

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §297.18.

Background and Summary of the Factual Basis for the Proposed Rule

In 2013, the 83rd Legislature passed House Bill (HB) 3233, relating to interbasin transfers of state water. HB 3233 amended Texas Water Code (TWC), §11.085, to add language to TWC, §11.085(l)(1), to specify that the commission's analysis of whether the benefits to the receiving basin are greater than the detriments to the basin of origin in an application for an interbasin transfer be based on the factors described in TWC, §11.085(k). HB 3233 also amended TWC, §11.085, to add language to TWC, §11.085(n), to clarify that interbasin transfers based on contracts can be extended as contracts are renewed or extended. Additionally, HB 3233 also amended TWC, §11.085(v)(4), which describes geographic areas exempt from the provisions of TWC, §11.085. The commission's procedural rules related to water rights are in 30 TAC Chapter 297, Water Rights, Substantive.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission proposes to also amend 30 TAC Chapter 295, Water Rights, Procedural.

Section Discussion

Section 297.18, Interbasin Transfers, Texas Water Code, §11.085 describes the

substantive requirements and exemptions for transferring state water from one river basin to another basin.

The commission proposes to amend §297.18(d)(1), to clarify the scope of the factors considered as benefits to the receiving basin and detriments to the basin of origin are only those in TWC, §11.085(k). The commission proposes to exclude §297.18(c)(5) from the factors considered by the commission in §297.18(d)(1), because the requirement in §297.18(c)(5) is not included in the requirements listed in TWC, §11.085(k). The commission proposes this change to implement TWC, §11.085(l)(1). Additionally, the commission proposes to amend §297.18(f) to incorporate the change from TWC, §11.085(n), which clarify that interbasin transfers based on contracts can be extended as contracts are renewed or extended. The commission also proposes to amend §297.18(k)(5) to reflect the revision to the description of exempt geographic areas as described in TWC, §11.085(v)(4). The commission proposes these amendments to implement the changes made to the TWC by HB 3233.

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 rule is in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule would implement HB 3233, relating to the requirements for the permitting process for interbasin transfers of surface water. The bill affects the permitting process for interbasin transfers of surface water rights and removes the requirement for an application for an interbasin transfer to include the projected effect on user rates and fees for each class of rate payers. The bill also limits the issues in an evidentiary hearing for an interbasin transfer application to the requirements of TWC, §11.085, and changes the published notice requirements for an interbasin transfer application from once a week for two consecutive weeks to two different weeks within a 30-day period. The bill specifies that when the commission analyzes interbasin transfer applications to determine whether detriments to the basin of origin are less than the benefits to the receiving basin, the determination should be based on the factors described in TWC, §11.085(k). The bill also clarifies that interbasin transfers based on contracts can be extended as contracts are renewed or extended and would substitute the term "service area of a retail water utility" for "municipality's retail service area."

In order to implement provisions of the bill, the commission is proposing to amend Chapter 297, Water Rights Substantive, and in a corresponding rulemaking, Chapter 295, Water Rights Procedural. This fiscal note addresses proposed changes to Chapter 297.

The proposed rulemaking for Chapter 297 would clarify that the scope of the factors considered as detriments to the basin of origin are only those in TWC, §11.085(k). The proposed rule would also add the descriptions of geographic areas that are exempt from the interbasin transfer provisions and add language to clarify that interbasin transfers based on contracts can be extended as contracts are renewed or extended.

The proposed rule would clarify that the factors described in TWC, §11.085(k), would be used to determine whether the detriments to the basin of origin are less than the benefits to the receiving basin. This clarification of the scope of the factors to be used in this determination could simplify the application process by describing more specifically the factors that are to be addressed in the application process and at the evidentiary hearing. Cities, counties, water districts, river authorities, or utility districts who apply for an interbasin transfer authorization from the TCEQ could experience some limited cost savings as a result of limiting the issues at evidentiary hearings.

