

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Rulemaking Adoption

AGENDA REQUESTED: May 6, 2020

DATE OF REQUEST: April 17, 2020

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Andreea Vasile, Rule/Agenda Coordinator, (512) 239-1806

CAPTION: Docket No. 2019-1000-RUL. Consideration of the adoption of amended Section 39.651 of 30 TAC Chapter 39, Public Notice; Section 281.19 of 30 TAC Chapter 281, Applications Processing; Section 295.158 of 30 TAC Chapter 295, Water Rights, Procedural; Sections 297.1 and 297.41 - 297.43 of 30 TAC Chapter 297, Water Rights, Substantive; and Sections 331.2, 331.7, 331.9, and 331.131 and new Subchapter O of 30 TAC Chapter 331, Underground Injection Control.

The adoption will implement House Bills 720 and 1964, 86th Texas Legislature, 2019, Regular Session, by amending existing requirements for underground injection control program public notice to include aquifer recharge (AR) projects; amend existing definitions, authorization mechanisms, standards, and requirements to include new standards for AR projects; and add new Subchapter O to implement Texas Water Code (TWC), Chapter 27, Subchapter H. The adopted rulemaking will also amend existing requirements for water right applications related to technical review and public notice; add and revise definitions; define availability criteria for various types of AR and aquifer storage and recovery projects; and implement the provisions of TWC, Sections 11.023, 11.122(b-3), 11.157, and 11.158. The adopted rulemaking will also remove obsolete text in Section 39.651(e) as a result of the Quadrennial Review of Chapter 39. The proposed rules were published in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7603). (Kathy Ramirez, Ruth Takeda) (Rule Project No. 2019-116-297-OW)

L'Oreal Stepney
Deputy Director

Kim Nygren
Division Director

Andreea Vasile
Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** April 17, 2020

Thru: Bridget C. Bohac, Chief Clerk
Toby Baker, Executive Director

From: L'Oreal W. Stepney, P.E., Deputy Director
Office of Water

Docket No.: 2019-1000-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 39, Public Notice
Chapter 281, Applications Processing
Chapter 295, Water Rights, Procedural
Chapter 297, Water Rights, Substantive
Chapter 331, Underground Injection Control
HB 720 and HB 1964: Procedure for Action on Certain Water Right
Amendment Applications and Surface Water Appropriations for Aquifer
Recharge and Aquifer Storage and Recovery
Rule Project No. 2019-116-297-OW

Background and reason(s) for the rulemaking:

This rulemaking will implement House Bill (HB) 720, 86th Texas Legislature, 2019, addressing the commission's regulation of aquifer recharge (AR) projects and aquifer storage and recovery projects (ASR) in Texas. HB 720 adds Subchapter H, Aquifer Recharge Projects, to the Texas Water Code (TWC), Chapter 27, as well as new TWC, §11.157 and §11.158. The adopted Chapter 39 amendments add AR projects to notification requirements, and the Chapter 331 amendments add definitions, authorization mechanisms, standards, and requirements for recharge injection wells associated with AR projects.

HB 720 also clarifies that AR projects are a beneficial use of water under TWC, Chapter 11, and removes permitting barriers for ASR and AR projects for both new water rights and existing water rights. HB 720 requires the Texas Commission on Environmental Quality (commission or TCEQ) to adopt rules for availability criteria for applications for new or amended water rights that seek a new appropriation for storage in an ASR or for AR and sets out a timeframe for technical review of these applications. The adopted amendment to Chapter 281 adds the technical requirement for review of these projects. The adopted changes to the notice rules in Chapter 295 and the amended requirements in Chapter 297 for granting an application, including water availability and beneficial use, implement the requirements in TWC, §§11.023, 11.157, and 11.158.

HB 1964, 86th Texas Legislature, 2019, streamlines the water rights permitting process for simple amendments to a water right that do not affect other water rights or the environment. The types of amendments covered by HB 1964 include changes to the purpose or place of use and small moves of diversion points. Amendments covered by HB 1964 would not be subject to notice and technical review. The adopted changes to the notice rules in Chapter 295, as mentioned above, would also implement HB 1964.

In addition, the adopted amendments to §39.651(e), related to notice of public meetings, are necessary due to the Quadrennial Review of Chapter 39.

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Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The adopted rulemaking adds new Subchapter O to Chapter 331, Underground Injection Control, to implement new TWC, Chapter 27, Subchapter H; amends existing underground injection control requirements for public notice in §39.651(h) to include AR projects; and amends existing definitions, authorization mechanisms, standards, and requirements to include new standards for underground injection control AR projects.

The adopted rulemaking adds requirements related to the processing time frame for technical review of new appropriations of water for storage in an ASR or for AR to Chapter 281. The adopted rulemaking also amends the notice rules in Chapter 295 to implement TWC, §§11.122 (b-3), 11.157 and 11.158, which include notice requirements for new water rights and various types of amendments to a water right. These provisions specify that simple amendments to a water right or an amendment to remove a storage authorization from a water right do not require notice and that an amendment to increase the diversion amount based on an evaporation credit or to replace storage capacity lost to sedimentation, if the water will be stored in an ASR, requires mailed and published notice. Finally, the adopted rulemaking amends definitions and the considerations for granting a new water right, including water availability and beneficial use in Chapter 297, as required in TWC, §§11.023, 11.157, and 11.158.

The adopted rulemaking allows different mechanisms of authorization of underground injection control AR projects and provides standards and requirements for underground injection control AR projects. Because of this, the adopted rulemaking will affect any persons who choose to implement an AR project. The adopted rulemaking also affects any water right holders who seek simple amendments to their water rights or seek new water rights or to amend their existing water rights to support AR projects or ASR projects.

In addition, the adopted rulemaking removes obsolete text in §39.651(e) as a result of the Quadrennial Review of Chapter 39.

B.) Scope required by federal regulations or state statutes:

The adopted rulemaking is in response to changes made to the TWC, by HB 720 and HB 1964. The amendment to §39.651(e) is in response to the commission's determination that certain rules in Chapter 39 are obsolete pursuant to review of the rules as required by the Texas Administrative Procedure Act, Texas Government Code, §2001.039.

C.) Additional staff recommendations that are not required by federal rule or state statute:

None.

Statutory authority:

TWC, Chapter 5, Subchapter M; and TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 11.122(c), 11.157, 11.158, 27.003, 27.011, and 27.019; TWC, Chapter 27, Subchapter H; Texas Health

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and Safety Code, §§361.017, 361.024, 361.0666, 361.0791, and 361.082; Texas Government Code, §2001.004; HB 720, Section 4; and HB 1964.

Effect on the:

A.) Regulated community:

Owners and operators of injection projects implemented under these rules must comply with these rules. Applicants for a new or amended water right may also be subject to these rules, depending on the type of application. In addition, permit applications will have greater clarity regarding the applicable public participation requirements.

B.) Public:

The public will benefit from additional AR projects, which will supplement groundwater quantities, and have a better understanding of the applicable public participation requirements for certain types of permit applications. The public will also benefit from streamlining water rights permitting for simple amendments and from removing barriers to seeking new or amended water rights for AR or ASR.

C.) Agency programs:

The Underground Injection Control Program regulates injection of water through permits and authorizations by rule. Because the applicants will have a more thorough understanding of the application and operation requirements, the applicants can build these requirements into their plans from the start. The Underground Injection Control program will benefit because applicants can submit more comprehensive and accurate initial applications. This will enable the agency to process applications with fewer iterations of requests for more information and expend less agency resources to maintain project compliance over time.

The Water Availability Division administers water rights permitting for applications for new or amended water rights. The rulemaking will streamline the water rights permitting process by reducing the processing time for certain water right amendment applications. The rulemaking will also clarify the permitting process for new or amended water right that support AR and ASR projects and will result in a more simplified process for these types of water right applications.

Stakeholder meetings:

A stakeholder meeting was held in Austin on August 1, 2019. The TCEQ received two comments. The rule team considered stakeholder input in the development of these rules.

Public comment:

The commission held a public hearing in Austin on January 7, 2020. The comment period closed on January 21, 2020. The commission received written comments from Representative Lyle Larson, Chairman of the Committee on Natural Resources, (Chairman Larson) and a joint comment letter from the National Wildlife Federation, Galveston Bay Foundation, Lone Star Chapter Sierra Club, and the Law Offices of Myron Hess, LLC (Joint Commenters).

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Chairman Larson requested that TCEQ be mindful of the distinction between AR projects, which themselves are defined as a beneficial purpose of use for which the TCEQ can appropriate state water and ASR projects in which the TCEQ may authorize state water to be stored prior to being later recovered for its ultimate authorized beneficial use under an appropriation. Regarding Chapters 281, 295, and 297, Chairman Larson requested revisions to the rule to support this distinction. The Joint Commenters requested various clarifying revisions to the rules.

Regarding Chapter 331, the Joint Commenters expressed concern that certain details in the rules were not specific enough to avoid unintended actions. Concerns focused on the possibility of applying the subchapter to ASR projects, the possibility of the area of review for an AR injection well field being too small to capture all potential impacts, and deliverables being submitted to the commission later than would be preferred.

Significant changes from proposal:

In Chapters 281, 295 and 297, the changes from proposal were made to clarify the distinction between ASR and AR. In Chapter 331, the changes from proposal were made to increase specificity as identified by the comments.

Potential controversial concerns and legislative interest:

There is legislative interest regarding the implementation of HB 720 and HB 1964 related to adopting the rule in a timely manner.

Does this rulemaking affect any current policies or require development of new policies?

No

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

HB 720 directed the TCEQ to adopt rules no later than June 1, 2020; this rulemaking complies with that directive. There are no alternatives to rulemaking. In addition, this rulemaking is necessary to ensure the rules regarding public notice and public participation in certain permit applications are current.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: December 13, 2019

Anticipated *Texas Register* adoption publication date: May 8, 2020

Anticipated effective date: June 28, 2020

Six-month *Texas Register* filing deadline: June 13, 2020

Agency contacts:

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Ruth Takeda, Staff Attorney, (512) 239-6635

Andreea Vasile, Texas Register Rule/Agenda Coordinator, (512) 239-1806

Attachments:

HB 720

Commissioners

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Re: Docket No. 2019-1000-RUL

HB 1964

cc: Chief Clerk, 2 copies
Executive Director's Office
Jim Rizk
Morgan Johnson
Brody Burks
Office of General Counsel
Kathy Ramirez
Andreea Vasile

AN ACT

relating to appropriations of water for recharge of aquifers and use in aquifer storage and recovery projects.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Sections 11.023(a) and (d), Water Code, are amended to read as follows:

(a) To the extent that state water has not been set aside by the commission under Section 11.1471(a)(2) to meet downstream instream flow needs or freshwater inflow needs, state water may be appropriated, stored, or diverted for:

(1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals;

(2) agricultural uses and industrial uses, meaning processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric;

(3) mining and recovery of minerals;

(4) hydroelectric power;

(5) navigation;

(6) recreation and pleasure;

(7) public parks; ~~and~~

(8) game preserves; and

(9) recharge into an aquifer underlying this state other than an aquifer described under Subsection (c) through

1 surface infiltration or an aquifer recharge project as defined by
2 Section 27.201.

3 (d) When it is put or allowed to sink into the ground, water
4 appropriated under Subsections (a)(9) and [Subsection] (c) [of
5 this section] loses its character and classification as state
6 water, storm water, or floodwater and is considered percolating
7 groundwater.

8 SECTION 2. Subchapter D, Chapter 11, Water Code, is amended
9 by adding Sections 11.157 and 11.158 to read as follows:

10 Sec. 11.157. WATER FOR USE AS AQUIFER RECHARGE OR IN AN
11 AQUIFER STORAGE AND RECOVERY PROJECT. (a) Unappropriated water,
12 including storm water and floodwater, may be appropriated for
13 recharge into an aquifer underlying this state, including an
14 aquifer recharge project as defined by Section 27.201. Water
15 appropriated for diversion and a beneficial use may be stored in an
16 aquifer storage and recovery project, as defined by Section 27.151,
17 before the water is recovered for that beneficial use.

18 (b) The commission may authorize the appropriation of water
19 under Subsection (a) if the commission determines that:

20 (1) the water is not needed under Section 11.147 or
21 11.1471(a)(2), as applicable, to meet downstream instream flow
22 needs or freshwater inflow needs;

23 (2) the appropriation will accomplish a purpose
24 established by Section 11.023; and

25 (3) the application for the water right or amendment
26 to the water right complies with Subsection (c).

27 (c) A water right or an amendment to a water right

1 authorizing a new appropriation of water for use under Subsection

2 (a):

3 (1) must comply with the requirements of Section

4 11.134;

5 (2) must include any special conditions the commission
6 considers necessary to implement this section; and

7 (3) may be for water that is not continuously
8 available.

9 (d) Before approving an application for a water right or an
10 amendment to a water right for a new appropriation of water in the
11 Rio Grande basin under this section, the commission shall consider
12 the water accounting requirements for any international water
13 sharing treaty, minutes, and agreement applicable to the Rio Grande
14 basin and the effect of the project on the allocation of water by
15 the Rio Grande watermaster in the middle and lower Rio Grande. The
16 commission may not authorize a new appropriation of water that
17 would result in a violation of a treaty or court decision.

18 (e) An application for a water right or an amendment to a
19 water right under this section is subject to the motion and hearing
20 requirements of this subchapter.

21 (f) Not later than the 180th day after the date the
22 commission determines that a water right or an amendment to a water
23 right under this section is administratively complete, the
24 commission shall complete a technical review of the application.

25 (g) The commission shall adopt rules providing for the
26 considerations for determining the frequency that the water must be
27 available before it may be appropriated.

1 Sec. 11.158. AMENDMENT TO CONVERT USE FROM RESERVOIR
2 STORAGE TO AQUIFER STORAGE AND RECOVERY. (a) In this section,
3 "aquifer storage and recovery project" has the meaning assigned by
4 Section 27.151.

5 (b) A holder of a water right that authorizes the storage of
6 water for a beneficial use in a reservoir that has not been
7 constructed may file an application to amend the water right to
8 remove the authorization for storage in a reservoir provided that
9 the water diverted under the right will be stored in an aquifer
10 storage and recovery project authorized under Section 27.153 for
11 later retrieval and use as authorized by the original water right.

12 (c) An application for an amendment to a water right
13 described by Subsection (b) may request an increase in the amount of
14 water that may be diverted or the rate of diversion on the basis of
15 an evaporation credit that takes into account the amount of water
16 that would have evaporated if the storage reservoir had been
17 constructed.

18 (d) A holder of a water right authorizing an appropriation
19 of water for storage in a storage reservoir that has lost storage
20 because of sedimentation, as determined by a survey performed by
21 the board, may file an application for an amendment to the water
22 right to change the use or purpose for which the appropriation is to
23 be made from storage by diversion to storage as part of an aquifer
24 storage and recovery project for later retrieval and use as
25 authorized by the original water right in an amount equal to all or
26 part of the amount of water yield lost to sedimentation.

