

The Texas Commission on Environmental Quality (TCEQ, commission or agency) proposes the repeal of §§339.1 - 339.3.

Background and Summary of the Factual Basis for the Proposed Repeals

House Bill (HB) 2694, Article 2 passed by the 82nd Legislature, 2011, and signed by the governor, transferred from the TCEQ to the Railroad Commission of Texas (RRC) duties relating to the protection of groundwater resources from oil and gas associated activities. Specifically, HB 2694, Article 2 amended Natural Resources Code to revise §91.011 and to add §§91.0115, 91.020 and 91.1015 and amended Texas Water Code (TWC), §27.033. The law transfers from the TCEQ to the RRC, effective September 1, 2011, those duties pertaining to the responsibility of preparing groundwater protection advisory/recommendation letters. Since the transfer, the RRC has been responsible for providing surface casing and/or groundwater protection recommendations for oil and gas activities under the jurisdiction of the RRC.

The TCEQ's Surface Casing Program and staff transferred to the RRC effective September 1, 2011. The RRC's Surface Casing Program has been renamed the Groundwater Advisory Unit, and is now located in the William B. Travis Building, 1701 North Congress, Austin.

The commission proposes the repeal of §§339.1 - 339.3, while the RRC will adopt

concurrent amendments to their regulations to reflect the changes in law made under HB 2694, Article 2. The rules in Chapter 339 authorized the executive director to provide groundwater protection letters to the RRC for use in various activities and applications before the RRC and to collect a fee for the expedited processing of a request for a groundwater protection recommendation. Because the executive director no longer provides the groundwater protection letters to the RRC, the commission's rules in Chapter 339 are no longer necessary. Therefore, the commission proposes the repeal of §§339.1 - 339.3 in their entirety.

A corresponding rulemaking amending 30 TAC §7.117, Memorandum of Understanding between the Railroad Commission of Texas and the Texas Commission on Environmental Quality, is published in this issue of the *Texas Register*.

Section by Section Discussion

§339.1, Purpose

The commission proposes the repeal of §339.1. This section authorizes the executive director to provide groundwater protection letters to the RRC. This section is no longer required because this function was transferred from the commission to the RRC in HB 2694.

§339.2, Applicability

The commission proposes the repeal of §339.2. The section explains the applicability for the types of applications for which a recommendation to the RRC is provided on depth or depths to usable-quality groundwater. This section is no longer required because this function was transferred from the commission to the RRC in HB 2694.

§339.3, Groundwater Protection Letter Requests, Expedited Processing, and Fee

The commission proposes the repeal of §339.3. This section authorizes the executive director to establish procedures and to collect fees for the processing of applications for groundwater protection recommendations. This section is no longer required because this function was transferred from the commission to the RRC in HB 2694.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, 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 the RRC as a result of administration or enforcement of the proposed rules. The proposed rules would not have any fiscal impacts for other state agencies or units of local government.

The proposed rulemaking would repeal Chapter 339 in its entirety since the duties related to this chapter are now the responsibility of the RRC. There is no fiscal impact to units of local government related to the agency's proposed repeal of this chapter.

On September 1, 2011, the agency transferred 9.0 full-time employees and \$931,256 in annual costs and fee revenue out of the Water Resource Management Account No. 153 to the RRC, to allow the RRC to implement groundwater protection programs. A separate fiscal note estimates the fiscal impact of adopting the RRC Memorandum of Understanding in Chapter 7.

Public Benefits and Costs

Nina Chamness 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 will be compliance with state law.

The proposed rules would not have a fiscal impact on individuals or businesses. The proposed rules repeal provisions that are no longer part of the agency's jurisdiction. The RRC became responsible for enforcing regulations pertaining to groundwater protection for oil and gas activities and geologic storage of anthropogenic carbon dioxide on September 1, 2011.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules.

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 required to comply with state law and do not adversely affect a small or micro-business 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 reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §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 proposal does not meet the definition of "major environmental rule" because the rulemaking action is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Instead, the rulemaking action is intended to repeal Chapter 339 which is no longer necessary because the functions and authorization provided in the rules were transferred by statute from the commission to the RRC.

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 rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The proposed action implements legislative requirements in HB 2694, 82nd Legislature, 2011, which transferred duties from the commission to the RRC relating to the preparation of groundwater protection letters for certain activities and applications before the RRC. The repeal of these rules would be neither a statutory nor a constitutional taking of private real property. The proposed repeals 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 proposed rulemaking and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §5.05.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking is not subject to the Texas Coastal Management Program.

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.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, 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://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 2011-037-007-WS. The comment period closes September 24,

2012. 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 Kari Bourland, Waste Permits Division, (512) 239-6137.

[§§339.1 - 339.3]

Statutory Authority

The repeals are proposed under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC, and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The proposed repeals implement House Bill 2694, 82nd Legislature, 2011.

[§339.1. Purpose.]

[This chapter authorizes the executive director to provide groundwater protection recommendation letters to the Railroad Commission of Texas for use in processing applications. This chapter also establishes the fee for the expedited processing of requests for groundwater protection recommendation letters.]

[§339.2. Applicability.]

[This chapter applies to Texas Commission on Environmental Quality groundwater protection recommendation letters required by Railroad Commission of Texas (RRC) rules or Texas Water Code, §27.033, except that §339.3(b) and (c) of this

title (relating to Groundwater Protection Letter Requests, Expedited Processing, and Fee) does not apply to letters related to drilling and use of disposal wells permitted by the RRC. The executive director provides these letters to applicants for authorizations from the RRC. The letters contain a recommendation to the RRC on the depth, or depths, that usable-quality groundwater should be isolated or protected in oil and gas operations. This chapter also applies to the expedited processing of requests for these letters and sets fees for expedited processing as authorized by Texas Water Code, §5.701.]

[§339.3. Groundwater Protection Letter Requests, Expedited Processing, and Fee.]

[(a) The applicant shall submit a request for a groundwater protection recommendation letter on a form approved by the executive director. The form must contain all information required by the executive director before a request will be processed.]

[(b) The executive director shall establish procedures for expedited processing of requests for groundwater protection recommendation letters. Requests for expedited groundwater protection recommendation letters shall be processed within four business days.]

[(c) The fee for expedited processing of a request for a groundwater protection recommendation letter is \$75 and must be in the form of a check, money order, cashier's check, or electronic funds transfer made payable to the Texas Commission on Environmental Quality. The fee must be paid before the request will be processed.]