The proposed language clarifying that interbasin transfers based on contracts can be extended as contracts are renewed or extended will make processing and consideration of these types of contracts more consistent with TCEQ practice on other permits which are based on contracts. Cities, counties, water districts, river authorities, or utility districts who apply for an interbasin transfer authorization from the TCEQ could experience some limited cost savings due to the implementation of the proposed rule.

The proposed changes to geographic areas that are exempt from the interbasin transfer provisions could increase the number of utilities that would be eligible for the exemption because the term "service area of retail water utility" encompasses more utility service areas than the existing language of "municipality's retail service area." However, the number of applications for interbasin transfers affected by this rulemaking is expected to be very small and any impact on those applicants is also expected to be very small. Therefore, any cost savings resulting from the new exemptions are not expected to be significant.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law and the potential for a more efficient interbasin transfer permit application process.

The proposed rule is not expected to have fiscal implications for businesses or individuals. The proposed rule would implement requirements for the permitting process for interbasin transfers of surface water. Businesses or individuals do not generally apply for interbasin transfer authorizations. Cities, counties, water districts, river authorities, or utility districts who apply for an interbasin transfer authorization

from the TCEQ could experience some limited cost savings due to the implementation of the proposed rule, but the proposed rule is not expected to directly affect businesses or individuals.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect. The proposed rule would implement requirements for the permitting process for interbasin transfers of surface water. Businesses do not generally apply for interbasin transfer authorizations. Cities, counties, water districts, river authorities, or utility districts who apply for an interbasin transfer authorization from the TCEQ could experience some limited cost savings due to the implementation of the proposed rule, but the proposed rule is not expected to directly affect small or micro-businesses.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect small or micro-businesses and are required to implement state law and therefore is consistent with the health, safety, or environmental and economic welfare of the state.

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 rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225. "Major environmental rule" means 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.

First, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is implementing legislation to clarify and streamline requirements

for the issuance of interbasin transfer authorizations upon application by a current or prospective water right owner.

Second, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed rule would not 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. It is not anticipated that the cost of complying with the proposed rule would be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

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 this proposed rulemaking and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The commission proposed the rule for the specific purpose of implementing legislation to clarify and streamline requirements for the issuance of interbasin transfer

authorizations. The commission would not act under the amended rule unless an application from a current or prospective water right owner is received requesting an authorization for an interbasin transfer. Further, the amendment clarifying exemptions to the requirement that an interbasin transfer be authorized by the commission expands the ability of a retail public utility to transfer water owned under surface water rights within the utility's service area.

A "taking" under Texas Government Code, Chapter 2007 means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%.

Because no taking of private real property will occur by amending the definitions as proposed, the commission has determined that promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the proposed rule neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rule. Therefore, the proposed rule would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is administrative and procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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 April 10, 2014, 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. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-2613. Electronic comments may be submitted at:

<http://www5.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 2013-055-295-OW. The comment period closes April 14, 2014.

Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Tracie Donnelly, Water Rights Permitting and Availability Section, (512) 239-0083.

SUBCHAPTER B: CLASSES OF WATER RIGHTS

§297.18

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule.

The amendment implements TWC, §§5.102, 5.103, 5.105, 11.085(l)(1), 11.085(n), and 11.085(v)(4).

§297.18. Interbasin Transfers, Texas Water Code, §11.085.

(a) No person may take or divert any state water from a river basin and transfer such water to any other river basin without first applying for and receiving a water right or an amendment to a water right authorizing the transfer.

(b) An increase in the authorized amount of water being transferred to the receiving basin under an existing water right constitutes a new interbasin transfer for purposes of this section.

(c) In addition to the other requirements of this chapter relating to the review of and action on an application for a new or amended water right, the commission shall weigh the effects of the proposed transfer by considering:

(1) the need for the water in the basin of origin and in the proposed receiving basin based on the period for which the water supply is requested, but not to exceed 50 [fifty] years;

(2) factors identified in the applicable approved regional water plans which address the following:

(A) the availability of feasible and practicable alternative supplies in the receiving basin to the water proposed for transfer;

(B) the amount and purposes of use in the receiving basin for which the water is needed;

(C) proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;

(D) proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;

(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and

(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries in each basin. If the water sought to be transferred is currently authorized to be used under an existing water right in the basin of origin, such impacts shall only be considered in relation to that portion of the water right proposed for transfer and shall be based on the historical uses of the water right for which amendment is sought.

