

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §295.21 and §295.22; new §295.21; and the amendment to §295.202.

New §295.21 is adopted *with change* to the proposed text as published in the December 25, 2015, issue of the *Texas Register* (40 TexReg 9496). The repeal of §295.21 and §295.22; and the amendment to §295.202 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

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. The adopted revisions to Chapter 295 implement amendments to Texas Water Code (TWC), §11.153 and the repeal of TWC, §11.154 under HB 655. HB 655 eliminated the requirement that ASR projects using appropriated water must first develop a pilot project. The adopted revisions in this chapter implement HB 655 by removing the requirements that an ASR project using surface water under a water right develop the project in separate phases. HB 655 states that a water right holder or a person who has contracted for the use of

water under a contract that does not prohibit the use of the water in an ASR project may undertake an ASR project without obtaining any additional authorization under the water rights program. An ASR project must comply with applicable requirements under TWC, Chapters 27 and 36.

In corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts amendments to 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 331, Underground Injection Control.

Section by Section Discussion

§295.21, Aquifer Storage and Retrieval Projects

The commission adopts the repeal of §295.21. Existing §295.21 includes the requirements for water rights permitting from TWC, §11.153(d) and (e). HB 655 amended TWC, §11.153, to remove subsections (d) and (e); therefore, the commission adopts the repeal of the corresponding requirements in §295.21.

§295.21, Aquifer Storage and Recovery Projects

HB 655 also amended TWC, §11.153(a) - (c), to allow a water right holder or a person who has contracted for the use of water under a contract that does not prohibit the use of the water in an ASR project to undertake an ASR project without obtaining any

additional authorization under TWC, Chapter 11. However, TWC, §11.153, as amended by HB 655, requires the applicant to obtain any necessary authorizations for an ASR project under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N. The commission adopts new §295.21 to incorporate these changes to the TWC.

Adopted new §295.21 allows a water right holder or contractee to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11, for the project. In addition, adopted new §295.21 specifies that a person undertaking an ASR project must obtain any required authorizations under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N and comply with the terms of the applicable water right.

Current TCEQ rules in 30 TAC §297.42(d) allow the commission to consider water availability on a case-by-case basis for projects, including ASR projects, that are not based on continuous availability of historical streamflow. Water for these projects could be available on a variable or non-constant basis and the commission could consider lower water availability for a water right application that includes an ASR project if the proposed project is viable for the intended purpose and the water can be beneficially used without waste. Adopted new §295.21(b) is included to allow TCEQ to continue to consider the storage made available through an ASR project in its water availability determination under §297.42(d) even though the ASR project does not require a water

rights permit.

§295.22, Additional Requirements for the Underground Storage of Surface Water for Subsequent Retrieval and Beneficial Use

The commission adopts the repeal of §295.22. This section contains additional requirements for the underground storage of surface water for subsequent retrieval and beneficial use associated with Phase I and II ASR projects. These requirements are from TWC, §11.154. HB 655 repealed TWC, §11.154; therefore, the commission adopts the repeal of this corresponding rule section.

§295.202, Reports

Section 295.202(e) contains requirements for operations reports for ASR projects. HB 655 amended TWC, §11.153(a) - (c), to allow a water right holder or contractee to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11, for the project. In addition, HB 655 repealed TWC, §11.153(d) and (e), and §11.154, which pertained to ASR projects; therefore, the commission adopts the deletion of subsection (e).

Final Regulatory Impact Analysis Determination

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

action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects and associated water rights. The adoption does not meet the definition of "major environmental rule" because the rulemaking does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment or public health and safety of the state or a sector of the state. The adopted rules implement the statutory repeal of the requirement to establish a pilot project for an ASR project under HB 655.