27 (e) An application for an amendment to a water right

1 described by Subsection (b) is exempt from any notice and hearing
2 requirements of a statute, commission rule, or permit condition and
3 may not be referred to the State Office of Administrative Hearings
4 for a contested case hearing if the requested change will not cause
5 a negative effect on other water rights holders or the environment
6 that is greater than the effect that the original permit would have
7 had were the permit rights exercised to the full extent of the
8 original permit.

9 (f) An application for an amendment to a water right
10 described by Subsection (c) or (d) is subject to the notice and
11 hearing requirements of this chapter.

12 (g) If the commission grants an application for an amendment
13 to a water right described by Subsection (c) or (d), the commission
14 shall include in the amendment any special conditions the
15 commission considers necessary to:

16 (1) protect existing water rights; and
17 (2) comply with any applicable requirements
18 established under Section 11.147 or 11.1471.

19 (h) The commission may adopt rules providing an expedited
20 procedure for acting on an application for an amendment to a water
21 right described by Subsection (b) and the procedures to file and act
22 on an application for an amendment to a water right described by
23 Subsection (c) or (d).

24 SECTION 3. Chapter 27, Water Code, is amended by adding
25 Subchapter H to read as follows:

26 SUBCHAPTER H. AQUIFER RECHARGE PROJECTS

27 Sec. 27.201. DEFINITIONS. In this subchapter:

1 (1) "Aquifer recharge project" means a project
2 involving the intentional recharge of an aquifer by means of an
3 injection well authorized under this chapter or other means of
4 infiltration, including actions designed to:

5 (A) reduce declines in the water level of the
6 aquifer;

7 (B) supplement the quantity of groundwater
8 available;

9 (C) improve water quality in an aquifer;

10 (D) improve spring flows and other interactions
11 between groundwater and surface water; or

12 (E) mitigate subsidence.

13 (2) "Native groundwater" means the groundwater
14 naturally occurring in a geologic formation.

15 (3) "Project operator" means a person holding an
16 authorization under this subchapter to undertake an aquifer
17 recharge project.

18 (4) "Recharge injection well" means a Class V
19 injection well used for the injection of water into a geologic
20 formation for an aquifer recharge project, including an improved
21 sinkhole or cave connected to an aquifer.

22 Sec. 27.202. JURISDICTION. The commission has exclusive
23 jurisdiction over the regulation and permitting of recharge
24 injection wells.

25 Sec. 27.203. AUTHORIZATION FOR USE OF CLASS V INJECTION
26 WELLS. (a) The commission may authorize the use of a Class V
27 injection well as a recharge injection well:

- 1 (1) by rule;
- 2 (2) under an individual permit; or
- 3 (3) under a general permit.

4 (b) In adopting a rule or issuing a permit under this
5 section, the commission shall consider:

6 (1) whether the injection of water will comply with
7 the standards established by the federal Safe Drinking Water Act
8 (42 U.S.C. Section 300f et seq.);

9 (2) the effect of the aquifer recharge project on
10 existing water wells; and

11 (3) whether the introduction of water into the
12 receiving geologic formation will alter the physical, chemical, or
13 biological quality of the native groundwater to a degree that
14 would:

15 (A) render the groundwater produced from the
16 receiving geologic formation harmful or detrimental to people,
17 animals, vegetation, or property; or

18 (B) require an unreasonably higher level of
19 treatment of the groundwater produced from the receiving geologic
20 formation than is necessary for the native groundwater to render
21 the groundwater suitable for beneficial use.

22 (c) The commission by rule shall provide for public notice
23 and comment on a proposed general permit authorized under this
24 section. The commission shall require an applicant for an
25 individual permit authorized under this section to provide notice
26 of the application by first class mail to any groundwater
27 conservation district in which the wells associated with the

1 aquifer recharge project will be located and by publishing notice
2 in a newspaper of general circulation in the county in which the
3 wells will be located.

4 Sec. 27.204. TECHNICAL STANDARDS. (a) The commission shall
5 adopt technical standards governing the approval of the use of a
6 Class V injection well as a recharge injection well.

7 (b) The commission may not adopt or enforce groundwater
8 quality protection standards for the quality of water injected into
9 a recharge injection well that are more stringent than applicable
10 federal standards.

11 Sec. 27.205. REPORTING OF INJECTION VOLUMES. (a) A project
12 operator shall install a meter on each recharge injection well
13 associated with the aquifer recharge project.

14 (b) Each calendar year, the project operator shall provide
15 to the commission a written or electronic report showing for the
16 preceding calendar year the volume of water injected for recharge.

17 Sec. 27.206. REPORTING OF WATER QUALITY DATA. A project
18 operator shall:

19 (1) perform water quality testing annually on water to
20 be injected into a geologic formation as part of the aquifer
21 recharge project; and

22 (2) provide the results of the testing described by
23 Subdivision (1) in written or electronic form to the commission.

24 Sec. 27.207. OTHER LAWS NOT AFFECTED. (a) This subchapter
25 does not affect the ability to regulate an aquifer recharge project
26 as authorized under:

27 (1) Chapter 626, Acts of the 73rd Legislature, Regular

1 Session, 1993, for the Edwards Aquifer Authority;

2 (2) Chapter 8801, Special District Local Laws Code,
3 for the Harris-Galveston Subsidence District;

4 (3) Chapter 8834, Special District Local Laws Code,
5 for the Fort Bend Subsidence District;

6 (4) Chapter 8802, Special District Local Laws Code,
7 for the Barton Springs-Edwards Aquifer Conservation District; or

8 (5) Chapter 8811, Special District Local Laws Code,
9 for the Corpus Christi Aquifer Storage and Recovery Conservation
10 District.

11 (b) This subchapter does not affect the authority of the
12 commission regarding:

13 (1) recharge projects in certain portions of the
14 Edwards underground reservoir under Sections 11.023(c) and (d);

15 (2) injection wells that transect or terminate in
16 certain portions of the Edwards Aquifer under Section 27.0516; or

17 (3) aquifer storage and recovery projects under
18 Section 11.155 or Subchapter G of this chapter.

19 SECTION 4. Not later than June 1, 2020, the Texas Commission
20 on Environmental Quality shall adopt rules to implement Sections
21 11.157 and 11.158, Water Code, as added by this Act, and Subchapter
22 H, Chapter 27, Water Code, as added by this Act.

23 SECTION 5. This Act takes effect immediately if it receives
24 a vote of two-thirds of all the members elected to each house, as
25 provided by Section 39, Article III, Texas Constitution. If this
26 Act does not receive the vote necessary for immediate effect, this
27 Act takes effect September 1, 2019.

President of the Senate

Speaker of the House

I certify that H.B. No. 720 was passed by the House on May 1, 2019, by the following vote: Yeas 135, Nays 3, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 720 was passed by the Senate on May 22, 2019, by the following vote: Yeas 25, Nays 6.

Secretary of the Senate

APPROVED: _____

Date

Governor

AN ACT

relating to the procedure for action on certain applications for an amendment to a water right.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 11.122, Water Code, is amended by adding Subsection (b-3) to read as follows:

(b-3) In addition to an application that meets the requirements of Subsection (b) and for which the commission has determined that notice or an opportunity for a contested case hearing is not required under another statute or a commission rule, an application for an amendment to a water right is exempt from any requirements of a statute or commission rule regarding notice and hearing or technical review by the executive director or the commission and may not be referred to the State Office of Administrative Hearings for a contested case hearing if the executive director determines after an administrative review that the application is for an amendment that:

(1) adds a purpose of use that does not substantially alter:

(A) the nature of the right from a right authorizing only nonconsumptive use to a right authorizing consumptive use; or

(B) a pattern of use that is explicitly authorized in or required by the original right;

1 (2) adds a place of use located in the same basin as
2 the place of use authorized by the original right; or

3 (3) changes the point of diversion, provided that:

4 (A) the authorized rate of diversion is not
5 increased;

6 (B) the original point of diversion and the new
7 point of diversion are located in the same contiguous tract of land;

8 (C) the original point of diversion and the new
9 point of diversion are from the same source of supply;

10 (D) there are no points of diversion from the
11 same source of supply associated with other water rights that are
12 located between the original point of diversion and the new point of
13 diversion;

14 (E) there are no streamflow gauges located on the
15 source of supply between the original point of diversion and the new
16 point of diversion that are referenced in the original water right
17 or in another water right authorizing a diversion from the same
18 source of supply; and

19 (F) there are no tributary watercourses that
20 enter the watercourse that is the source of supply located between
21 the original point of diversion and the new point of diversion.

22 SECTION 2. This Act applies to an application to amend a
23 water right that is filed with the Texas Commission on
24 Environmental Quality on or after the effective date of this Act or
25 is pending as of the effective date of this Act.

26 SECTION 3. This Act takes effect immediately if it receives
27 a vote of two-thirds of all the members elected to each house, as

H.B. No. 1964

1 provided by Section 39, Article III, Texas Constitution. If this
2 Act does not receive the vote necessary for immediate effect, this
3 Act takes effect September 1, 2019.

President of the Senate

Speaker of the House

I certify that H.B. No. 1964 was passed by the House on April 11, 2019, by the following vote: Yeas 140, Nays 4, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 1964 was passed by the Senate on May 22, 2019, by the following vote: Yeas 30, Nays 1.

Secretary of the Senate

APPROVED: _____

Date

Governor

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §39.651.

The amendment to §39.651 is adopted *without change* to the proposed text as published in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7603) and, therefore, this section will not be republished.

Background and Summary of the Factual Basis for the Adopted Rule

This rulemaking implements House Bill (HB) 720, 86th Texas Legislature, 2019, addressing the commission's regulation of aquifer recharge (AR) projects in Texas. HB 720 added Texas Water Code (TWC), §27.203(c), which requires applicants for AR individual permits to provide notice to any groundwater conservation district in which the AR project will be located and publish notice in a newspaper of general circulation in the county in which the wells will be located.

Chapter 39 does not currently contain notice requirements for AR projects. Section 39.651(h) contains similar notice requirements for aquifer storage and recovery projects, therefore, the adopted amendment adds AR projects to this rule.

In addition, on June 12, 2019, the commission determined that certain rules in Chapter 39 (Non-Rule Project Number 2019-013-039-LS) are obsolete and no longer needed (June 28, 2019, issue of the *Texas Register* (44 TexReg 3304)). As a result, the

commission proposed to repeal obsolete rules in Chapter 39 (Rule Project Number 2019-119-039-LS) and to update other rules, primarily to remove obsolete text and update cross-references (Rule Project Number 2019-121-033-LS). The adopted amendment of §39.651(e) is included in this rulemaking due to the necessary amendment of §39.651(h).

As part of this rulemaking, the commission adopts amendments to 30 TAC Chapter 281, Applications Processing; Chapter 295, Water Rights, Procedural; Chapter 297, Water Rights, Substantive; and Chapter 331, Underground Injection Control.

Section Discussion

The commission adopts various stylistic, non-substantive changes, such as grammatical corrections and correct uses of references. These changes are non-substantive and are not specifically discussed in this preamble.

§39.651, Application for Injection Well Permit

As a result of the quadrennial review, the commission adopts the amendment to §39.651, by removing obsolete text in §39.651(e)(1) and (2) regarding the requirement for a public meeting for an application for a new hazardous waste facility, or for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit because no applications filed before September 1, 2005 remain pending with the commission.

To implement HB 702, the commission adopts the amendment to §39.651(h), so that the notice requirements for individual Class V permit applications for aquifer storage and recovery projects also apply to individual Class V permit applications for AR projects.

Final Regulatory Impact Determination

The commission reviewed the 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. A "Major environmental rule" means a rule with a specific intent 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 rulemaking is to implement HB 720, which enacted requirements in TWC, Chapters 11 and 27, for aquifer storage projects and AR projects, and to remove obsolete text.

Second, the adopted rulemaking does not meet the statutory definition of a "Major environmental rule" because the rule will 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 there will be a significant cost to comply with the adopted rule because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted amendment removes obsolete text and establishes notice requirements consistent with the requirement of HB 720; therefore, will not adversely affect in a material way the public health and safety of the state or a sector of the state.

Finally, the adopted rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a

specific state law. This rulemaking does not meet any of the preceding four applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law for the commission's Underground Injection Control Program authorized for the State of Texas under the federal Safe Drinking Water Act; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because it is consistent with the requirements of the commission's Underground Injection Control Program; and is not based solely under the general powers of the agency, but is based specifically under TWC, §27.019, Texas Health and Safety Code, §§361.0666, 361.0791, and 361.082; and HB 720, Section 4, as well as under the other authority of the commission cited in the statutory authority section of this preamble.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission received no comments on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted action implements legislative requirements in HB 720, for aquifer storage or AR projects.

The commission determined that the adopted rule will be neither a statutory nor a constitutional taking of private real property. The adopted rule establishes public notice requirements consistent with the requirements of HB 720 for an AR project application and removes obsolete text. The adopted rule will not affect a landowner's rights in private real property because this rulemaking 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 regulation.

Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rule and found it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(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 adopted rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission received no comments regarding the CMP.

Public Comment

The commission offered a public hearing on January 7, 2020. The comment period closed on January 21, 2020. The commission received no comments for the amendment to Chapter 39.

**SUBCHAPTER L: PUBLIC NOTICE OF INJECTION WELL AND
OTHER SPECIFIC APPLICATIONS
§39.651**

Statutory Authority

This amendment is adopted under the authority of Texas Water Code (TWC), Chapter 5, Subchapter M, which establishes environmental permitting procedural requirements; 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §27.003, which allows the commission to use all reasonable methods to implement its policy of maintaining the quality of fresh water in the state of Texas; TWC, §27.011, which establishes the commission's jurisdiction over certain injection well permits; TWC, §27.019, which specifically authorizes the commission to adopt rules and procedures necessary for performance of its powers, duties, and functions under TWC, Chapter 27; Texas Health and Safety Code (THSC), §361.017, which establishes the commission's jurisdiction over all aspects of the management of hazardous waste; THSC, §361.024, which provides the commission with rulemaking authority; THSC, §361.0666, which establishes public meeting and notice requirements for solid waste facilities; THSC, §361.0791, which establishes public meetings and notice requirements for new

hazardous waste management facilities; THSC, §361.082, which establishes notice and hearing requirements for hazardous waste permit applications; Texas Government Code, §2001.004, which requires state agencies to adopt procedural rules; and House Bill (HB) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158, and TWC, Chapter 27, Subchapter H.

The adopted amendment implements TWC, Chapter 5, Subchapter M; THSC, §§361.0666, 361.0791, and 361.082; and HB 720.

§39.651. Application for Injection Well Permit.

(a) Applicability. This subchapter applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must be mailed to the mayor of the municipality.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, notice must be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit). This notice must contain the text as required by §39.411(b)(1) - (9) and (11) of this title (relating to Text of Public Notice). Notice under §39.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness).

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, notice must be given to the School Land Board, if the application will affect lands dedicated to the permanent school fund. The notice must be in the form required by Texas Water Code, §5.115(c).

(4) For Notice of Receipt of Application and Intent to Obtain a Permit concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) The chief clerk or executive director shall also mail a copy of the application or a summary of its contents to the mayor and health authority of a

municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located and to the county judge and the health authority of the county in which the facility is located.

