The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §295.13 and §295.155 and proposes a new §295.177.

Background and Summary of the Factual Basis for the Proposed Rules

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 remove TWC, §11.085(b)(4), which requires an application for an interbasin transfer to include the projected effect on user rates and fees for each class of ratepayers. HB 3233 also added language to TWC, §11.085(e), which limits consideration of issues in an evidentiary hearing to those requirements included in TWC, §11.085. HB 3233 further amended TWC, §11.085(g), to clarify the length of notice publication. Additionally, HB 3233 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 295, Water Rights, Procedural.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes to amend 30 TAC Chapter 297, Water Rights, Substantive.

Section by Section Discussion

Section 295.13, Interbasin Transfers, describes the general application requirements and exemptions for transferring state water from one river basin to another basin.

The commission proposes to delete §295.13(b)(4) which requires an application for a non-exempt interbasin transfer of state water to include the projected effect on user rates and fees for each class of ratepayers. The commission proposes this amendment to update its rules to reflect the deletion of TWC, §11.085(b)(4), by HB 3233. Paragraphs (5) - (9) of §295.13(b) are proposed to be renumbered to accommodate the deleted provision. HB 3233 amended TWC, §11.085(v)(4), to clarify the geographic areas exempt from the provisions of TWC, §11.085(b) - (u). The commission proposes to amend §295.13(c)(4) to incorporate these changes.

Section 295.155, Notice for Interbasin Transfers, describes the requirements and exemptions for public notice for an application to transfer state water from one river basin to another basin. The commission proposes to amend the published notice requirement in §295.155(b)(2) from once a week for two consecutive weeks to two different weeks within a 30-day period. The commission proposes this amendment to incorporate the changes made to TWC, §11.085(g), by HB 3233. The commission also proposes to amend §295.155(d)(4) to incorporate the revisions to the description of exempt geographic areas as described in TWC, §11.085(v)(4).

New §295.177, Evidentiary Hearing on Interbasin Transfer Amendments, is proposed to limit the issues to be considered during a hearing to those requirements under TWC, §11.085. This new section implements TWC, §11.085(e), as amended 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 rules are 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 rules.

The proposed rules 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 ~~twice~~ 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 295, Water Rights Procedural, and in a corresponding rulemaking, Chapter 297, Water Rights Substantive. This fiscal note addresses proposed changes to Chapter 295.

The proposed rules for Chapter 295 would relate to requirements for interbasin surface water transfers. These requirements describe the general application requirements and exemptions for transferring state water from one river basin to another basin.

The proposed rules would delete requirements for an application for an interbasin transfer of state water to include the projected effect on user rates and fees for each class of ratepayers. The commission proposes this amendment to update its rules to reflect the deletion of this requirement by HB 3233. HB 3233 also amended requirements that specify which geographic areas would be exempt from the permitting requirements. The commission proposes to amend §295.13(c)(4) to incorporate these changes.

The proposed rules also make changes to the requirements and exemptions for public notice for an application to transfer state water from one river basin to another basin. The commission proposes to amend the published notice requirement from once a week

for two consecutive weeks to two different weeks within a 30-day period in order to comply with HB 3233.

The proposed rules would limit those issues that can be heard during an evidentiary hearing to those specified under TWC, §11.085 as required by HB 3233.

The proposed rules may simplify and potentially shorten the permitting process for an interbasin transfer application through the deletion of requirements for an application for an interbasin transfer of state water to include the projected effect on user rates and fees for each class of ratepayers. Many interbasin transfers are for regional projects with many retail public water systems. Calculating rate impacts for all those systems could be a challenge because "rates" may imply the cost of treated water and many entities only sell raw water. In addition, for some projects the applicant may not know all future entities that will buy water.

Limiting the issues that can be raised in an evidentiary hearing on an interbasin transfer application to only those in TWC, §11.085, could help focus the issues and potentially shorten the hearing process. The change in notice requirements may make publication easier for an applicant without adversely affecting the public.

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.

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 rules, but any cost savings are difficult to project and 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 rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and the potential for a more efficient interbasin transfer permit application process.

The proposed rules are not expected to have fiscal implications for businesses or individuals. The proposed rules 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 rules, but the proposed rules are 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 rules for the first five-year period the proposed rules are in effect. The proposed rules 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 rules, but the proposed rules are 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 rules do not

adversely affect small or micro-businesses and are required to implement state law and therefore are 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 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 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 rulemaking 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 rulemaking would be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed rulemaking 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 rules constitute a taking under Texas Government Code, Chapter

2007. The commission proposed the rules 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 proposed rule unless an application from a current or prospective water right owner is received requesting an authorization for an interbasin transfer. Further, the rulemaking 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 rules 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 rules 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 rules. Therefore, the proposed rules 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 A: REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL PROVISIONS
DIVISION 1: GENERAL REQUIREMENTS
§295.13

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 proposed amendment implements TWC, §§5.102, 5.103, 5.105 and 11.085(v)(4).

§295.13. Interbasin Transfers.