Furthermore, the adopted rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The adopted rules do not exceed a standard set by federal law, because there are no federal standards regarding Texas water rights. The adopted rules do not exceed an express requirement of state law because the rules are consistent with the express requirements of HB 655 and TWC, §11.153. The adopted rules do not exceed requirements of a federal delegation agreement

or contract because there is no federal delegation or contract for the Texas Water Rights program. The rulemaking is not adopted under the general powers of the agency and is adopted under the express requirements of HB 655, Section 6.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission did not receive comments on the regulatory impact analysis determination for the Chapter 295 rules.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The adopted action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of water rights associated with ASR projects.

The adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted rules eliminate a requirement that ASR projects first establish a pilot project and develop the project in phases consistent with the requirements of HB 655. The adopted rules do not affect a landowner's rights in private real property because this rulemaking action does not burden (constitutionally), nor restrict or limit,

the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulations.

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 Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the 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 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 CMP during the public comment period. The commission did not receive comments on the CMP.

Public Comment

The commission held a public hearing on January 22, 2016. The comment period closed

on February 8, 2016. The commission received comments from the Benbrook Water Authority (Benbrook), Hemphill Underground Water Conservation District (Hemphill Underground WCD), High Plains Underground Water Conservation District (High Plains Underground WCD), Llano Estacado Underground Water Conservation District (Llano Estacado Underground WCD), Mesa Underground Water Conservation District (Mesa Underground WCD), Permian Basin Underground Water Conservation District (Permian Basin Underground WCD), Sandy Land Underground Water Conservation District (Sandy Land Underground WCD), Sledge Law and Public Strategies (Sledge Law), and South Plains Underground Water Conservation District (South Plains Underground WCD).

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD supported the rulemaking. Benbrook and Sledge Law suggested changes as discussed in the Response to Comments section of this preamble.

Response to Comments

Section by Section Discussion of §295.21, Aquifer Storage and Recovery Projects

Comment

Benbrook and Sledge Law requested that the commission include additional preamble

language to explain what the commission means by the words: "... not based on continuous availability of historical streamflow" in the preamble discussion of new §295.21. Benbrook commented that they believe these words were meant as a clarification that an applicant for a water right could use ASR to help prove up a water right that qualifies a firm yield demonstration through storage (i.e. municipal use right).

Response

The commission responds that adopted §295.21(b) implements TWC, §11.053(c). Water for ASR projects could be available on a variable or non-constant basis. Under adopted new §295.21(b) the commission could consider lower water availability for a water right application that includes an ASR project if the proposed project is viable for the intended purpose and the water can be beneficially used without waste. Adopted new §295.21(b) allows TCEQ to continue to consider the storage made available through an ASR project in its water availability determinations under §297.42(d), even though the ASR component of the project does not require a water rights permit. The commission clarified the Section by Section discussion of adopted §295.21 in response to this comment.

Subchapter A: Requirements of Water Rights Applications General Provisions

Division 2: Additional Requirements for the Storage of Appropriated Surface Water in

Aquifers

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that they support the repeal of existing §295.21 and §295.22 and the new rule language in §295.21.

Response

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

Comment

Benbrook and Sledge Law commented that the commission should add the words, "as defined in §297.1 of this title (relating to Definitions)" after the words, "aquifer storage and recovery project" in §295.21(b). The commenters stated that the suggested language is in repealed §295.21 and that without the language there is no definition for an ASR project in Chapter 295.

Response

The commission agrees with the commenters. Section §295.21(b) was

changed in response to this comment.

Subchapter F: Miscellaneous

Comment

The Hemphill Underground WCD, High Plains Underground WCD, Llano Estacado Underground WCD, Mesa Underground WCD, Permian Basin Underground WCD, Sandy Land Underground WCD, and South Plains Underground WCD commented that they support the amendment of §295.202.

Response

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

SUBCHAPTER A: REQUIREMENTS OF WATER RIGHTS APPLICATIONS

GENERAL PROVISIONS

**DIVISION 2: ADDITIONAL REQUIREMENTS FOR THE STORAGE OF
APPROPRIATED SURFACE WATER IN AQUIFERS**

[\$295.21, §295.22]

Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted repeal implements HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

[\$295.21. Aquifer Storage and Retrieval Projects.]