(6) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1) - (6) of this title. In addition to the requirements of §39.405(h) and §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county that is adjacent or contiguous to each county in which the proposed facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice) and to local governments located in the county of the facility. "Local governments" have the meaning as defined in Texas Water Code, Chapter 26.

(4) For Notice of Application and Preliminary Decision concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title (relating to Application for Industrial or Hazardous Waste Facility Permit).

(6) The deadline for public comments on industrial solid waste, Class III, or Class V injection well permit applications will be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) For [If] an application for a new hazardous waste facility, the agency:
[is filed:]

[(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; or]

[(B) on or after September 1, 2005, the agency:]

(A) [(i)] may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(B) [(ii)] shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning the application:

(i) [(I)] on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(ii) [(II)] if the executive director determines that there is substantial public interest in the proposed facility.

(2) For [If] an application for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit, the agency [is filed:]

[(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is located to receive public comment on the application if a person affected files with the chief clerk a request for a public meeting concerning the application before the deadline to file public comment or to file requests for reconsideration or hearing; or]

[(B) on or after September 1, 2005, the agency:]

(A) [(i)] may hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment on the application; but

(B) [(ii)] shall hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment concerning the application:

(i) [(I)] on the request of a member of the legislature who represents the general area in which the facility is located; or

(ii) [(II)] if the executive director determines that there is substantial public interest in the facility.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location in which the facility is located or proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location in which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

(4) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review

committee process under subsection (b) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(5) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters).

(6) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of contested case hearing.

(1) Applicability. This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) If the application concerns a facility other than a hazardous waste facility, the applicant shall publish notice at least once in a newspaper of general

circulation in the county in which the facility is located and in each county and area that is adjacent or contiguous to each county in which the proposed facility is located.

(B) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(C) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). The notice must appear in the section of the newspaper containing state or local news items. The text of the notice must include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.413 of this title.

(B) For notice of hearings concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(i) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(ii) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(iii) persons who own mineral rights underlying the existing or proposed injection well facility;

(iv) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(v) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(C) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not

listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the contested case hearing. Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(4) Radio broadcast. If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title.

(5) Deadline. Notice under paragraphs (2)(A), (3), and (4) of this subsection must be completed at least 30 days before the contested case hearing.

(g) Approval. All published notices required by this section must be in a form approved by the executive director prior to publication.

(h) Applications for individual Class V injection well permits for aquifer storage and recovery (ASR) projects and aquifer recharge (AR) projects. Notwithstanding the requirements of subsections (c) and (d) of this section, this subsection establishes the public notice requirements for [an application for] an individual Class V injection well permit application for either an ASR project or an AR project. Issuance of the Notice of Receipt of Application and Intent to Obtain a Permit is not required for [an application for] an individual Class V injection well permit application for an ASR project or an AR project. The notice required by §39.419 of this title must be published by the applicant once in a newspaper of general circulation in the county in which the injection well will be located after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. The chief clerk shall provide notice by first class mail to any groundwater conservation district in which the wells associated with the ASR project or AR project will be located. The chief clerk shall also mail notice to the persons listed in §39.413(7) - (9) of this title. This notice must contain the text as required by §39.411(c)(1) - (6) of this title.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §281.19.

The amendment to §281.19 is adopted *with change* to the proposed text as published in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7611) and, therefore, this section will be republished.

Background and Summary of the Factual Basis for the Adopted Rule

In 2019, the 86th Texas Legislature passed House Bill (HB) 720. HB 720 added Texas Water Code (TWC), §11.157, related to new appropriations of water for: 1) storage in an aquifer storage and recovery project for later recovery for the ultimate authorized beneficial use under the appropriation (ASR) and 2) aquifer recharge (AR) projects. Under TWC, §11.157(f), the commission has 180 days to complete technical review of applications for new appropriations of water for ASR and AR. The commission must adopt rules implementing TWC, §11.157, by June 1, 2020.

This rulemaking implements the requirement in TWC, §11.157(f), for the commission to complete technical review for applications for new appropriations of water for ASR and AR in 180 days.

As part of this rulemaking, the commission adopts amendments to 30 TAC Chapter 39, Public Notice; Chapter 295, Water Rights, Procedural; Chapter 297, Water Rights,

Substantive; and Chapter 331, Underground Injection Control, to implement HB 720.

Section Discussion

§281.19, Technical Review

The commission adopts the amendment to §281.19(a). Currently, §281.19(a), requires that technical review of a water rights application be completed within 75 working days after the initial review period. TWC, §11.157(f), provides for a 180-day technical review period for new appropriations of water for ASR and AR. Adopted §281.19(a) will require that technical review for new appropriations of water for ASR and AR be completed 180 days after the application is determined to be administratively complete. Additionally, the commission adopts to further amend §281.19(a) to remove obsolete language referring to 30 TAC §291.102 and §291.109, because it relates to areas that were transferred to the Public Utility Commission of Texas (applications for certificates of public convenience and necessity and applications for sale, transfer, or merger requests).

In response to comments, the commission revised the rule to clarify the distinction between AR, which is defined as a beneficial purpose of use for which the commission can appropriate water, and ASR in which the commission may authorize state water to be stored prior to being later recovered for its authorized beneficial use under the appropriation. The commission revised §281.19(a) to add a reference to TWC, §11.157 and to add the words "storage in an" and "project" to clarify that the new appropriation

of water is for storage in an ASR as defined in the Background section of this preamble. The commission also added the word "for" and deleted the word "project" to clarify that the new appropriation of water is for aquifer recharge, which is defined as a beneficial purpose of use under TWC, §11.023(a)(9).

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. A "Major environmental rule" means a rule with a specific intent 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 rulemaking is to implement HB 720, which enacted requirements in TWC, Chapters 11 and 27, for ASR and AR projects.

Second, the adopted rulemaking does not meet the statutory definition of a "Major

environmental rule" because the rule will 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 there will be a significant cost to comply with the adopted rule because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted rule establishes a time period consistent with the requirements of HB 720 for technical review of applications for a new appropriation of water for ASR or AR, therefore, will not adversely affect in a material way the public health and safety of the state or a sector of the state.

Finally, the adopted rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four

applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law because there are no federal standards governing water rights; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because there are no delegation agreements or contracts between the commission and the federal government for the commission's water rights program; and is not based solely under the general powers of the agency, but is based specifically under TWC, §27.019, and HB 720, Section 4, as well as, under the other authority of the commission cited in the statutory authority section of this preamble.

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 rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted action implements legislative requirements in HB 720 for new appropriations of water for ASR or AR.

The commission determined that the adopted rule will be neither a statutory nor a

constitutional taking of private real property. The adopted rule establishes the time period consistent with the requirements of HB 720 for technical review of an application for a new appropriation of water for ASR or AR. The adopted rule will not affect a landowner's rights in private real property because this rulemaking 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 regulation.

Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found it 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 (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 received no comments regarding the CMP.

Public Comment

The commission offered a public hearing on January 7, 2020. The comment period closed on January 21, 2020. The commission received written comments from the Honorable Lyle Larson, Texas House of Representatives, Chairman of the House Committee on Natural Resources (Chairman Larson), and a joint comment letter from the National Wildlife Federation, Galveston Bay Foundation, Lone Star Chapter Sierra Club, and the Law Offices of Myron Hess, LLC (Joint Commenters).

Chairman Larson and the Joint Commenters suggested changes to the rule.

Response to Comments

Comment

Chairman Larson commented that he greatly appreciates the diligent work that TCEQ and its staff put into the rulemaking effort. Chairman Larson thanked TCEQ for its expedited work on the rulemaking package for HB 720, the opportunity to participate in the rulemaking process, and for TCEQ's consideration of his comments.

Response

The commission appreciates and acknowledges Chairman Larson's comments.

Comment

Chairman Larson requested that TCEQ be mindful of the distinction between AR projects, which themselves are defined as a beneficial purpose of use for which the TCEQ can appropriate state water and ASR projects in which the TCEQ may authorize state water to be stored prior to being later recovered for its ultimate authorized beneficial use under an appropriation.

Response

The commission agrees and, in response to this comment, revised the preamble to clarify the distinction between an appropriation of water for AR and an appropriation of water where ASR is a storage component for appropriated water with an authorized beneficial use and made additional changes to support this clarification throughout the preamble.

Comment

Chairman Larson requested that the commission consider rewording the language in §281.19(a) to clarify the difference between an appropriation of water for an AR project and an appropriation of water where ASR is a storage component for

appropriated water with an authorized beneficial use.

Response

The commission agrees and revised §281.19(a) in response to this comment to clarify the difference between an appropriation of water for AR and an appropriation of water where ASR is a storage component of the appropriated water with an authorized beneficial use. The commission also added a reference to TWC, §11.157 in response to other comments to provide further clarification.

Comment

The Joint Commenters commented that they understand that the amendment to §281.19 is intended to implement TWC, §11.157(g), which refers only to amendment applications filed under TWC, §11.157 in establishing the 180-day period for completing technical review. The commenters further added that §281.19(a) should only apply to that subset of applications. The commenters recommend that the proposed rule language be revised to read as follows: "In the case of applications filed under Chapter 295 of this title (relating to Water Rights, Procedural) that solely request a new appropriation of water for aquifer storage and recovery or aquifer recharge projects pursuant to TWC, §11.157, the technical review shall commence on the date the application is administratively complete and will continue for a period of time not to exceed 180 days."

Response

The commission responds that TWC, §11.157(f), which requires that technical review be completed within 180 days applies to both new water rights and amendments. The commission notes that it revised the rule in response to other comments. However, the commission agrees, in part, with this comment and included a reference to TWC, §11.157 to provide further clarification on which applications would be subject to the adopted rule. No further changes were made in response to this comment.

SUBCHAPTER A: APPLICATIONS PROCESSING

§281.19

Statutory Authority

This amendment is adopted under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The adopted amendment implements HB 720.

§281.19. Technical Review.

(a) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of these sections, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 75 working days. [In the case of

applications filed under §291.102 of this title (relating to Criteria for Considering and Granting Certificates or Amendments), the technical review period is that period of time beginning 30 days after notice of the application has been given in accordance with §291.109 of this title (relating to Report of Sale, Merger, etc.; Investigation; Disallowance of Transaction) and will continue for a period of time not to exceed 75 working days.] In the case of applications filed under §335.43 of this title (relating to Permit Required) or §331.7 of this title (relating to Permit Required), the technical review period shall commence upon assignment of the application to a staff member and continue for a period of time not to exceed 120 days. For applications filed under Chapter 336 of this title (relating to Radioactive Substance Rules) and subject to the Notice of Deficiency (NOD) process established in this section, the technical review period shall begin the day after the date of determination of administrative completeness and for issuance, renewal, or major amendments, shall continue for a period of time not to exceed 255 days; however, this time frame may be extended to a maximum of 600 days if an application is technically deficient; or, for applications for minor amendments, shall continue for a period of time not to exceed 90 days; however, this time frame may be extended to a maximum of 150 days if an application is technically deficient. In the case of applications filed under Chapter 295 of this title (relating to Water Rights, Procedural) that request a new appropriation of water pursuant to Texas Water Code, §11.157 for storage in an aquifer storage and recovery project or for aquifer recharge projects, the technical review shall commence on the

date the application is administratively complete and will continue for a period of time not to exceed 180 days.

(b) Except as provided in subsection (c) of this section, the applicant shall be promptly notified of any additional technical material as may be necessary for a complete review. If the applicant provides the information within the period of time prescribed by subsection (a) of this section, the executive director will complete processing of the application within the technical review period extended by the number of days required for the additional data. If the necessary additional information is not received by the executive director prior to expiration of the technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 30 days to provide the technical data before an application is returned. Decisions to return material to the applicant during the technical review stage will be made on a case by case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision instead of having the application returned.

(c) For applications for radioactive material licenses, the applicant shall be promptly notified of any additional technical information necessary to complete technical review. For new applications, renewal applications, or major amendment

applications, the executive director shall complete application processing within the technical review period (600 days) if the applicant provides the information within 75 days of the date of the first NOD and 60 days of the subsequent NODs. For minor amendments, the applicant must provide the information within 20 days from the date of the first NOD and 20 days from the date of the second NOD. If the necessary additional information is not received by the executive director prior to the end of the response period, the executive director may return the application to the applicant. In no instance shall the executive director issue more than four NODs before returning the application. The applicant has the option of having the question of sufficiency of necessary technical information referred to the commission for a decision instead of having the application returned. The applicant may request additional time to respond to a notice of technical deficiency. The request must be in writing, set forth the reasons why the applicant cannot respond within the time provided and specify the amount of additional time requested. Any extension of time must be approved by the executive director in writing. The executive director may extend or delay the schedule for the processing of an application under this subsection to comply with the priority established by law for processing and review of radioactive material licenses.

(d) This subsection applies to the technical review of applications for radioactive material licenses submitted to the Texas Department of State Health Services on or before June 18, 2007. For new applications, renewal applications, or major amendment applications, the executive director shall complete application processing within the

technical review period (600 days) if the applicant provides the information within 75 days of the date of the first NOD and 60 days of the second NOD. For minor amendments, the applicant must provide the information within 20 days from the date of the first NOD and 20 days from the date of the second NOD. If the necessary additional information is not received by the executive director prior to the end of the response period, the executive director may return the application to the applicant. In no instance shall the executive director issue more than two NODs before returning the application. The applicant has the option of having the question of sufficiency of necessary technical information referred to the commission for a decision instead of having the application returned. The applicant may request additional time to respond to a notice of technical deficiency. The request must be in writing, set forth the reasons why the applicant cannot respond within the time provided and specify the amount of additional time requested. Any extension of time must be approved by the executive director in writing. The executive director may extend or delay the schedule for the processing of an application under this subsection to comply with the priority established by law for processing and review of radioactive material licenses.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §295.158.

The amendment to §295.158 is adopted *with change* to the proposed text as published in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7614) and, therefore, this section will be republished.

Background and Summary of the Factual Basis for the Adopted Rule

In 2019, the 86th Texas Legislature passed House Bill (HB) 1964. HB 1964 streamlines the water rights permitting process for simple amendments to a water right that do not affect other water rights or the environment. The types of amendments covered by HB 1964 include changes to the purpose or place of use and small moves of diversion points. Amendments covered by HB 1964 will not be subject to notice and technical review.

The 86th Texas Legislature also passed HB 720, which removes permitting barriers for water right applications for new appropriation and amendments that include: 1) storage in an aquifer storage and recovery project for later recovery for the ultimate authorized beneficial use under an appropriation (ASR) and 2) aquifer recharge (AR) projects. HB 720 adds aquifer recharge as a beneficial use of water and sets out a process for new appropriations for ASR and AR. These new appropriations are subject to notice and contested case hearings and TCEQ has 180 days to complete technical

review of such applications. HB 720 addresses amendments to existing water rights for reservoirs that have not been constructed or existing reservoirs that have lost storage capacity because of sedimentation. A water right holder with a water right authorizing storage that has not been constructed can remove the storage authorization without notice and hearing if other water rights and the environment are not affected by the amendment and provided that the water diverted under the water right will be stored in an ASR.

