

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §297.18 *without change* to the proposed text as published in the March 14, 2014, issue of the *Texas Register* (39 TexReg 1864) and, therefore, it will not be republished.

### **Background and Summary of the Factual Basis for the Adopted 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 substantive rules related to water rights are in 30 TAC Chapter 297.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission adopts amendments to 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 adopts the amendment to §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 excluded §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 adopts this change to implement TWC, §11.085(l)(1). Additionally, the commission adopts the amendment to §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 adopts the amendment to §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 adopts this rulemaking to implement the changes made to the TWC by HB 3233.

### **Final Regulatory Impact Determination**

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the

rulemaking is not subject to Texas Government Code, §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 adopted 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 adopted 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 adopted rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted 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 adopted rule would be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore,

the adopted amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. The commission received no comments regarding the draft regulatory impact analysis determination.

### **Takings Impact Assessment**

The commission evaluated this adopted rulemaking and performed an assessment of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The commission adopted 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 adopted, the commission has determined that promulgation and enforcement of the adopted 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 adopted 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 adopted rule would not constitute a taking under Texas Government Code, Chapter 2007.

### **Consistency with the Coastal Management Program**

The commission reviewed the adopted rulemaking and found the adoption 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.

The commission invited public comment regarding the Consistency with the Coastal Management Program section during the public comment period. The commission received no comments regarding the Consistency with the Coastal Management Program section.

### **Public Comment**

The commission held a public hearing on April 10, 2014. The comment period closed on April 14, 2013. The commission received one comment from an individual.

The commenter asked a question outside the scope of this rulemaking as discussed in the Response to Comments section of this preamble.

### **Response to Comments**

One individual requested information regarding the limit of water that can be drilled or produced per well per year in Atascosa and McMullen counties.

**The purpose of this rulemaking is to implement HB 3233, relating to interbasin transfers of state water. The commenter's question is outside the scope of this rulemaking. The rule was not changed in response to this comment.**

## **SUBCHAPTER B: CLASSES OF WATER RIGHTS**

### **§297.18**

#### **Statutory Authority**

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

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