[(a) Except as provided by subsection (b) of this section, an applicant shall file the appropriate application and obtain the issuance of the following:]

[(1) a temporary or term permit under Chapter 297 of this title (relating to Water Rights, Substantive) and the necessary authorization under Chapter 331 of this title (relating to Underground Injection Control) prior to commencement of construction of Phase I of an aquifer storage and retrieval project, as defined in §297.1 of this title (relating to Definitions); or]

[(2) a permit under §297.11 of this title (relating to General Authorization to Divert, Store, or Use State Water, Texas Water Code, §11.121) and the necessary authorization under Chapter 331 of this title (relating to Underground Injection Control) prior to actual storage of state water for underground storage and retrieval for purposes other than a Phase I project.]

[(A) An application for permit under paragraph (2) of this subsection will not be accepted for processing by the executive director until such time as the applicant has obtained the necessary authorizations and successfully completed a Phase I project.]

[(B) The commission will only issue a final order granting a water right under §297.11 of this title (relating to General Authorization to Divert, Store, or Use State Water, Texas Water Code §11.121) or an amendment to an existing water right authorizing that storage of state water in an aquifer for subsequent retrieval and

beneficial use where completed pilot projects or historically demonstrated projects have been shown to be feasible.]

[(b) A water right permit is not required for Phase I of an aquifer storage and retrieval project that proposes the temporary storage of appropriated surface water in an aquifer for testing and subsequent retrieval and beneficial use if the diversion and purpose of use (e.g., municipal, industrial, etc.) of the surface water is covered by an existing water right. The water right holder or person holding a valid contract with a water right holder shall notify the executive director, in writing, of the proposed temporary storage and shall submit the information required by §295.22 of this title (relating to Additional Requirements for Storage of Surface Water for Subsequent Retrieval and Beneficial Use) with the written notification not later than 60 days prior to the proposed temporary storage of water in an applicable aquifer. Upon completion of Phase I of the project, an amendment to the existing water right is required for permanent authorization to store appropriated surface water in an aquifer for subsequent retrieval and beneficial use.]

[(c) This section does not apply to any existing permit or permit amendment issued by the commission or to any administratively complete application for a permit or permit amendment filed with the commission prior to June 5, 1995.]

[\$295.22. Additional Requirements for the Underground Storage of Surface Water for Subsequent Retrieval and Beneficial Use.]

[(a) Phase I projects. In addition to the applicable information required by Subchapter A of this chapter (relating to Requirements of Water Right Application), the appropriate application must include:]

[(1) all information sufficient to demonstrate compliance with Chapter 331, Subchapter K of this title (relating to Additional Requirements for Class V Aquifer Storage Wells) and those portions of Chapter 331, Subchapters A and H of this title (relating to General Provisions and Standards for Class V Wells, respectively) which relate to aquifer storage injection wells;]

[(2) a map or plat showing the proposed depth and location of all injection facilities, retrieval wells, and the aquifer in which the water will be stored; and]

[(3) if applicable, the application for storage of surface water in a groundwater reservoir or a subdivision of a groundwater reservoir, as defined by Chapter 35 of the Texas Water Code, that is under the jurisdiction of a groundwater conservation district, must include:]

[(A) evidence of service, by certified mail, of a copy of the application or notification submitted in accordance with §295.21 of this title (relating to Aquifer Storage and Retrieval Projects) to the groundwater water conservation district having jurisdiction over the aquifer; and]

[(B) a copy of an agreement, if any, reached by the applicant with the groundwater water conservation district reflecting the applicant's consent to cooperate in the development of, and abidance with, the rules governing the injection, storage, or retrieval of appropriated surface water in the underground water reservoir or a subdivision thereof.]