A water right holder can request to remove the storage authorization and increase the amount of water to be diverted or the diversion rate, based on an evaporation credit, to increase the amount of water available for ASR. A water right holder can also amend a water right to replace storage capacity lost to sedimentation by changing the use or purpose of use for the appropriation from storage by diversion to storage as part of an ASR. These two types of amendments are subject to notice and contested case hearing.

This rulemaking implements changes to notice rules in Chapter 295 required by HB 1964 and HB 720.

As part of this rulemaking, the commission adopts amendments to 30 TAC Chapter 39, Public Notice; Chapter 281, Applications Processing; Chapter 297, Water Rights, Substantive; and Chapter 331, Underground Injection Control, to implement HB 720.

Section Discussion

§295.158, Notice of Amendments to Water Rights

The commission adopts the amendment to §295.158(b)(3) that adds the word "use" to correct a typographic error in the rule.

The commission adopts revised §295.158(b)(9), and the addition of §295.158(b)(10) to implement Texas Water Code (TWC), §11.158(f). The commission's intent is that amendment applications that: a) increase the amount of water diverted or the diversion rate based on an evaporation credit, or b) replace storage capacity lost to sedimentation by changing the use or purpose of use for the appropriation from storage by diversion to storage as part of an ASR for later retrieval and use as authorized by the original water right, be subject to full basin mailed and published notice.

The commission adopts §295.158(c)(2) to implement TWC, §11.122(b-3) which describes applications that are not subject to notice or technical review. The subsequent paragraph will be renumbered.

The commission adopts the deletion of renumbered §295.158(c)(3)(C) because this language is now obsolete due to the implementation of TWC, §11.122(b-3), as previously stated. Subsequent subparagraphs will be re-lettered.

The commission adopts re-lettered §295.158(c)(3)(C) and (D) as revised to clarify that some changes to the point of diversion in a water right are exempt from notice and technical review under adopted §295.158(c)(2)(C). The commission further adopts re-lettered §295.158(c)(3)(C) and (D) as revised to clarify that the provisions in these subparagraphs relating to interjacent notice apply to water right holders of record and that only existing water right holders of record receive notice of these applications.

The commission adopts §295.158(c)(3)(F) to implement the provisions of TWC, §11.158(e) by specifying that applications to amend a water right to remove an authorization for storage in a storage reservoir that has not been constructed may not require additional notice if the water authorized for diversion will be stored in an ASR, the diversion amount or diversion rate are not increased, and if the executive director determines after an administrative review that other water rights and the environment would not be affected by the request.

In response to comments, the commission revised the rule to clarify the distinction between AR, which is defined as a beneficial purpose of use for which the commission can appropriate water, and ASR in which the commission may authorize state water to be stored prior to being later recovered for its authorized beneficial use under the appropriation. The commission restructured §295.158(b)(9) by moving language related to notice for amendments related to loss of storage capacity due to sedimentation to §295.158(b)(10) and revising the restructured §295.158(b)(10) to

more closely track the language in TWC, §11.158 by deleting the words "an appropriation of water for" and adding the words "storage by diversion." The commission corrected a typographic error in §295.158(c)(2)(C)(v) to replace the word "not" with the word "no." Finally, the commission revised §295.158(c)(3)(F) to track the language in TWC, §11.158(b) by adding the words "if the water diverted under the right will be stored in an aquifer storage and recovery project for later retrieval and use as authorized by the original water right."

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. A "Major environmental rule" means a rule with a specific intent 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 rulemaking is to implement laws enacted by the Texas Legislature. HB 720 sets forth

requirements in TWC, Chapters 11 and 27, for ASR and AR projects. HB 1964 sets forth notice requirements in TWC, Chapter 11, for certain applications to amend water rights.

Second, the adopted rulemaking does not meet the statutory definition of a "Major environmental rule" because the rule will 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 there will be a significant cost to comply with the adopted rule because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted rule establishes notice requirements consistent with the requirements of HB 720 and HB 1964, therefore, will not adversely affect in a material way the public health and safety of the state or a sector of the state.

Finally, the adopted rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement

of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law because there are no federal standards governing water rights; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because there are no delegation agreements or contracts between the commission and the federal government for the commission's water rights program; and is not based solely under the general powers of the agency, but is based specifically under TWC, §11.122(c) and HB 720, Section 4, as well as, under the other authority of the commission cited in the statutory authority section of this preamble.

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 rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted action

implements legislative requirements in HB 720 for ASR or AR projects and in HB 1964 for notice requirements for certain water right amendment applications.

The commission determined that the adopted rule will be neither a statutory nor a constitutional taking of private real property. The adopted rule establishes notice requirements for ASR and AR project applications consistent with the requirements in HB 720 and notice requirements for certain applications to amend water rights consistent with the requirements in HB 1964. It is not anticipated that there will be many ASR or AR project applications and the cost of complying with the regulations is not expected to be substantial. The adopted rule will also streamline notice requirements for certain water right amendment applications, allowing these applications to be processed more quickly without imposition of additional fees or costs since no new fees are proposed. The adopted rule will not affect a landowner's rights in private real property because this rulemaking 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.

Therefore, the adopted rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found it 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 (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 received no comments regarding the CMP.

Public Comment

The commission offered a public hearing on January 7, 2020. The comment period closed on January 21, 2020. The commission received written comments from the Honorable Lyle Larson, Texas House of Representatives, Chairman of the House Committee on Natural Resources (Chairman Larson), and a joint comment letter from the National Wildlife Federation, Galveston Bay Foundation, Lone Star Chapter Sierra

Club, and the Law Offices of Myron Hess, LLC (Joint Commenters).

Chairman Larson and the Joint Commenters suggested changes to the rule.

Response to Comments

Comment

Chairman Larson commented that he greatly appreciates the diligent work that TCEQ and its staff put into the rulemaking effort. Chairman Larson also thanked TCEQ for its expedited work on the rulemaking package for HB 720, the opportunity to participate in the rulemaking process and for TCEQ's consideration of his comments.

Response

The commission appreciates and acknowledges Chairman Larson's comments.

Comment

Chairman Larson requested that TCEQ be mindful of the distinction between AR projects, which themselves are defined as a beneficial purpose of use for which the TCEQ can appropriate state water, and ASR projects, in which the TCEQ may authorize state water to be stored prior to being later recovered for its ultimate authorized beneficial use under an appropriation. Chairman Larson requested that the commission consider rewording the language in in the Background section of the preamble to clarify the difference between an appropriation of water for an AR project and an appropriation of water where ASR is a storage component for appropriated

water with an authorized beneficial use.

Response

The commission agrees and, in response to this comment, revised the preamble to clarify the distinction between an appropriation of water for AR and an appropriation of water where ASR is a storage component for appropriated water with an authorized beneficial use and made additional changes to support this clarification throughout the preamble.

Comment

Chairman Larson requested that TCEQ clarify the notice requirements in §295.158(b)(9) to more closely track the requirements in TWC, §11.158(f) to make it clear that an application described under TWC, §11.158(b) is not subject to notice and hearing requirements, while applications described under TWC, §11.158(c) or (d) are subject to notice and hearing requirements. Chairman Larson also requested that the commission reconcile the language in §295.158(b)(9) and (b)(9)(B) regarding a reservoir that has not been constructed and a reservoir that has lost storage because of sedimentation (inherently implying that the reservoir was constructed) to more closely track the language in TWC, §11.158 by restructuring §295.158(b)(9) or adding an additional subdivision to that subsection.

Response

The commission agrees and, in response to this comment, restructured §295.158(b)(9) by adding §295.158(b)(10) to more closely track the language in TWC, §11.158.

Comment

The Joint Commenters stated that proposed §295.158(b)(9)(B) does not appear to fit because a storage reservoir that has not been constructed could not have lost storage as a result of sedimentation. Furthermore, such an application would likely involve a reduction in authorization for storage in a reservoir rather than the removal of such authorization. The language in TWC, §11.158(d) is difficult to parse, including its confusing reference to a change from a use or purpose of use for storage by diversion to storage as part of an ASR project. The commenters believe it would be more straightforward and more consistent with TWC, §11.158(f) for the rule to simply state that applications subject to TWC, §11.158(d) are subject to notice and hearing and to revise §295.158(b)(9) and add §295.158(b)(10) so that the revised rule reads as follows: "(9) to remove the authorization for storage in a reservoir that has not been constructed if the application requests an increase in the amount of water to be diverted or in the diversion rate based on an evaporation credit; or (10) for authorization pursuant to TWC, §11.158(d) to change storage lost to sedimentation in a storage reservoir to storage as part of an aquifer storage and recovery project for later retrieval and use as authorized by the original water right."

Response

The commission responds that, in response to other comments, it restructured §295.158(b)(9) by replacing proposed subparagraph (B) with adopted §295.158(b)(10) to more closely track the language in TWC, §11.158. No changes were made in response to this comment.

Comment

The Joint Commenters commented that minor revisions were needed to §295.158(c) to minimize potential ambiguity. The commenters requested additional clarifying language to §295.158(c)(2) to explicitly indicate that exemption from notice and technical review only applies for an application that solely involves one or more of the listed changes to avoid any potential argument that an amendment application seeking one of the listed changes in addition to a change not listed also qualifies for such an exemption. The commenters also identified a typographic error in proposed §295.158(c)(2)(C)(5) and proposed the following revisions to the rule: "(2) Applications solely involving the following do not require notice, except to the record holder, and do not require technical review:" and "(v) there are no tributary watercourses that enter the watercourse that is the source of supply located between the original point of diversion and the new point of diversion."

Response

The commission responds that when determining the notice required for an

application it reviews all requests in the application and determines the type of notice required for each request. If one of the requests in the application requires notice under TCEQ's rules, appropriate notice will be provided. No changes were made in response to this portion of the comment. The commission appreciates the identification of the typographical error and revised the rule to make this correction.

Comment

The Joint Commenters comment that they understand that §295.158(C)(3)(f) is intended to implement TWC, §11.158 as added by HB 720. TWC, §11.158(b) authorizes an amendment to remove surface storage authorizations when the storage will be replaced by storage in an aquifer storage and recovery project. TWC, §11.158(e) provides specific prerequisites for an amendment to escape notice and hearing requirements. The commenters request that the rule language track the statutory language authorizing the exemption from notice and hearing including the requirement for replacement of the authorized storage by storage in an ASR project. Availability of storage may well have been a prerequisite to a determination of viability for the intended purpose during initial permit issuance. The commenters request that the rule be revised as follows: "(F) to remove the authorization for storage in a reservoir that has not been constructed, provided that: (i) the reservoir storage will be replaced by storage in an aquifer recharge and recovery project.

Response

The commission agrees that the rule could be clarified. Therefore, in order to be consistent with other changes throughout the rule made in response to other comments, it revised §295.158(c)(3)(F) to track the language in TWC, §11.158(b), which states that the water diverted under the water right will be stored in an ASR for later retrieval and use as authorized by the original water right, rather than adding an additional subsection as suggested by the commenters.

SUBCHAPTER C: NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS

§295.158

Statutory Authority

This amendment is adopted under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §11.122(c), which requires the commission to adopt rules to effectuate the provisions of TWC, §11.122; and HB 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158, and TWC, Chapter 27, Subchapter H.

The adopted amendment implements HB 720 and HB 1964.

§295.158. Notice of Amendments to Water Rights.

(a) On motion of executive director.

(1) If the executive director determines to file a petition to amend a water right, notice of the determination stating the grounds therefore and a copy of a

proposed amendment draft shall be personally served on or mailed by certified mail to the water right holder at the last address of record with the commission.

(2) This notice shall be given at least 15 days before a petition is filed with the commission.

(b) Requiring mailed and published notice. Unless authorized by subsection (c) of this section, applications for amendments to permits, certified filings, or certificates of adjudication, including, but not limited to, those of the following nature, must comply with requirements for a water use permit, including the notice requirements in the Texas Water Code, §11.132, and this subchapter:

(1) to change the place of use when other water users of state water may be affected;

(2) to increase an appropriation and/or rate or period of diversion;

(3) to change the purpose of use when the change would authorize a greater consumption of state water or would materially alter the period of time when state water could be diverted;

(4) to add points of diversion which would result in a greater rate of diversion or impair other water rights;

(5) to remove or modify the requirements or conditions of a water right which were included for the protection of other water rights;

(6) to change a point of diversion which may impair other water rights;

(7) to relocate or enlarge a reservoir; [or]

(8) to extend the period of duration of any term permit; ~~or~~ [.]

(9) to remove the authorization for storage in a reservoir that has not been constructed if the application requests:

(A) an increase in the amount of water to be diverted or the diversion rate based on an evaporation credit; or

(10) (B) to change the use or purpose of use of a water right authorizing an appropriation of water for storage in an on-channel storage reservoir that has lost storage because of sedimentation **from storage by diversion** to storage as

part of an aquifer storage and recovery project for later retrieval and use as authorized by the original water right.

(c) Not requiring mailed and published notice.

(1) Only an application to amend an existing permit, certified filing, or certificate of adjudication which does not contemplate an additional consumptive use of state water or an increased rate or period of diversion and which, in the judgment of the commission, has no potential for harming any other existing water right, is subject to amendment by the commission without notice other than that provided to the record holder. Once the technical review of an application is complete and the technical memoranda have been filed with the chief clerk of the commission, the commission shall consider whether additional notice is required based on the particular facts of the application.

(2) Applications for the following do not require notice, except to the record holder, and do not require technical review:

(A) to add a purpose of use that does not substantially alter:

(i) the nature of the water right from a water right authorizing only non-consumptive use to a water right authorizing consumptive use;
or

(ii) a pattern of use that is explicitly authorized by or required by the original water right;

(B) to add a place of use located in the same river basin as the place of use authorized in the original water right;

(C) to change the point of diversion provided that:

(i) the authorized rate of diversion is not increased;

(ii) the original point of diversion and the new point of diversion are located on the same contiguous tract of land;

(iii) there are no other water right holders with points of diversion located on the same watercourse between the original point of diversion and the new point of diversion;

(iv) there are no streamflow gages located on the watercourse between the original point of diversion and the new point of diversion that are referenced in the original water right or in another water right authorizing a diversion from the same watercourse; and

(v) there are not tributary watercourses that enter the watercourse that is the source of supply located between the original point of diversion and the new point of diversion.

(3) [(2)] Applications of the following descriptions may not require additional notice:

(A) to cure ambiguities or ineffective provisions in a water right;

(B) to reduce an appropriation or rate of diversion;

[(C) to change the place of use when there will be no increased use of state water and the change will not operate to the injury of any other lawful user of state water. If a water right is owned by more than one party, all other parties will be notified of the proposed changes by certified mail and given two weeks to protest. If no protest is received, further notice will not be required;]

(C) [(D)] to change the point of diversion, except for applications under paragraph (2)(C) of this subsection, when the existing rate of diversion will not be increased and there are no interjacent water right holders [users] of record between the originally authorized point of diversion and the new one, or when interjacent water users agree in writing to the amendment. If written agreements are not obtained, interjacent water right holders [users] will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;

(D) [(E)] to add additional points of diversion, except for applications under paragraph (2)(C) of this subsection, where the existing rate of diversion will not be increased and there are no water right holders [users] of record between any originally authorized point of diversion and the new one to be added, or when interjacent water right holders [users] agree in writing to the amendment. If written agreements are not obtained, interjacent water users will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;

(E) [(F)] to increase the rate or period for diversion from a storage reservoir; and [.]