(a) An applicant seeking to transfer state water from one basin to another basin shall so state in the application. For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code (TWC), §16.051. The application content requirements contained in this chapter for a new or amended water right, as applicable, shall apply to all applications for an interbasin transfer unless otherwise provided.

(b) In addition to the application requirements for a new or amended water right contained in this chapter, the application must also include the following unless exempted by subsection (c) of this section:

(1) the contract price of the water to be transferred;

(2) a statement of each general category of proposed use of the water to be transferred and a detailed description of the proposed uses and users under each category;

(3) the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users;

[(4) the projected effect on user rates and fees for each class of ratepayers;]

(4) [(5)] an analysis of whether and to what extent there is the need for the water in the basin of origin and in the proposed receiving basin based upon the period for which the transfer is requested, but not to exceed 50 years;

(5) [(6)] factors identified in the applicable approved regional water plans which address the following (Regional water management plans must be submitted to

the Texas Water Development Board for review and approval not later than September 1, 2000. If applicable approved regional water management plans do not exist at the time the application is submitted, the following information under this paragraph is not required to be submitted.):

(A) an analysis of the availability of feasible and practicable alternative supplies in the receiving basin for which the water is needed;

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

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

(D) the 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 that must be assessed under TWC, §§11.147, 11.150, and 11.152 and related commission rules contained in §§297.49 - 297.52 of this title (relating to Return and Surplus Waters, Consideration of Water Conservation Plans, Time Limitations for Commencement or Completion of Construction, Suppliers of Water for Agriculture) in each basin. If the water sought to be transferred is currently authorized to be used under an existing water right, such impacts shall only be considered in relation to that portion of the water right proposed for transfer and shall be based on historical uses of the water right for which amendment is sought.

(6) [(7)] proposed mitigation or compensation, if any, to the basin of origin by the applicant;

(7) [(8)] 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 being sought; and

(8) [(9)] any other related information the executive director or commission may require to review the application to make recommendation or

determine, as applicable, whether it meets all applicable requirements of the TWC or other applicable law.

(c) Subsection (b) of this section shall 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 under §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139));

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

(4) a proposed transfer from the part of the geographic area of [a basin to] a county or municipality, or the part of the [municipality's] retail service area of a retail public utility as defined by TWC, §13.002, that is [partially] within the basin of origin for use in that 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[. For purposes of this paragraph, a county, municipality, or municipality's service area refers to a geographic area]; or

(5) 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.

SUBCHAPTER C: NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS

§295.155

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 proposed amendment implements TWC, §§5.102, 5.103, 5.105, 11.085(g), and 11.085(v)(4).

§295.155. Notice for Interbasin Transfers.

(a) The notice requirements of this subchapter for an application for a new or amended water right, as applicable, shall apply to an application for an interbasin transfer except as otherwise provided by this section. In addition, notice shall be given to users of record in the receiving basin who are located below the point of introduction except for interbasin transfers described under subsection (d)(2) - (5) of this section. For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code, §16.051. An increase in the

amount of water being transferred to the receiving basin under an existing water right constitutes a new interbasin basin transfer for purposes of this section.

(b) In addition to the notice requirements provided by subsection (a) of this section, notice of an application for an interbasin transfer shall also include the following unless exempted by subsection (d) of this section:

(1) notice of the application shall be mailed to:

(A) all holders of water rights located in whole or in part in the basin of origin if not already provided under subsection (a) of this section;

(B) each county judge of a county located in whole or in part in the basin of origin;

(C) each mayor of a city with a population of 1,000 or more based upon the most recent estimate of the U.S. Census Bureau located in whole or in part in the basin or origin; and

(D) all groundwater conservation districts located in whole or in part in the basin of origin;

(E) each state legislator in both basins; and

(F) the presiding officer of each affected regional water planning group in both basins.

(2) the applicant shall cause notice of the application to be published in two different weeks within a 30-day period [once a week for two consecutive weeks] in one or more newspapers having general circulation in each county located in whole or in part in the basin of origin and the receiving basin. The published notice may not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. The notice of application and public meetings shall be combined in the mailed and published notices; and

(3) the notice of the application must state how a person may obtain from the applicant, without cost, information relating to the contract price of the water to be transferred; a statement of each general category of proposed use of the water to be transferred, and a detailed description of the proposed uses and users under each category; the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users; and the projected effect on user rates and fees for each class of ratepayers.

(c) The applicant shall pay the cost of notice required to be provided under this section.

(d) Subsection (b) of this section shall 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 under §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139));

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

(4) a proposed transfer from the part of the geographic area of [a basin of origin to] a county or municipality, or the part of the [municipality's] retail service area of a retail public utility as defined by as defined by Texas Water Code, §13.002, that is [partially] within the basin of origin for use in that 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.]

(5) 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.

SUBCHAPTER D: CONTESTED CASE HEARING

§295.177

Statutory Authority

The new section 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 proposed new section implements TWC, §§5.102, 5.103, 5.105 and 11.085(e).

§295.177. Evidentiary Hearing on Interbasin Transfer Amendments.

An evidentiary hearing on an application to transfer water under an existing water right is limited to considering issues related to the requirements of Texas Water Code, §11.085.