[(b) Phase II projects. In addition to the information required by subsection (a) of this section, the appropriate permit application must include:]

[(1) a copy of the final report on the Phase I project required under §331.185(b) of this title (relating to Monitoring and Reporting Requirements);]

[(2) an operations plan for the life of the project detailing the following:]

[(A) injection rates and volumes;]

[(B) frequency of injection periods;]

[(C) retrieval rates and volumes;]

[(D) frequency of retrieval periods;]

[(E) radial distances of travel from the injection wells on an annual basis;]

[(F) maximum extent of travel for the life of the project; and]

[(G) location of all injection, retrieval and monitoring wells.]

[(3) a report identifying any potential impacts to artificial penetrations within one-quarter mile of the perimeter of the buffer zone, as described in subsection (e)(5) of this section;]

[(4) a proposed monitoring plan which would address the quality of water injected and retrieved and the water levels of the receiving body of underground water within the perimeter of the buffer zone and within one-quarter mile of the perimeter of

the buffer zone. In addition, the proposed monitoring plan shall describe how waters injected and retrieved will be measured and reported;]

[(5) other information as determined by the executive director as necessary for the protection of underground sources of drinking water.]

[(c) Control of Stored State Water. If the applicant does not have the power of condemnation and proposes to store state water in and withdraw it from underneath or to place any installation upon the land of another, the name(s) and address(es) of such landowner(s) shall be given. A copy of a duly acknowledged written easement, consent, or license from the landowner(s) or of a written lease or other evidence of agreement between the landowner(s) and the applicant shall be filed with the application.]

[(d) Map Requirements. All maps, plats and drawings accompanying the application shall be submitted in accordance with §§295.121-295.123 of this title (relating to Requirements, Drawings Not To Be Folded and Content Requirements of Maps, respectively).]

[(e) Additional Map Requirements. In addition to the preceding requirements, maps or plats submitted with the application for an aquifer storage and retrieval project shall include the following, if applicable:]

[(1) an overall plan of the project area showing the locations and extent of the proposed works and the locations of all pertinent features, including structures, pipelines, roads, natural springs, artesian wells and property lines. Also, such plan shall include all proposed or existing injection and retrieval facilities, by course and distance from a corner of an original land survey and/or other survey point of record, associated with the aquifer storage and retrieval project;]

[(2) name(s) and location(s) of the underground formation(s) in which state water will be stored for later retrieval and the general direction of flow indicated;]

[(3) cross sections and profiles of the underground formation(s) into which water will be injected and stored, any underground formation which confines the injection interval, any underground formation(s) located between the storage area and the land surface and the actual and/or proposed operating depths of all planned injection and retrieval facilities;]

[(4) if applicable, the location of any area or areas proposed for underground storage which would be within any part or portion of a critical area designated or proposed for designation by the commission under Chapter 294 of this title (relating to Underground Water Management Areas);]

[(5) for Phase II projects, the location of a buffer zone surrounding the land surface area under which the underground storage of state water will occur and beyond which pumpage by other wells will not interfere or significantly affect the movement or storage of the state water;]

[(6) for Phase II projects, the location and ownership of all existing domestic, public water supply, irrigation, or commercial wells within one-quarter mile of the perimeter of the buffer zone described in this subsection, indicated by appropriate symbols to differentiate these works from the proposed works;]

[(7) all elevations shall be referred to mean sea level datum;]

[(8) any additional information the executive director may require to determine the feasibility of the project.]

**SUBCHAPTER A: REQUIREMENTS OF WATER RIGHTS APPLICATIONS
GENERAL PROVISIONS**

**DIVISION 2: ADDITIONAL REQUIREMENTS FOR THE STORAGE OF
APPROPRIATED SURFACE WATER IN AQUIFERS**

§295.21

Statutory Authority

The new section is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted new section implements HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

§295.21. Aquifer Storage and Recovery Projects.

(a) A water right holder or a person who has contracted for the use of water under a contract that does not prohibit the use of the water in an aquifer storage and recovery project may undertake an aquifer storage and recovery project without obtaining any

additional authorization under Texas Water Code (TWC), Chapter 11, for the project. A person, as described in this section, undertaking an aquifer storage and recovery project must:

(1) obtain any required authorizations under TWC, Chapter 27, Subchapter G, and TWC, Chapter 36, Subchapter N; and

(2) comply with the terms of the applicable water right.

