to the provisions in §§50.113, 50.115, 50.117, 50.119, and 55.211 of this title (relating to Applicability and Action on Application; Scope of Contested Case Hearings; Commission Actions; Notice of Commission Action; Motion for Rehearing; and Commission Action of Requests for Reconsideration and Contested Case Hearing, respectively). The commission may refer an application to the State Office of Administrative Hearings if the commission finds that an 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.

§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 adopted 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 adopted 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, quality, 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.

Actions by the **executive director** ~~Executive Director~~ under this subchapter are subject to the provisions in §§50.133, 50.135, and 50.137 of this title (relating to ~~Executive Director Action on Application or WOMP Update; Effective Date of Executive Director Action; and Remand for Action by Executive Director, respectively~~).

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

A motion to overturn may be filed under this subchapter in accordance with the provisions in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

SUBCHAPTER D: NEAR-SHORE DISCHARGES

§318.60, §318.61

Statutory Authority

The rules are adopted 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 adopted 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.

Near-shore ~~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.

(1) whether the complaint is within the scope of [the] Insurance Code Chapter 1467, concerning Out-of-Network Claim Dispute Resolution;

(2) whether medical care has been delayed or has not been given;

(3) whether the medical service [and/]or supply that is the subject of the complaint was for emergency care; and

(4) specific information about the qualified claim, including:

(A) the type and specialty of the hospital-based physician;

(B) the type of service performed or supplies provided;

(C) the city and county where service was performed; and

(D) the dollar amount of the disputed claim.

(c) Department Processing. The department will [shall] maintain procedures to ensure that a written complaint made under this section is not dismissed without appropriate consideration, including:

(1) review of all of the information submitted in the written complaint;

(2) contact with the parties that are the subject of the complaint;

(3) review of the responses received from the subjects of the complaint to determine if and what further action is required, as appropriate; and

(4) notification to the enrollee of the mediation process, as described in [the] Insurance Code Chapter 1467, Subchapter B, concerning Mandatory Mediation.

§21.5031. Department Outreach.

In addition to the notice provided to consumers regarding the availability of mandatory mediation [as] described in §21.5030(c) of this title [division] (relating to Complaint Resolution), the department will provide outreach as required by [the] Insurance Code §1467.151(a)(2), concerning Consumer Protection Rules, by making information concerning the availability of this mandatory mediation process available:

(1) on the department's website; and

(2) in [via] consumer publications.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 12, 2016.

TRD-201602325

Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 676-6584



TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE SUBCHAPTER O. PUBLIC NOTICE FOR MARINE SEAWATER DESALINATION PROJECTS

30 TAC §§39.901 - 39.903

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 wa-

ter 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 delimitation 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 news-

paper 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 of 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 July 5, 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 Division, at (512) 239-6757 or Laurie Fleet, Wastewater Permitting Section, at (512) 239-5445.

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 agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2016.

TRD-201602345

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



CHAPTER 295. WATER RIGHTS, PROCEDURAL SUBCHAPTER G. DESALINATION, PROCEDURAL

30 TAC §§295.300 - 295.306

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 Chapter 295, 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, except for Chapter 55, Subchapter G. 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), the commission proposes a requirement that an application include a determination of the TDS concentration of the water source in accordance with TWC, §18.003(c). Proposed §295.302(j) includes a requirement relating to measures to minimize impingement and entrainment associated with the requested diversion as prescribed by

TWC, §18.003(h). 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.

§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 appli-

cations to divert marine seawater or seawater will be processed in accordance with Chapter 55, Subchapter G.

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 re-

quire 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, com-

petition, 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 July 5, 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 Avail-

ability Division, at (512) 239-6757 or Kathy Alexander, Water Availability Division, at (512) 239-0778.

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--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 §55.256 of this title (relating to Determination of Affected Person).

(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 agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6812



CHAPTER 297. WATER RIGHTS,
SUBSTANTIVE

SUBCHAPTER K. DESALINATION,
SUBSTANTIVE

30 TAC §§297.200 - 297.210

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 ex-

pedite 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 July 5, 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 Division, at (512) 239-6757 or Kathy Alexander, Water Availability Division, at (512) 239-0778.

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 agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2016.

TRD-201602347

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 239-6812



CHAPTER 318. MARINE SEAWATER DESALINATION DISCHARGES

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, specifies that public meetings held on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §55.154. Notice of a public meeting must comply with the requirements in proposed new §39.902.

§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, specifies that actions by the executive director on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §§50.133, 50.135, and 50.137.

§318.26, Motion to Overturn Executive Director's Decision

Proposed new §318.26, specifies that Motions to Overturn the Executive Director's decision on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §50.139.

§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 and specifies that requests for a contested case hearing on those applications under Chapter 318 are subject to the provisions outlined in 30 TAC §§55.201, 55.203, 55.205, and 55.209.

§318.28, Direct Referrals

Proposed new §318.28, specifies that direct referrals on applications under Chapter 318 are subject to the provisions outlined in 30 TAC §55.210.

§318.29, Action by the Commission

Proposed new §318.29, specifies that actions by the commission on applications under Chapter 318 are subject to the provi-

sions outlined in 30 TAC §§50.113, 50.115, 50.117, 50.119, and 55.211.

§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, specifies that actions by the executive director on applications under Chapter 318 are subject to the provisions outlined in §§50.133, 50.135, and 50.137.

§318.43, Motion to Overturn Executive Director's Decision

Proposed new §318.43, specifies that Motions to Overturn the Executive Director's decision on applications under Chapter 318 are subject to the provisions outlined in §50.139.

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 (CN-RAs); 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 July 5, 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 Division, at (512) 239-6757 or Laurie Fleet, Wastewater Permitting Section, at (512) 239-5445.