(F) to remove the authorization for storage in a reservoir that has not been constructed; If the water diverted under the right will be stored in an aquifer storage and recovery project for later retrieval and use as authorized by the original water right, provided that:

(i) the application does not request an increase in the diversion amount or rate; and

(ii) the executive director determines after an administrative review that the application will not cause a negative impact on other water rights or the environment that is greater than the effect the original permit would have had were the permit rights exercised to the full extent of the original permit.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §297.1 and §§297.41 - 297.43.

The amendments to §297.1 and §297.41 are adopted *without change* to the proposed text as published in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7618) and, therefore, these sections will not be republished. The amendments to §297.42 and §297.43 are adopted *with changes* as published in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7618) and, therefore, this section will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2019, the 86th Texas Legislature passed HB 720, which removes permitting barriers for water right applications for new appropriations and amendments that include: 1) storage in an aquifer storage and recovery project for later recovery for the ultimate authorized beneficial use under the appropriation (ASR) and 2) aquifer recharge (AR) projects. HB 720 adds aquifer recharge as a beneficial use of water and sets out a process for new appropriations for ASR and AR. These new appropriations are subject to notice and contested case hearings and TCEQ has 180 days to complete technical review of the applications. HB 720 also requires TCEQ to adopt rules providing for the considerations for determining water availability for new appropriations for ASR and AR.

HB 720 also addresses amendments to existing water rights for reservoirs that have not been constructed or existing reservoirs that have lost storage capacity because of sedimentation. A water right holder with a water right authorizing storage in a reservoir that has not been constructed can remove the storage authorization without notice and hearing if other water rights and the environment are not affected by the amendment and provided that the water diverted under the water right will be stored in an ASR.

A water right holder can request to remove the storage authorization and increase the amount of water to be diverted or the diversion rate, based on an evaporation credit, to increase the amount of water available for ASR. A water right holder can also amend a water right to replace storage capacity lost to sedimentation by changing the use or purpose of use for the appropriation from storage by diversion to storage as part of an ASR. These two types of amendments are subject to notice and contested case hearing.

This rulemaking implements changes to Chapter 297 required by HB 720.

As part of this rulemaking, the commission adopts amendments to 30 TAC Chapter 39, Public Notice; Chapter 281, Applications Processing, Chapter 295, Water Rights, Procedural; and Chapter 331, Underground Injection Control, to implement HB 720.

Section by Section Discussion

§297.1, Definitions

The commission adopts §297.1(5) to provide a definition of an AR project consistent with the definition in Texas Water Code (TWC), §27.201. The commission adopts this change to implement TWC, §11.157(a) which allows water to be appropriated for AR. The subsequent paragraphs are renumbered.

The commission adopts the deletion of the sentence in renumbered §297.1(52) stating that water injected into the ground for an ASR project remains state water. In response to comments, the commission confirms that its intent in removing this sentence is to not weigh in on water ownership characterization issues for water stored in an ASR.

§297.41, General Approval Criteria

The commission adopts amended §297.41(a)(3)(D) to implement TWC, §11.157(b)(1) and (c)(1) and §11.158(g)(2). These provisions require the commission to consider the requirements in TWC, §§11.134, 11.147, and 11.1471 in granting an application for a water right. Adopted amended §297.41(a)(3)(D) follows the language of TWC, §11.134.

§297.42, Water Availability

The commission adopts amended §297.42(b). The adopted changes to §297.42(b) implement TWC, §11.157(b)(1) and (c)(1) and (2), and §11.158(g)(2), which require the commission to consider the requirements in TWC, §§11.134, 11.147, and 11.1471 in

granting an application for a water right. This change is to clarify that the commission can condition new and amended water rights for ASR and AR to protect the adopted environmental flow standards in 30 TAC Chapter 298 (Environmental Flow Standards for Surface Water).

The commission adopts amended §297.42(d), as revised, to remove references to water availability for ASR and AR because water availability for these types of projects is specifically addressed in adopted §297.42(e). The commission also adopts amended §297.42(d) to clarify the non-consumptive instream uses for which water may be appropriated to ensure consistency with TWC, §11.0235(d) and §11.0237(a).

The commission adopts §297.42(e), as revised, to specify the water availability criteria for new appropriations for ASR and AR as required by TWC, §11.157(g). Adopted §297.42(e) states that new appropriations of water for these types of projects need not be continuously available as set out in TWC, §11.157(c)(3). The commission adopts the minimum water availability criteria for these types of projects, which is that the full amount of the request be available at least one year in the period of record of the commission's water availability model for the applicable river basin, and that this availability criteria would apply provided the project is viable for the intended purpose and the water can be beneficially used without waste. This availability criteria is consistent with the commission's current practice in reviewing applications that are not required to be based on historic normal streamflow.

The commission adopts §297.42(f) to specify water availability criteria for new appropriations of water based on an evaporation credit, as described by TWC, §11.158(c). The commission adopts that evaporation credits would apply to on-channel storage that has not been constructed. The volume of water diverted for an off-channel project likely already includes the amount of water that would be lost to evaporation and the commission does not anticipate changes to the volume of water diverted from the stream if a water right holder removes the authorization for an off-channel reservoir from its water right so that the water diverted under the right from a watercourse will be stored in an aquifer storage and recovery project for later retrieval and use as authorized by the original water right. Further, adding an ASR project for off-channel storage would not require an amendment to the underlying water right under TWC, §11.153, provided the terms of the water right are not changed and the water right holder obtains the required authorizations specified in that section. The commission proposes that water for these types of projects need not be continuously available. The commission further adopts that the evaporation credit be determined based on the evaporation calculations used in developing the terms of the original water right and cannot exceed the maximum annual modeled evaporation as determined in the commission's water availability model for the applicable river basin. The commission adopts these criteria for the protection of other water right holders. If an applicant for an amendment to a water right requests more water than would be available as an evaporation credit, then TWC, §11.157, and the availability criteria

under adopted §297.42(e) would apply to the additional volume of water requested in the application.

The commission adopts §297.42(g), as revised, to set out criteria for determining the volume of water available to a water right holder with a water right for a storage reservoir which has lost capacity due to sedimentation and who, pursuant to TWC, §11.158(d), amends the water right to change the use or purpose of use from storage by diversion to storage as part of an ASR project. The commission adopts that the volume of water be limited to the lesser of the calculated volume that has been lost to sedimentation and the volume of storage in an ASR project that is necessary to restore the storage capacity of the reservoir that has been lost to sedimentation. The commission adopts these criteria for the protection of other water right holders. If an applicant for an amendment to a water right requests more water than would be needed to restore the storage capacity lost to sedimentation, then TWC, §11.157, and the availability criteria under adopted §297.42(e) will apply to the additional volume of water requested in the application. The subsequent subsections will be re-lettered.

In response to comments, the commission adopts revised §297.42(d) to remove the words "or other similar beneficial uses" and to add the words "pursuant to TWC, §11.0237(a)." The commission revised §297.42(e) to clarify that this subsection applies to water appropriated for both storage in an ASR and for AR by adding the words "or for storage in an aquifer storage and recovery project before the water is recovered for

a beneficial use." Finally, the commission also revised §297.42(f) to cross-reference the definition of water that is continuously available described in §297.42(e) and revised §297.42(g)(2) to change "yield" to "storage capacity."

§297.43, Beneficial Uses

The commission adopts amended §297.43 to ensure consistency with TWC, §11.023. The commission adopts amended subsection (a) to insert the language in TWC, §11.023(a), and amended paragraph (10) by removing the existing language relating to instream uses, water quality, aquatic and wildlife habitat, or freshwater inflows to bays and estuaries because these uses are not specified in TWC, §11.023. To the extent the commission has the authority to appropriate water for any of those uses, they will be covered in §297.43(a)(11). Finally, the commission incorporates the language in TWC, §11.023(9) into §297.43(10) to clarify that water appropriated for AR is a beneficial use of water, as set out in TWC, §11.023.

Final Regulatory Impact Determination

The commission reviewed the 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. A "Major environmental rule" means a rule with a specific intent 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 rulemaking is to implement HB 720 which enacted requirements in TWC, Chapters 11 and 27, for ASR and AR projects.

Second, the adopted rulemaking does not meet the statutory definition of a "Major environmental rule" because the rulemaking will 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 there will be a significant cost to comply with the adopted rules because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendments will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted rules establish program requirements consistent with the requirements of HB 720, therefore, will not adversely impact in a material way the public health and safety of the state or a sector of the state.

Finally, the adopted rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law because there are no federal standards governing water rights; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because there are no delegation agreements or contracts between the commission and the federal government for the commission's water rights program; and is not based solely under the general powers of the agency, but is based specifically under HB 720, Section 4, as well as, under the other authority of the commission cited in the statutory authority section of this preamble.

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 rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted action implements legislative requirements in HB 720 for ASR or AR projects.

The commission determined that the adopted rules will be neither a statutory nor a constitutional taking of private real property. The adopted rules establish program requirements for ASR or AR applications consistent with the requirements of HB 720. It is not anticipated that there will be many ASR or AR applications and the cost of complying with the regulations is not expected to be substantial because no new fees are proposed. The adopted rules will not affect a landowner's rights in private real property because this rulemaking 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.

Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et. seq.*, and, therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22, and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the adopted rules include those contained in 31 TAC §501.33. The adopted rules require that the commission consider the adopted environmental flow standards in Chapter 298 in determining whether to grant an application and provide that the new water rights can be conditioned as appropriate to protect the adopted standards. The adopted standards provide adequate protection of the state's streams, rivers, bays, and estuaries. Since one of the purposes of the adopted rules is to ensure that the commission consider protection of coastal natural resources in considering applications for new or amended water rights that request additional water and can condition these water rights to ensure that coastal natural

resources are protected, the rules are consistent with CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies, because the proposed rules are consistent with these CMP goals and policies; do not create or have a direct or significant adverse effect on any coastal natural resource areas; and one of the purposes of the proposed rules is to ensure protection of coastal natural resources as the commission issues new or amended water rights that request additional water.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission received no comments regarding the CMP.

Public Comment

The commission offered a public hearing on January 7, 2020. The comment period closed on January 21, 2020. The commission received written comments from the Honorable Lyle Larson, Texas House of Representatives, Chairman of the House Committee on Natural Resources (Chairman Larson), and a joint comment letter from the National Wildlife Federation, Galveston Bay Foundation, Lone Star Chapter Sierra Club, and the Law Offices of Myron Hess, LLC (Joint Commenters).

The Joint Commenters suggested changes to the rule.

Response to Comments

Comment

Chairman Larson commented that he greatly appreciates the diligent work that TCEQ and its staff put into the rulemaking effort. Chairman Larson also thanked TCEQ for its expedited work on the rulemaking package for HB 720, the opportunity to participate in the rulemaking process and for TCEQ's consideration of his comments.

Response

The commission appreciates and acknowledges Chairman Larson's comments.

Comment

Chairman Larson requested that TCEQ be mindful of the distinction between AR projects, which themselves are defined as a beneficial purpose of use for which the TCEQ can appropriate state water and ASR projects in which the TCEQ may authorize state water to be stored prior to being later recovered for its ultimate authorized beneficial use under an appropriation.

Response

The commission agrees and, in response to this comment, revised the preamble to clarify the distinction between an appropriation of water for AR and an appropriation of water where ASR is a storage component for appropriated water

with an authorized beneficial use and made additional changes to support this clarification throughout the preamble.

Comment

Chairman Larson commented on the proposed change to §297.1(52) to delete the sentence characterizing ASR project water after injection as state water. It was the Chairman's understanding that it was not TCEQ's intent to weigh in on water ownership characterizations one way or another with the change. Chairman Larson indicated support for this position.

Response

The commission thanks Chairman Larson for his comment and responds that the preamble discussion was revised to confirm this intent.

Comment

Chairman Larson requested that the TCEQ consider adding a definition for water "continuously available" for purposes of proposed §297.42(f) and (g), or that these subsections be directly cross-referenced back to the definition found in §297.42(e) for purposes of clarity and to assist with interpretation for applications described in §297.42(f) and (g). Chairman Larson further requested that TCEQ revise the proposed changes to §297.42(d) - (f) to clarify that in addition to AR projects, new water appropriations that involve storage in an ASR project prior to recovery and beneficial

use may be based on water that is not continuously available as set forth in TWC, §11.157(a) and (c). Chairman Larson also requested that §297.42(g)(2) be revised to change the reference to "previously authorized yield lost to sedimentation" to "previously authorized storage capacity lost to sedimentation."

Response

The commission agrees and responds that it revised §297.42(e) to clarify that subsection (e) applies to water appropriated for both storage in an ASR and for AR. The commission also responds that it revised §297.42(f) and (g) to cross-reference the definition of water that is continuously available described in §297.42(e). The commission also revised §297.42(g)(2) to change "yield" to "storage capacity."

Comment

The Joint Commenters commented that the proposed language in §297.42(d) regarding availability prerequisites for instream uses creates unnecessary ambiguity, suggesting that continuous availability is required for protection of instream flows and freshwater inflows. The commenters understand the stated intent to be a reflection of the limitation imposed by TWC, §11.0237(a) and that a direct reference requiring consistency with TWC, §11.0237(a) would provide a clear acknowledgement of limitations on permits for certain types of non-consumptive instream uses without creating unnecessary ambiguity about water availability requirements for "other similar beneficial uses." The commenters noted that the preamble discussion

references TWC, §11.0235(d) which addresses policy about new water rights exclusively for instream flows. The commenters believe that TWC, §11.0237(a) provides a more straight-forward description of statutory limitations on water rights for flow protection. Including an explicit reference noting that non-consumptive instream uses consistent with TWC, §11.0237(a) need not be based on continuous availability avoids introducing unnecessary ambiguity. The commenters requested that the rule be revised as follows: "Projects that are not required to be based upon the continuous availability of historic, normal stream flow include, but are not limited to: conjunctive ground and surface water management projects; diversions or impoundments at time of above-normal stream flow (e.g., "scalping" operations) for seasonal or supplemental use; a system operation in conjunction with other water rights; non-consumptive instream uses that are consistent with TWC, §11.0237(a); or other similar type projects. The required availability of unappropriated water for these special type projects shall be determined on a case-by-case basis based upon whether the proposed project can be viable for the intended purposes and the water will be beneficially used without waste."

Response

The commission agrees that the change in the proposed rule was intended to avoid ambiguity by making it clear that TCEQ cannot issue a new permit for instream flows dedicated to environmental needs or bay and estuary inflows. In response to this comment, the commission revised §297.42(d) to include a cross-reference to

TWC, §11.0237(a) and to remove language related to other similar beneficial uses.