(b) This section does not preclude the commission from considering an aquifer storage and recovery project, as defined in §297.1 of this title (relating to Definitions), to be a component of a project permitted under TWC, Chapter 11, that is not required to be based on the continuous availability of historic, normal stream flow.

SUBCHAPTER F: MISCELLANEOUS

§295.202

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under TWC and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 655, Section 6, 84th Texas Legislature, 2015.

The adopted amendment implements HB 655; TWC, §11.153; and the repeal of TWC, §11.154.

§295.202. Reports.

(a) Annual reports. Every person who takes water from a stream or reservoir during the preceding calendar year shall submit a written report to the commission. Blank forms for recording the information required by the Texas Water Code, §11.031 and §11.032(a), shall be mailed to all surface water users during January of each year. Water use report forms shall be furnished to anyone on request. In completing the

reports, a water user shall fill in the blanks to the best of his ability in accordance with the instructions that accompany each form. The report must be returned to the executive director not later than March 1 of each year to avoid the penalties prescribed by the Texas Water Code, §11.031(b). Water users under the jurisdiction of the Rio Grande Watermaster shall return their annual reports to the Rio Grande Watermaster so that office can prepare and submit water use data covering the area of watermaster control. No report is required to be filed by persons who divert water solely for domestic and livestock purposes.

(b) Reports by temporary permit holders. Upon the expiration of the period for which a temporary permit is granted, the appropriator shall cease diverting water and file a written report with the executive director, stating the amount of water and the date of cessation of use.

(c) Report on time limitations for construction. Within 10 days after beginning construction or installation of diversion and distribution facilities, a permittee shall file a statement with the executive director showing that work was begun within the time limit allowed. Immediately upon completion of the project, a similar statement must be filed with the executive director showing that the work was completed within the specified time limitations.

(d) Report of contractual sales.

(1) The purchaser under a contract to supply state water shall submit annual written reports to the executive director in accordance with subsection (a) of this section indicating the total amount of water diverted each month and the total amount diverted each week. Purchasers diverting from the perimeter of a reservoir need to report only monthly diversions.

(2) The supplier shall submit annual written reports to the executive director in accordance with subsection (a) of this section indicating the total amount of water diverted and used each month for each purpose and the total amount released downstream each week to each purchaser under the storage water right specified in the contract. A separate reporting of the amount of water estimated for transmission losses shall be made.

(3) These reporting requirements shall apply to all contractual permits and water supply contracts.

(4) For purposes of this subchapter, a week is the period from Saturday midnight to Saturday midnight.

[(e) Operations report for aquifer storage and retrieval projects.]

[(1) On the five-year anniversary date of the issuance of the permit or permit amendment, and every ten years thereafter or upon a more frequent schedule established by the executive director, the permittee shall provide the executive director with an operations report describing what efforts the permittee has made to:]

[(A) protect the state water stored in the receiving aquifer from unauthorized withdrawals; and]

[(B) maximize the retrieval and beneficial use of the stored water without experiencing unreasonable losses of state water.]

[(2) The operations report shall identify and provide:]

[(A) any potential or real impacts identified during the operation of the project;]

[(B) a summary of all data, information and analyses associated with any monitoring during the operation of the project;]

[(C) a comparison of actual movement of injected state water with the modeling predictions submitted with the application for permit under Chapter 295 of this title (relating to Water Rights, Procedural);]

[(D) an assessment of the project in terms of the protection of ground water quality; and]

[(E) any additional information the executive director determines is necessary for the protection of underground sources of drinking water.]

[(3) The executive director shall review the report described in this subsection. If the executive director determines that the circumstances, under which the permit was granted, have significantly changed, the executive director may pursue an amendment to such permit in accordance with §297.61 of this title (relating to Amendments by Executive Director).]