SUBCHAPTER A. GENERAL REQUIREMENTS FOR MARINE SEAWATER DESALINATION DISCHARGES

30 TAC §§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.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2016.

TRD-201602348

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



SUBCHAPTER B. TREATED MARINE SEAWATER DISCHARGES

30 TAC §§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) Applications for a discharge permit for treated marine seawater shall comply with the relevant public meeting provisions in §55.154 of this title (relating to Public Meetings), except as noted in this section.

(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) 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).

§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.

Actions by the executive director under this subchapter are subject to the provisions in §§50.133, 50.135, and 50.137 of this title (relating to Executive Director Action on Application or WQMP Update; Effective Date of Executive Director Action; and Remand for Action by Executive Director, respectively).

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

A motion to overturn may be filed under this subchapter in accordance with the provisions in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

§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) Requests for a Contested Case Hearing are subject to the provisions in §§55.201, 55.203, 55.205, and 55.209 of this title (relating to Requests for Reconsideration or Contested Case Hearing; Determination of Affected Person; Request by Group or Association; and Processing Requests for Reconsideration and Contested Case Hearing, respectively).

§318.28. Direct Referrals.

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 for a hearing on the application, pursuant to the provisions in §55.210 of this title (relating to Direct Referrals).

§318.29. Action by the Commission.

Commission consideration of the following items are subject to the provisions in §§50.113, 50.115, 50.117, 50.119, and 55.211 of this title (relating to Applicability and Action on Application; Scope of Contested Case Hearings; Commission Actions; Notice of Commission Action; Motion for Rehearing; and Commission Action of Requests for Reconsideration and Contested Case Hearing, respectively). The commission may refer an application to the State Office of Administrative Hearings if the commission finds that an 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.

§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).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2016.

TRD-201602349

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



SUBCHAPTER C. OFF-SHORE DISCHARGES

30 TAC §§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.

Actions by the Executive Director under this subchapter are subject to the provisions in §§50.133, 50.135, and 50.137 of this title (relating to Executive Director Action on Application or WQMP Update; Effective Date of Executive Director Action; and Remand for Action by Executive Director, respectively).

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

A motion to overturn may be filed under this subchapter in accordance with the provisions in §50.139 of this title (relating to Motion to Overturn Executive Director's Decision).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2016.

TRD-201602350

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 26, 2016

For further information, please call: (512) 239-6812



SUBCHAPTER D. NEAR-SHORE DISCHARGES

30 TAC §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.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2016.

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.369

The Comptroller of Public Accounts proposes amendments to §3.369, concerning sales tax holiday--certain energy star products.

This section is being amended to implement Senate Bill 1356, 84th Legislature, 2015, which added Tax Code, §151.3335 to provide a sales tax exemption for certain water-efficient products sold during a limited period. Sales of certain water-conserving products and products that have been designated as a WaterSense certified product under the WaterSense program operated by the United States Environmental Protection Agency are exempt from sales and use tax if sold during the 3-day period each May described by Tax Code, §151.333. Additional non-substantive revisions are made throughout the section for clarity and consistency with other sales tax holiday provisions.

The title of §3.369 is amended to reference the exemption for certain water-conserving and WaterSense products.

The definition of "energy-efficient product" provided in subsection (a)(1) is amended to add subparagraphs (A) - (H) and to specify the definition is limited to the list of items provided in those paragraphs. This list of specific items is currently included under the definition of "qualifying products" provided in subsection (a)(5).

The definition of "layaway" in paragraph (4) is amended by deleting the last sentence to make the definition consistent with the definition of the term in other sections of this title addressing sales tax holiday provisions.

The definition of "qualifying products" provided in paragraph (5) is amended to include water-conserving and WaterSense products. The definition is also amended to delete the list of specific energy-efficient items, as it is now provided in subsection (a)(1).

New paragraph (7) defines the term "water-conserving product" and includes examples of water-conserving products. Subparagraphs (7)(C) and (D) explain when items are used in a business or trade and are not water-conserving products for purposes of this section. New paragraph (8) defines the term "WaterSense product." Both definitions are based on Tax Code, §151.3335.

Subsection (b)(4) is amended for readability and consistency with other sales tax holiday provisions. No substantive change is intended.

Subsection (c)(1) is amended to specify that sales of energy-efficient items other than those specifically included in subsection (a)(1) are taxable and do not qualify for an exemption under this section.

Paragraph (2) is added to specify that sales of products that conserve water but do not fall within the definition of water-conserving products in subsection (a)(7) are taxable and do not qualify for the exemption under this section. Subsequent paragraphs are renumbered accordingly.

Renumbered paragraph (3) is amended to replace the term "Energy Star qualified products" with the defined term "qualifying

Texas Commission on Environmental Quality



ORDER ADOPTING NEW RULES

Docket No. 2015-1015-RUL

Rule Project No. 2015-029-295-OW

On October 19, 2016, the Texas Commission on Environmental Quality (Commission) adopted new §§39.901 - 39.903 of 30 TAC Chapter 39, Public Notice; new §§295.300 - 295.306 of 30 TAC Chapter 295, Water Rights, Procedural; new §§297.200 - 297.210 of 30 TAC Chapter 297, Water Rights, Substantive; and, new §§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 rules were published for comment in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3839).

IT IS THEREFORE ORDERED BY THE COMMISSION that the new rules are hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rules necessary to comply with *Texas Register* requirements. The adopted rules and the preamble to the adopted rules are incorporated by reference in this Order as if set forth at length verbatim in this Order.

This Order constitutes the Order of the Commission required by the Texas Administrative Procedure Act, Tex. Gov't Code Ann., §2001.033 (Vernon 2016).

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., P.E., Chairman

Date Signed