Comment

The Joint Commenters commented that the proposed availability criteria in §297.42(e) is too relaxed to establish any meaningful standard. The criteria would allow availability to be based solely on the single largest flood in the period of record even though the duration of that event may make capture of a significant amount of water infeasible and that the criteria should be that the full amount is available for capture at least one year in every ten. The commenters requested that the rule be revised as follows: "(e) New appropriations of water for recharge into an aquifer underlying this state, including aquifer recharge projects as defined by TWC, §27.201 may be for water that is not continuously available. Water availability for the full amount of water requested for these types of projects must, at a minimum, be available at least one year in every ten throughout the period of record based on the commission's water availability model for the applicable river basin, and, based on the predicted availability, the propose project must be viable for the intended purposes and the water must be beneficially used without waste."

Response

The commission respectfully disagrees with the comment and responds that the required availability of at least one year in the period of record provides a meaningful standard and is reasonable based on the type of projects described in

TWC, §11.157. As stated in the Section by Section Discussion of this preamble for §297.42(e), the required availability is consistent with the commission's current practice in reviewing applications that are not required to be based on historic normal streamflow. Furthermore, the requirement that the project be viable for the intended purpose will alleviate concerns about project feasibility. The rule was not changed in response to this comment although the rule was changed in response to other comments.

Comment

The Joint Commenters commented that the proposed removal of §297.43(10) creates unnecessary ambiguity about what the Water Code authorizes. These commenters suggest that, instead of repealing that provision, it should simply be amended to qualify it by explicitly requiring consistency with TWC, §11.0237(a). Water certainly can be stored or diverted for any of those purposes under an amended permit consistent with TWC, §11.0237(a). Water can be "appropriated" for any of those uses within the scope of the use of that term in TWC, §11.025, that right could be amended, consistent with TWC, §11.0237(a), to add, for example, environmental flow protection as an authorized use and use of the amended right for that purpose would complete the appropriation. Various new appropriations for aquatic and wildlife habitat also remain available under TWC, §11.0237(a). The commenters suggested the rule be revised as follows to ensure consistency with the limitations imposed by TWC, §11.0237(a) without introducing unnecessary ambiguity and uncertainty: "(a) To the extent State

water has not been set aside by the commission under Texas Water Code (TWC), §11.1471(a)(2), to meet downstream instream flow needs or freshwater inflow needs, State water may be appropriated, stored, or diverted for the following purposes of use: (1) domestic and municipal; (2) industrial; (3) agriculture; (4) mining and recovery of minerals; (5) hydroelectric power; (6) navigation; (7) recreation and pleasure; (8) public parks; (9) game preserves; (10) to the extent consistent with Section 11.0237(a), instream uses, water quality, aquatic and wildlife habitat, or freshwater inflows to bays and estuaries; (11) recharge into an aquifer underlying this state other than an aquifer described under subsection (b) of this section through surface infiltration or an aquifer recharge project as defined by TWC, §27.201; and (12) other beneficial purposes of use recognized by law."

Response

The commission agrees that a water right holder can add instream purposes of use to an existing water right. However, as stated in the Section by Section Discussion of this preamble, the purpose of the proposed changes to §297.43 was to track the language in TWC, §11.023. No changes were made in response to this comment.

SUBCHAPTER A: DEFINITIONS AND APPLICABILITY

§297.1

Statutory Authority

This amendment is adopted under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The adopted amendment implements HB 720.

§297.1. Definitions.

The following words and terms, when used in this chapter and in Chapters 288 and 295 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements; and Water Rights, Procedural, respectively), shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agriculture or agricultural--Any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management;

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure; and

(G) aquaculture as defined in Texas Agriculture Code, §134.001, which reads "'aquaculture' or 'fish farming' means the business of producing and selling cultured species raised in private facilities. Aquaculture or fish farming is an agricultural activity."

(2) Agricultural use--Any use or activity involving agriculture, including irrigation.

(3) Appropriations--The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water.

(4) Appropriative right--The right to impound, divert, store, take, or use a specific quantity of state water acquired by law.

(5) Aquifer recharge project--A project involving the intentional recharge of an aquifer by means of an injection well or other means of infiltration, as described in Texas Water Code, §27.201(1).

(6) [(5)] Aquifer Storage and Recovery Project--A project involving the injection of water into a geologic formation for the purpose of subsequent recovery and beneficial use by the project operator.

(7) [(6)] Baseflow or normal flow--The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, agricultural, or other uses of ground or surface waters may be included at times.)

(8) [(7)] Beneficial inflows--Freshwater inflows providing for a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(9) [(8)] Beneficial use--Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

(10) [(9)] Certificate of adjudication--An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of Texas Water Code, §11.323, or the final judgment and decree in State of Texas v. Hidalgo County Water Control and Improvement District No. 18, 443 S.W.2d 728 (Texas Civil Appeals - Corpus Christi 1969, writ ref. n.r.e.).

(11) [(10)] Certified filing--A declaration of appropriation or affidavit which was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, §14, as amended.

(12) [(11)] Claim--A sworn statement filed under Texas Water Code, §11.303.

(13) [(12)] Commencement of construction--An actual, visible step beyond planning or land acquisition, which forms the beginning of the on-going (continuous) construction of a project in the manner specified in the approved plans and specifications, where required, for that project. The action must be performed in good faith with the bona fide intent to proceed with the construction.

(14) [(13)] Conservation--Those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve

the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(15) [(14)] Conserved water--That amount of water saved by a water right holder through practices, techniques, or technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from the storage, transportation, distribution, or application of the water. Conserved water does not mean water made available simply through its non-use without the use of such practices, techniques, or technologies.

(16) [(15)] Dam--Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam. A structure used only for diverting water from a watercourse by gravity is a diversion dam.

(17) [(16)] Diffused surface water--Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)

(18) [(17)] District--Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(19) [(18)] Domestic use--Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

(20) [(19)] Drought of record--The historic period of record for a watershed in which the lowest flows were known to have occurred based on naturalized streamflow.

(21) [(20)] Firm yield--That amount of water, that the reservoir could have produced annually if it had been in place during the worst drought of record. In performing this simulation, naturalized streamflows will be modified as appropriate to account for the full exercise of upstream senior water rights is assumed as well as the passage of sufficient water to satisfy all downstream senior water rights valued at their full authorized amounts and conditions as well as the passage of flows needed to meet all applicable permit conditions relating to instream and freshwater inflow requirements.

(22) [(21)] Groundwater--Water under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.

(23) [(22)] Habitat Mitigation--Actions taken to off-set anticipated adverse environmental impacts from a proposed project. Such actions and their sequence include:

(A) avoiding the impact altogether by not taking a certain action or parts of an action or pursuing a reasonably practicable alternative;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(24) [(23)] Hydropower use--The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(25) [(24)] Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric, but does not include agricultural use.

(26) [(25)] Instream use--The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other instream use recognized by law. An instream use is a beneficial use of water. Water necessary to protect instream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

(27) [(26)] Irrigation--The use of water for the irrigation of crops, trees, and pasture land, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(28) [(27)] Irrigation water efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include but are not limited to evapotranspiration needs for vegetative maintenance and growth and salinity management and leaching requirements associated with irrigation.

(29) [(28)] Livestock use--The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in Texas Agriculture Code, §142.001, and the terms game animals and fur-bearing animals are to be used as defined in Texas Parks and Wildlife Code, §63.001 and §71.001, respectively.

(30) [(29)] Mariculture--The propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.

(31) [(30)] Marine seawater--Water that is derived from the Gulf of Mexico.

(32) [(31)] Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(33) [(32)] Municipal per capita water use--The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(34) [(33)] Municipal use--

(A) The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, other public or recreational spaces; or

(B) the use of reclaimed water in lieu of potable water for the preceding purposes; or

(C) the use of return flows authorized pursuant to Texas Water Code, §11.042, in lieu of potable water for the preceding purposes. Return flows used for human consumption as defined in §290.38(34) of this title (relating to Definitions) must be of a quality suitable for the authorized beneficial use as may be required by applicable commission rules; or

(D) the application of municipal sewage effluent on land, under a Texas Water Code, Chapter 26, permit where:

(i) the application site is land owned or leased by the Chapter 26 permit holder; or

(ii) the application site is within an area for which the commission has adopted a no-discharge rule.

(35) [(34)] Navigable stream--By law, Texas Natural Resources Code, §21.001(3), any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more, at which point it becomes statutorily nonnavigable.

(36) [(35)] Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(37) [(36)] One-hundred-year flood--The flood peak discharge of a stream, based upon statistical data, which would have a 1.0% chance of occurring in any given year.

(38) [(37)] Permit--The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.

(39) [(38)] Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful or detrimental to humans, animal life, vegetation, or property, or the public health, safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(40) [(39)] Priority--As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law.

(41) [(40)] Reclaimed water--Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or agricultural tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized beneficial use.

(42) [(41)] Recreational use--The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including aquatic and wildlife enjoyment, and aesthetic land enhancement of a subdivision, golf course, or similar development.

(43) [(42)] Register--The *Texas Register*.

(44) [(43)] Reservoir system operations--The coordinated operation of more than one reservoir or a reservoir in combination with a direct diversion facility in order to optimize available water supplies.

(45) [(44)] Return water or return flow--That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(46) [(45)] Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(47) [(46)] River basin--A river or coastal basin designated by the Texas Water Development Board as a river basin under Texas Water Code, §16.051. The term does not include waters originating in bays or arms of the Gulf of Mexico.

(48) [(47)] Runoff--That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(49) [(48)] Secondary use--The reuse of state water for a purpose after the original, authorized use.

(50) [(49)] Sewage or sewage effluent--Water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with any groundwater infiltration and surface waters with which it may be commingled.

(51) [(50)] Spreader dam--A levee-type embankment placed on alluvial fans or within a flood plain of a watercourse, common to land use practices, for the purpose of overland spreading of diffused waters and overbank flows.

(52) [(51)] State water--The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, and watercourse in the state. State water also includes water which is imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state. [Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water.] State water does not include percolating groundwater; nor does it include diffuse surface rainfall runoff, groundwater seepage, or springwater before it reaches a watercourse.

(53) [(52)] Stormwater or floodwater--Water flowing in a watercourse as the result of recent rainfall.

(54) [(53)] Streamflow--The water flowing within a watercourse.

(55) [(54)] Surplus water--Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law. Water that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

(56) [(55)] Unappropriated water--The amount of state water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.

(57) [(56)] Underflow of a stream--Water in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(58) [(57)] Waste--The diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system, or the diversion or use of water in any manner that causes or threatens to cause pollution of

water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance with all applicable rules and standards prior to its discharge into or adjacent to water in the state so that it may be subsequently beneficially used.

(59) [(58)] Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for preventing or reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate planning document or may be contained within another water management document(s).

(60) [(59)] Water in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(61) [(60)] Watercourse--A definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter with some degree of regularity, depending on the characteristics of the sources.)

(62) [(61)] Water right--A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water.

(63) [(62)] Watershed--A term used to designate the area drained by a stream and its tributaries, or the drainage area upstream from a specified point on a stream.

(64) [(63)] Water supply--Any body of water, whether static or moving, either on or under the surface of the ground, available for beneficial use on a reasonably dependable basis.

(65) [(64)] Wetland--An area (including a swamp, marsh, bog, prairie pothole, playa, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition is saturated, flooded, or ponded long enough during a growing

season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including, but not limited to, impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts. This definition does not apply to man-made wetlands described under this subparagraph constructed or created on or after August 28, 1989. If this definition conflicts with the federal definition in any manner, the federal definition prevails.

SUBCHAPTER E: ISSUANCE AND CONDITIONS OF WATER RIGHTS

§§297.41 - 297.43

Statutory Authority

These amendments are adopted under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and 11.158 and TWC, Chapter 27, Subchapter H.

The adopted amendments implement HB 720.

§297.41. General Approval Criteria.

(a) Except as otherwise provided by this chapter, the commission shall grant an application for a water right only if:

(1) the application conforms to the requirements prescribed by Chapter 295 of this title (relating to Water Rights, Procedural) and is accompanied by the prescribed fee;

(2) unappropriated water is available in the source of supply;

(3) the proposed appropriation:

(A) is intended for a beneficial use;

(B) does not impair existing water rights or vested riparian rights;

(C) is not detrimental to the public welfare;

(D) considers any applicable environmental flow standards established under Texas Water Code (TWC), §11.1471 and, if applicable, the assessments performed under TWC [Texas Water Code (TWC)], §§11.147(d) and (e), and 11.150 - 11.152; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in

which the proposed appropriation is located, unless the commission determines that new, changed, or unaccounted for conditions warrant waiver of this requirement;

(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 of this title (relating to Definitions); and

(5) the applicant has completed and returned all Texas Water Development Board surveys of groundwater and surface water use required since September 1, 2001 under TWC, §16.012.

(b) Beginning January 5, 2002, the commission will not issue a water right for municipal purposes in a region that does not have an approved regional water plan in accordance with TWC, §16.053(i) unless the commission determines that new, changed, or unaccounted for conditions warrant the waiver of this requirement.

§297.42. Water Availability.

(a) Except as provided by Texas Water Code (TWC), §11.1381, and §297.19 of this title (relating to Term Permit under [Under] Texas Water Code, §11.1381 [§§11.1381 and 11.153, 11.155]), an application for a new or increased appropriation will be denied unless there is a sufficient amount of unappropriated water available for

a sufficient amount of the time to make the proposed project viable and ensure the beneficial use of water without waste.

(b) A new water right may be conditioned as appropriate to protect any applicable environmental flow standards as described in Chapter 298 of this title (relating to Environmental Flow Standards for Surface Water), and, if applicable, instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries as provided by TWC, §§11.147, 11.150, 11.152, and 16.059.

(c) For the approval of an application for a direct diversion from a stream without sufficient on or off channel water storage facilities for irrigation, approximately 75% of the water requested must be available approximately 75% of the time when distributed on a monthly basis and based upon the available historic stream flow record. Lower availability percentages may be acceptable if the applicant can demonstrate that a long-term, reliable, alternative source or sources of water of sufficient quantity and quality are economically available to the applicant to make the proposed project viable and ensure the beneficial use of state water without waste.

(d) Projects that are not required to be based upon the continuous availability of historic, normal stream flow include, but are not limited to: [the artificial recharge of the Edwards Aquifer under TWC, §11.023(c);] conjunctive ground and surface water management projects [such as aquifer storage and recovery projects]; diversions or

impoundments at times of above-normal stream flow (e.g., "scalping" operations) for seasonal or supplemental use; a system operation in conjunction with other water rights; non-consumptive instream uses except for instream flows dedicated to environmental needs or inflows to the state's bay and estuary systems, pursuant to TWC, §11.0237(a) ~~or other similar beneficial uses~~; or other similar type projects. The required availability of unappropriated water for these special type projects shall be determined on a case-by-case basis based upon whether the proposed project can be viable for the intended purposes and the water will be beneficially used without waste.

(e) New appropriations of water for recharge into an aquifer underlying this state, including aquifer recharge projects as defined by TWC, §27.201 or for storage in an aquifer storage and recovery project before the water is recovered for a beneficial use may be for water that is not continuously available. Water availability for the full amount of water requested for these types of projects must, at a minimum, be available at least one year in the period of record based on the commission's water availability model for the applicable river basin, and the proposed project must be viable for the intended purposes and the water must be beneficially used without waste.