(3) proposed mitigation or compensation, if any, to the basin of origin by the applicant;

(4) the continued need to use the water for the purposes authorized under the existing water right if an amendment to an existing water right is sought;

(5) comments received from county judges required to be provided notice of the application as provided by §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139)); and

(6) information required to be submitted by the applicant.

(d) The commission may grant, in whole or in part, an application for an interbasin transfer only to the extent that:

(1) the detriments to the basin of origin during the proposed transfer period are less than the benefits to the receiving basin during the proposed transfer period, as determined by the commission based on consideration of the factors described by [as defined by the factors provided in] subsection (c)(1) - (4) and (6) [(c)] of this section; and

(2) the applicant for the interbasin transfer has prepared drought contingency and water conservation plans meeting the requirements of Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements) and has implemented a water conservation plan that will result in the highest practicable levels of water conservation and efficiency achievable within the jurisdiction of the applicant.

(e) The commission may grant new or amended water rights under this section with or without specific terms or periods of use and with specific conditions under which a transfer of water may occur.

(f) If an interbasin transfer of water is based on a contractual sale of water, the new or amended water right authorizing the transfer shall contain a condition for a term or period not greater than the [contract] term of the contract, including any extension or renewal of the contract [term].

(g) The parties to a contract for an interbasin transfer of water may include provisions for compensation and mitigation. If the party from the basin of origin is a governmental entity, each county judge located in whole or in part in the basin of origin may provide comment on the appropriate compensation and mitigation for the interbasin transfer.

(h) A new water right or amendment to an existing water right for a proposed interbasin transfer of water is junior in priority to water rights in the basin of origin granted before the time an administratively complete application for the transfer is filed with the chief clerk in accordance with §281.17 of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness). If an amendment is

made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.

(i) A new water right or amendment to an existing water right for a transfer of water from a river basin in which two or more river authorities or water districts have written agreements or permits that provide for the coordinated operation of their respective reservoirs to maximize the amount of water for beneficial use within their respective water service areas shall be junior in priority to water rights granted in that basin before the time an administratively complete application for the interbasin transfer is filed with the chief clerk in accordance with §281.17 of this title. If an amendment is made to the water right to effectuate an interbasin transfer of water for a term, the affected portion of the water right shall be junior to all existing water rights in the basin of origin only for the term of the amendment.

(j) An appropriator of water for municipal purposes in the basin of origin may, at the appropriator's option, be a party in any hearings under this section. Nothing in this provision shall be construed as adversely affecting the ability of any other potentially affected person to obtain party status.

(k) The provisions that are contained in subsections (b) - (j) of this section that are in addition to those generally required for an application for a new or amended water right do not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same water right;

(2) a request for an emergency transfer of water as provided by §297.17 of this title;

(3) a proposed transfer from a basin to its adjoining coastal basin;

(4) a proposed transfer of water that is:

(A) imported from a source located wholly outside the boundaries of this state; except water that is imported from a source located in the United Mexican States;

(B) for use in this state; and

(C) transported by using the bed and banks of any flowing natural stream in this state; or

(5) a proposed [interbasin] transfer from the part of the geographic area of [basin of origin to] a county or municipality, or the part of the retail service area of a retail public utility as defined by Texas Water Code, §13.002, [municipality's retail service area] that is [partially] within the basin of origin for use in the part of the geographic area of the county or municipality, or that contiguous part of the retail service area of the utility, [and the municipality's retail service area] not within the basin of origin. The further transfer and use of this water outside of such county, municipality, or the part of the retail service area of a retail public utility as defined by Texas Water Code, §13.002 [or municipal retail service area] as existing at the time of the transfer or as may exist in the future other than back to the basin of origin shall not be exempt under this paragraph. [For purposes of this paragraph, a county, municipality, or municipality's retail service area refers to a geographic area.]