(f) New appropriations of water based on an increase in the amount of water diverted or the rate of diversion resulting from an evaporation credit under TWC, §11.158(c) may be for water that is not continuously available, as defined in subsection

(e) of this section. Water availability for projects under this subsection that request an increase in the amount of water diverted or the rate of diversion from an on-channel reservoir that has not been constructed shall be based on the evaporation calculations that were used in developing the terms of the water right for which the amendment is sought and cannot exceed the maximum annual modeled evaporation as determined in the commission's water availability model for the applicable river basin.

(g) The volume of water available for conversion of a water right that authorizes storage in a reservoir that has lost storage capacity because of sedimentation to storage as part of an aquifer storage and recovery project, as described in TWC, §11.158(d), does not have to be continuously available, as defined in subsection (e) of this section. The volume of water that can be converted to storage in an aquifer storage and recovery project under this subsection is limited to the lesser of:

(1) the storage volume that is demonstrated to have been lost to sedimentation, as determined by a survey performed by the Texas Water Development Board; or

(2) the volume of storage in the aquifer storage and recovery project that would restore the amount of previously authorized storage capacity yield lost to sedimentation.

(h) [(e)] For an application for an on-channel storage facility to be authorized for domestic or municipal water use, the proposed diversion right of the reservoir must be equal to its firm yield. The purpose of this limitation is to ensure a secure and dependable source of water supply for uses necessary to protect the public health, safety, and welfare (see also [30 TAC] §290.41(b) of this title (relating to Water Sources) requiring public water systems to have a "safe" yield capable of supplying the maximum daily demands during extended periods of peak usage and "critical hydrologic conditions"). Such reservoir may be authorized in excess of its firm yield when the implementation of a drought management plan or alternative sources of water supply such as groundwater, other reservoir systems, or other means are available to satisfy water needs during drought periods when the reservoir's normal supply capabilities would be exceeded.

(i) [(f)] Except for an application for an emergency, temporary, seasonal, or term permit, or as provided by this section, the commission may require an applicant to provide storage sufficient to yield the requested annual diversion.

(j) [(g)] In order to make the optimum beneficial use of available water, a water right may be granted based upon the availability of return flows or discharges. However, a water right granted upon return flows or discharges that may cease in the future because of new or increased direct reuse (i.e., the lawful reuse of water before it is returned or discharged into the stream) or that may cease for other lawful reasons

will be granted with the express provision that the water available for the water right is dependent upon potentially interruptible return flows or discharges.

§297.43. Beneficial Uses.

(a) To the extent that State water has not been set aside by the commission under Texas Water Code (TWC), §11.1471(a)(2), to meet downstream instream flow needs or freshwater inflow needs; State water may be appropriated, stored, or diverted for the following purposes of use:

- (1) domestic and municipal;
- (2) industrial;
- (3) agriculture;
- (4) mining and the recovery of minerals;
- (5) hydroelectric power;
- (6) navigation;
- (7) recreation and pleasure;

(8) public parks;

(9) game preserves;

(10) recharge into an aquifer underlying this state other than an aquifer described under subsection (b) of this section through surface infiltration or an aquifer recharge project as defined by TWC, §27.201 [instream uses, water quality, aquatic and wildlife habitat, or freshwater inflows to bays and estuaries]; and

(11) other beneficial purposes of use recognized by law.

(b) Unappropriated storm water and floodwater may be appropriated to recharge freshwater bearing sands and aquifers in the portion of the Edwards Aquifer located within Kinney, Uvalde, Medina, Bexar, Comal, and Hays Counties if it can be established by expert testimony that an unreasonable loss of state water will not occur and that the water can be withdrawn at a later time for application to a beneficial use. The normal or ordinary flow of a stream or watercourse may never be appropriated, diverted, or used by a water right holder for this recharge purpose.

(c) The amount of water appropriated for each purpose listed under this section shall be specifically appropriated for that purpose. The commission may authorize the

appropriation of a single amount or volume of water for more than one purpose of use. In the event that a single amount or volume of water is appropriated for more than one purpose of use, the total amount of water actually diverted for all of the authorized purposes may not exceed the total amount of water appropriated.

(d) State policy regarding preferences for certain type uses provided by Texas Water Code (TWC), §11.024, does not alter the basic principle of priority based upon first in time established under TWC, §11.027. Rather, such preferences will be used, in part, by the commission in determining which competing new uses will be granted water rights as provided by TWC, §11.123.

(e) The water of any arm, inlet, or bay of the Gulf of Mexico may be changed from salt water to sweet or fresh water and held or stored by dams, dikes, or other structures and may be taken or diverted for any purpose authorized by this chapter.

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §§331.2, 331.7, 331.9, and 331.131 and new §§331.262 - 331.267.

The amendments to §§331.2, 331.7, 331.9, and 331.131, and new §§331.264, 331.265, and 331.267 are adopted *without change* to the proposed text as published in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7626) and, therefore, these sections will not be republished. New §§331.262, 331.263, and 331.266 are adopted *with change* to the proposed text as published in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7626) and, therefore, these sections will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking implements House Bill (HB) 720, 86th Texas Legislature, 2019, addressing the commission's regulation of aquifer recharge (AR) projects in Texas. HB 720 adds Subchapter H, Aquifer Recharge Projects, to the Texas Water Code (TWC), Chapter 27. The adopted amendments add definitions, authorization mechanisms, standards, and requirements for recharge injection wells associated with AR projects.

As part of this rulemaking, the commission adopts the amendments to 30 TAC Chapter 39, Public Notice; Chapter 281, Applications Processing; Chapter 295, Water Rights, Procedural; and Chapter 297, Water Rights, Substantive.

Section by Section Discussion

The commission adopts various stylistic, non-substantive changes, such as grammatical corrections and correct uses of references. These changes are non-substantive and are not specifically discussed in this preamble.

§331.2, Definitions

The commission adopts §331.2(7)(A) - (E) to define "Aquifer recharge project" to conform to HB 720 and TWC, §27.201(1). The subsequent definitions are renumbered accordingly.

The commission adopts the amendment of renumbered §331.2(51) and (56) to correct the cross-reference from TWC, §27.023 to TWC, §27.025.

The commission adopts the amendment of renumbered §331.2(93) to add "or an aquifer recharge project" to the definition to conform to TWC, §27.201(3).

The commission adopts §331.2(96) to define "Recharge injection well" to conform to TWC, §27.201(4). The subsequent definitions will be renumbered.

§331.7, Permit Required

The commission adopts amended §331.7(h) to add "or an aquifer recharge (AR) project" to the types of projects for which Class V injection wells may be authorized by

rule, individual permit or general permit, to conform to TWC, §27.203(a).

§331.9, Injection Authorized by Rule

The commission adopts amended §331.9(b)(2)(E) to include the reference to adopted Subchapter O (Additional Requirements for Class V Injection Wells Associated with Aquifer Recharge Projects) to implement newly adopted TWC, Chapter 27, Subchapter H.

§331.131, Applicability

The commission adopts amended §331.131 to include reference to adopted Subchapter O to implement newly adopted TWC, Chapter 27, Subchapter H.

§331.262, Applicability

The commission adopts new §331.262 to explain that the requirements of current Chapter 331, Subchapter H and adopted new Chapter 331, Subchapter O are both applicable to all AR projects that use a recharge injection well, as established by TWC, §§27.201 - 27.207.

§331.263, Area of Review

The commission adopts new §331.263 to provide the standards applicable to Class V AR projects that use a recharge injection well for the identification and review of activities in the project area that may impact or be impacted by the AR project as

established by TWC, §27.203(b) and §27.204(a).

§331.264, Construction and Closure Standards

The commission adopts new §331.264 to provide the construction and closure standards applicable to AR projects that use a recharge injection well as established by TWC, §27.204(a).

§331.265, Operating Requirements

The commission adopts new §331.265(a) - (e) to provide the operating requirements applicable to AR projects that use a recharge injection well, with the primary objectives of preventing the projects from being operated in a manner that endangers underground sources of drinking water and preventing movement of injected fluid into unauthorized zones, as established by TWC, §27.203(b) and §27.204(a).

The commission adopts new §331.265(f) to require all AR injection wells be installed with a flow meter to measure the volume of water injected, a requirement established by TWC, §27.205.

§331.266, Monitoring and Reporting Requirements

The commission adopts new §331.266 to specify the operating functions to be monitored, the monitoring and reporting frequency, and the elements to be reported to the executive director for all AR projects that use a recharge injection well, as

established by TWC, §27.205 and §27.206.

§331.267, Additional Requirements

The commission adopts new §331.267 to provide additional requirements applicable to AR projects that use a recharge injection well. These requirements include matters to be considered by the commission, as specified by TWC, §27.203(b), and information to be submitted to the executive director by the owner or operator of the AR project. This specific information is necessary to evaluate the requirements established by TWC, §27.203(b) and §27.204(a), and includes information on construction, logging and testing results, and modeling results.

Final Regulatory Impact Determination

The commission reviewed the 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. A "Major environmental rule" means a rule with a specific intent 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 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 rulemaking is to implement HB 720 which enacted requirements in TWC, Chapters 11 and 27, for ASR and AR projects.

Second, the rulemaking does not meet the statutory definition of a "Major environmental rule" because the rulemaking will 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 there will be a significant cost to comply with the adopted rules because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted rulemaking establishes program requirements consistent with the requirements of HB 720, therefore, will not adversely affect in a material way the public health and safety of the state or a sector of the state.

Finally, the rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically

required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law for the commission's Underground Injection Control Program authorized for the state of Texas under the federal Safe Drinking Water Act; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because it is consistent with the requirements of the commission's Underground Injection Control Program; and is not based solely under the general powers of the agency, but is based specifically under TWC, §27.019, and HB 720, Section 4, as well as, under the other authority of the commission cited in the statutory authority section of this preamble.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission received no comments on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted action implements legislative requirements in HB 720 for aquifer storage or AR projects.

The commission determined that the adopted rules will be neither a statutory nor a constitutional taking of private real property. The adopted rules establish program requirements for AR projects consistent with HB 720. It is not anticipated that there will be many AR project applications and the cost of complying with the regulations is not expected to be substantial because no new fees are proposed. The adopted rules will not affect a landowner's rights in private real property because this rulemaking 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.

Therefore, the adopted rules do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(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 adopted rulemaking is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission received no comments regarding the CMP.

Public Comment

The commission offered a public hearing on January 7, 2020. The comment period closed on January 21, 2020. The commission received a joint comment letter from the National Wildlife Federation, Galveston Bay Foundation, Lone Star Chapter Sierra Club, and the Law Offices of Myron Hess, LLC (Joint Commenters).

The Joint Commenters all suggested changes to the rule.

Response to Comments

Comment

The Joint Commenters commented that the proposed definition of "Aquifer recharge project" in §331.2(7) is so broad that it could include an ASR project, creating confusion and ambiguity about which requirements apply to a project.

Response

The commission is not changing the definition of "Aquifer recharge project" in response to the comment because the definition of "Aquifer recharge project" in the rule is the same definition established by the legislature in TWC, §27.201. The commission does not expect confusion about whether a particular project is considered an "aquifer recharge project" or an ASR project. Separate and distinctive requirements apply to ASR projects and AR projects as established by the legislature in TWC, Chapter 27, Subchapters G and H. For ASR projects, there is an intent of the injection well owner/operator to retrieve the water injected for subsequent use by that owner/operator. ASR projects require quantification and demonstration that the owner/operator can recover the injected water. For AR projects, the owner/operator desires the recharge of an aquifer, but does not necessarily have the intent to retrieve the water injected for subsequent use by that owner/operator. The commission expects that prospective operators will decide early in the planning stages of a project whether to seek authorization as an ASR project or as an AR project. The commission would not apply the requirements of an AR project to an ASR project.

Comment

The Joint Commenters commented that §331.262 uses the undefined term "Class V aquifer recharge projects," and request that applicability in §331.262 exclude ASR projects.

Response

The commission agrees that the term "Class V aquifer recharge projects" used at §331.262 is not specifically defined in the rule. The commission has revised §331.262 to use terms defined in the rule, and to state the requirements of Subchapter O do not apply to ASR projects.

Comment

The Joint Commenters commented that the proposed area of review for an AR injection well field determined by a "radius of at least 1/2 mile from the centroid of the AR injection well field" creates ambiguity; that using the centroid as the starting point for the 1/2-mile radius would not create comparable protections in an area with more than one injection well; that the review area for a large well field might not include all the AR injection wells in the well field if the well field radius is greater than 1/2 mile, and might not address all potential impacts. The Joint Commenters provided suggested language.

Response

The commission agrees that the area of review for an AR injection well field in proposed §331.263 might not include all the AR injection wells in that well field if the well field radius is greater than 1/2 mile. The commission has revised §331.263 to address this concern. The commission acknowledges that 1/2-mile radius might not address all potential impacts, however, §331.263 uses the term "at least 1/2

mile" so that the general permit, individual permit, or authorization can require a greater radius, if that is required to address all potential impacts.

Comment

The Joint Commenters requested that a specific calendar date be specified as the due date for the written report required in §331.266 and suggested March 1.

Response

The commission agrees with this comment and has amended §331.266 to include a specific calendar date, March 1, as the due date for the written report.

Comment

The Joint Commenters requested that a specific length of time be specified as the due date for the water-quality results required in §331.266 and suggested 30 days from the date of receipt.

Response

The commission agrees with this comment and has amended §331.266 to include a specific length of time as the due date, within 60 days of sampling, for the water-quality results.

SUBCHAPTER A: GENERAL PROVISIONS

§§331.2, 331.7, 331.9

Statutory Authority

These amendments are adopted under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §27.003, which allows the commission to use all reasonable methods to implement its policy of maintaining the quality of fresh water in the state of Texas; TWC, §27.011, which establishes the commission's jurisdiction over certain injection well permits; TWC, §27.019, which specifically authorizes the commission to adopt rules and procedures necessary for performance of its powers, duties, and functions under TWC, Chapter 27; and, House Bill (HB) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The adopted amendments implement HB 720.

§331.2. Definitions.

General definitions can be found in Chapter 3 of this title (relating to Definitions). The following words and terms, when used in this chapter, have the following meanings.

(1) Abandoned well--A well which has been permanently discontinued from use or a well for which, after appropriate review and evaluation by the commission, there is no reasonable expectation of a return to service.

(2) Activity--The construction or operation of any of the following:

(A) an injection well for disposal of waste;

(B) an injection or production well for the recovery of minerals;

(C) a monitor well at a Class III injection well site;

(D) pre-injection units for processing or storage of waste; or

(E) any other class of injection well regulated by the commission.

(3) Affected person--Any person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the proposed injection operation for which a permit is sought.

(4) Annulus--The space in the wellbore between the injection tubing and the long string casing and/or liner.

(5) Annulus pressure differential--The difference between the annulus pressure and the injection pressure in an injection well.

(6) Aquifer--A geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

(7) Aquifer recharge project--A project involving the intentional recharge of an aquifer by means of an injection well authorized under this chapter or other means of infiltration, including actions designed to:

(A) reduce declines in the water level of the aquifer;

(B) supplement the quantity of groundwater available;

(C) improve water quality in an aquifer;

(D) improve spring flows and other interactions between groundwater and surface water; or

(E) mitigate subsidence.

(8) [(7)] Aquifer restoration--The process used to achieve or exceed water quality levels established by the commission for a permit/production area.

(9) [(8)] Aquifer storage and recovery--The injection of water into a geologic formation, group of formations, or part of a formation that is capable of underground storage of water for later retrieval and beneficial use.

(10) [(9)] Aquifer storage and recovery injection well--A Class V injection well used for the injection of water into a geologic formation as part of an aquifer storage and recovery project.

(11) [(10)] Aquifer storage and recovery production well--A well used for the production of water from a geologic formation as part of an aquifer storage and recovery project.

(12) [(11)] Aquifer storage and recovery project--A project involving the injection of water into a geologic formation for the purpose of subsequent recovery and beneficial use by the project operator.

(13) [(12)] Area of review--The area surrounding an injection well described according to the criteria set forth in §331.42 of this title (relating to Area of Review) or in the case of an area permit, the project area plus a circumscribing area the width of which is either 1/4 mile or a number calculated according to the criteria set forth in §331.42 of this title.

(14) [(13)] Area permit--A permit that authorizes the construction and operation of two or more similar injection, production, or monitoring wells used in operations associated with Class III well activities within a specified area.

(15) [(14)] Artificial liner--The impermeable lining of a pit, lagoon, pond, reservoir, or other impoundment, that is made of a synthetic material such as butyl rubber, chlorosulfonated polyethylene, elasticized polyolefin, polyvinyl chloride (PVC), other manmade materials, or similar materials.

(16) [(15)] Baseline quality--The parameters and their concentrations that describe the local groundwater quality of an aquifer prior to the beginning of injection operations.

(17) [(16)] Baseline well--A well from which groundwater is analyzed to define baseline quality in the permit area (regional baseline well) or in the production area (production area baseline well).

(18) [(17)] Bedded salt--A geologic formation, group of formations, or part of a formation consisting of non-domal salt that is layered and may be interspersed with non-salt sedimentary materials such as anhydrite, shale, dolomite, and limestone. The salt layers themselves often contain significant impurities.

(19) [(18)] Bedded salt cavern disposal well--A well or group of wells and connecting storage cavities which have been created by solution mining, dissolving or excavation of salt bearing deposits or other geological formations and subsequently developed for the purpose of disposal of nonhazardous drinking water treatment residuals.

(20) [(19)] Blanket material or blanket pad--A fluid placed within a salt cavern that is lighter than the water in the cavern and will not dissolve the salt or any mineral impurities that may be contained within the salt. The function of the blanket is to prevent unwanted leaching of the salt cavern roof, prevent leaching of salt from around the cemented casing, and to protect the cemented casing from internal corrosion. Blanket material typically consists of crude oil, mineral oil, or some fluid

possessing similar noncorrosive, nonsoluble, low density properties. The blanket material is placed between the salt cavern's outermost hanging string and innermost cemented casing.

(21) [(20)] Buffer area--The area between any mine area boundary and the permit area boundary.

(22) [(21)] Caprock--A geologic formation typically overlying the crest and sides of a salt stock. The caprock consists of a complex assemblage of minerals including calcite (CaCO_3), anhydrite (CaSO_4), and accessory minerals. Caprocks often contain lost circulation zones characterized by rock layers of high porosity and permeability.

(23) [(22)] Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(24) [(23)] Casing--Material lining used to seal off strata at and below the earth's surface.

(25) [(24)] Cement--A substance generally introduced as a slurry into a wellbore which sets up and hardens between the casing and borehole and/or between casing strings to prevent movement of fluids within or adjacent to a borehole, or a similar substance used in plugging a well.

(26) [(25)] Cementing--The operation whereby cement is introduced into a wellbore and/or forced behind the casing.

(27) [(26)] Cesspool--A drywell that receives untreated sanitary waste containing human excreta, and which sometimes has an open bottom and/or perforated sides.

(28) [(27)] Commercial facility--A Class I permitted facility, where one or more commercial wells are operated.

(29) [(28)] Commercial underground injection control (UIC) Class I well facility--Any waste management facility that accepts, for a charge, hazardous or nonhazardous industrial solid waste for disposal in a UIC Class I injection well, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(30) [(29)] Commercial well--An underground injection control Class I injection well which disposes of hazardous or nonhazardous industrial solid wastes, for a charge, except for a captured facility or a facility that accepts waste only from facilities owned or effectively controlled by the same person.

(31) [(30)] Conductor casing or conductor pipe--A short string of large-diameter casing used to keep the top of the wellbore open during drilling operations.

(32) [(31)] Cone of influence--The potentiometric surface area around the injection well within which increased injection zone pressures caused by injection of wastes would be sufficient to drive fluids into an underground source of drinking water or freshwater aquifer.

(33) [(32)] Confining zone--A part of a formation, a formation, or group of formations between the injection zone and the lowermost underground source of drinking water or freshwater aquifer that acts as a barrier to the movement of fluids out of the injection zone.

(34) [(33)] Contaminant--Any physical, biological, chemical, or radiological substance or matter in water.

(35) [(34)] Control parameter--Any physical parameter or chemical constituent of groundwater monitored on a routine basis used to detect or confirm the presence of mining solutions in a designated monitor well. Monitoring includes measurement with field instrumentation or sample collection and laboratory analysis.

(36) [(35)] Desalination brine--The waste stream produced by a desalination operation containing concentrated salt water, other naturally occurring impurities, and additives used in the operation and maintenance of a desalination operation.

(37) [(36)] Desalination concentrate--Same as desalination brine.

(38) [(37)] Desalination operation--A process which produces water of usable quality by desalination.

(39) [(38)] Disposal well--A well that is used for the disposal of waste into a subsurface stratum.

(40) [(39)] Disturbed salt zone--Zone of salt enveloping a salt dome cavern, typified by increased values of permeability or other induced anomalous conditions relative to undisturbed salt which lies more distant from the salt dome cavern, and is the result of mining activities during salt dome cavern development and

which may vary in extent through all phases of a cavern including the post-closure phase.

(41) [(40)] Drilling mud--A heavy suspension used in drilling an injection well, introduced down the drill pipe and through the drill bit.

(42) [(41)] Drinking water treatment residuals--Materials generated, concentrated or produced as a result of treating water for human consumption.

(43) [(42)] Drywell--A well, other than an improved sinkhole or subsurface fluid distribution system, completed above the water table so that its bottom and sides are typically dry except when receiving fluids.

(44) [(43)] Enhanced oil recovery project (EOR)--The use of any process for the displacement of oil from the reservoir other than primary recovery and includes the use of an immiscible, miscible, chemical, thermal, or biological process. This term does not include pressure maintenance or water disposal projects.

(45) [(44)] Excursion--The movement of mining solutions, as determined by analysis for control parameters, into a designated monitor well.

(46) [(45)] Existing injection well--A Class I well which was authorized by an approved state or United States Environmental Protection Agency-administered program before August 25, 1988, or a well which has become a Class I well as a result of a change in the definition of the injected waste which would render the waste hazardous under §335.1 of this title (relating to Definitions).

(47) [(46)] Fluid--Material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

(48) [(47)] Formation--A body of rock characterized by a degree of lithologic homogeneity which is prevailingly, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

(49) [(48)] Formation fluid--Fluid present in a formation under natural conditions.

(50) [(49)] Fresh water--Water having bacteriological, physical, and chemical properties which make it suitable and feasible for beneficial use for any lawful purpose.

(A) For the purposes of this chapter, it will be presumed that water is suitable and feasible for beneficial use for any lawful purpose only if:

(i) it is used as drinking water for human consumption; or

(ii) the groundwater contains fewer than 10,000 milligrams per liter (mg/L) total dissolved solids; and

(iii) it is not an exempted aquifer.

(B) This presumption may be rebutted upon a showing by the executive director or an affected person that water containing greater than or equal to 10,000 mg/L total dissolved solids can be put to a beneficial use.

(51) [(50)] General permit--A permit issued under the provisions of this chapter authorizing the disposal of nonhazardous desalination concentrate and nonhazardous drinking water treatment residuals as provided by Texas Water Code, §27.025 [§27.023].

(52) [(51)] Groundwater--Water below the land surface in a zone of saturation.

(53) [(52)] Groundwater protection area--A geographic area (delineated by the state under federal Safe Drinking Water Act, 42 United States Code, §300j-13) near

and/or surrounding community and non-transient, non-community water systems that use groundwater as a source of drinking water.

(54) [(53)] Hazardous waste--Hazardous waste as defined in §335.1 of this title (relating to Definitions).

(55) [(54)] Improved sinkhole--A naturally occurring karst depression or other natural crevice found in carbonate rocks, volcanic terrain, and other geologic settings which has been modified by man for the purpose of directing and emplacing fluids into the subsurface.

(56) [(55)] Individual permit--A permit, as defined in the Texas Water Code (TWC), §27.011 and §27.021, issued by the commission or the executive director to a specific person or persons in accordance with the procedures prescribed in the TWC, Chapter 27 (other than TWC, §27.025 [§27.023]).

(57) [(56)] Injection interval--That part of the injection zone in which the well is authorized to be screened, perforated, or in which the waste is otherwise authorized to be directly emplaced.

(58) [(57)] Injection operations--The subsurface emplacement of fluids occurring in connection with an injection well or wells, other than that occurring solely for construction or initial testing.

(59) [(58)] Injection well--A well into which fluids are being injected. Components of an injection well annulus monitoring system are considered to be a part of the injection well.

(60) [(59)] Injection zone--A formation, a group of formations, or part of a formation that receives fluid through a well.

(61) [(60)] In service--The operational status when an authorized injection well is capable of injecting fluids, including times when the well is shut-in and on standby status.

(62) [(61)] Intermediate casing--A string of casing with diameter intermediate between that of the surface casing and that of the smaller long-string or production casing, and which is set and cemented in a well after installation of the surface casing and prior to installation of the long-string or production casing.

(63) [(62)] Large capacity cesspool--A cesspool that is designed for a flow of greater than 5,000 gallons per day.

(64) [(63)] Large capacity septic system--A septic system that is designed for a flow of greater than 5,000 gallons per day.

(65) [(64)] Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(66) [(65)] Liner--An additional casing string typically set and cemented inside the long string casing and occasionally used to extend from base of the long string casing to or through the injection zone.

(67) [(66)] Long string casing or production casing--A string of casing that is set inside the surface casing and that usually extends to or through the injection zone.

(68) [(67)] Lost circulation zone--A term applicable to rotary drilling of wells to indicate a subsurface zone which is penetrated by a wellbore, and which is characterized by rock of high porosity and permeability, into which drilling fluids flow from the wellbore to the degree that the circulation of drilling fluids from the bit back to ground surface is disrupted or "lost."

(69) [(68)] Mine area--The area defined by a line through the ring of designated monitor wells installed to monitor the production zone.

(70) [(69)] Mine plan--A plan for operations at a mine, consisting of:

(A) a map of the permit area identifying the location and extent of existing and proposed production areas; and

(B) an estimated schedule indicating the sequence and timetable for mining and any required aquifer restoration.

(71) [(70)] Monitor well--Any well used for the sampling or measurement with field instrumentation of any chemical or physical property of subsurface strata or their contained fluids. The term "monitor well" shall have the same meaning as the term "monitoring well" as defined in Texas Water Code, §27.002.

(A) Designated monitor wells are those listed in the production area authorization for which routine water quality sampling or measurement with field instrumentation is required.

(B) Secondary monitor wells are those wells in addition to designated monitor wells, used to delineate the horizontal and vertical extent of mining solutions.

(C) Pond monitor wells are wells used in the subsurface surveillance system near ponds or other pre-injection units.

(72) [(71)] Motor vehicle waste disposal well--A well used for the disposal of fluids from vehicular repair or maintenance activities including, but not limited to, repair and maintenance facilities for cars, trucks, motorcycles, boats, railroad locomotives, and airplanes.

(73) [(72)] Native groundwater--Groundwater naturally occurring in a geologic formation.

(74) [(73)] New injection well--Any well, or group of wells, not an existing injection well.

(75) [(74)] New waste stream--A waste stream not permitted.

(76) [(75)] Non-commercial facility--A Class I permitted facility which operates only non-commercial wells.

(77) [(76)] Non-commercial underground injection control (UIC) Class I well facility--A UIC Class I permitted facility where only non-commercial wells are operated.

(78) [(77)] Non-commercial well--An underground injection control Class I injection well which disposes of wastes that are generated on-site, at a captured facility or from other facilities owned or effectively controlled by the same person.

(79) [(78)] Notice of change (NOC)--A written submittal to the executive director from a permittee authorized under a general permit providing changes to information previously provided to the agency, or any changes with respect to the nature or operations of the facility, or the characteristics of the waste to be injected.

(80) [(79)] Notice of intent (NOI)--A written submittal to the executive director requesting coverage under the terms of a general permit.

(81) [(80)] Off-site--Property which cannot be characterized as on-site.

(82) [(81)] On-site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as

opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which the owner controls and to which the public does not have access, is also considered on-site property.

(83) [(82)] Out of service--The operational status when a well is not authorized to inject fluids, or the well itself is incapable of injecting fluids for mechanical reasons, maintenance operations, or well workovers or when injection is prohibited due to the well's inability to comply with the in-service operating standards of this chapter.

(84) [(83)] Permit area--The area owned or under lease by the permittee which may include buffer areas, mine areas, and production areas.

(85) [(84)] Plugging--The act or process of stopping the flow of water, oil, or gas into or out of a formation through a borehole or well penetrating that formation.

(86) [(85)] Point of injection--For a Class V well, the last accessible sampling point prior to fluids being released into the subsurface environment.

(87) [(86)] Pollution--The contamination of water or the alteration of the physical, chemical, or biological quality of water:

(A) that makes it harmful, detrimental, or injurious:

(i) to humans, animal life, vegetation, or property; or

(ii) to public health, safety, or welfare; or

(B) that impairs the usefulness or the public enjoyment of the water for any lawful and reasonable purpose.

(88) [(87)] Pre-injection units--The on-site above-ground appurtenances, structures, equipment, and other fixtures including the injection pumps, filters, tanks, surface impoundments, and piping for wastewater transmission between any such facilities and the well that are or will be used for storage or processing of waste to be injected, or in conjunction with an injection operation.

(89) [(88)] Production area--The area defined by a line generally through the outer perimeter of injection and recovery wells used for mining.

(90) [(89)] Production area authorization--An authorization, issued under the terms of a Class III injection well area permit, approving the initiation of mining activities in a specified production area within a permit area, and setting specific

conditions for production and restoration in each production area within an area permit.

(91) [(90)] Production well--A well used to recover uranium through in situ solution recovery, including an injection well used to recover uranium. The term does not include a well used to inject waste.

(92) [(91)] Production zone--The stratigraphic interval extending vertically from the shallowest to the deepest stratum into which mining solutions are authorized to be introduced.

(93) [(92)] Project operator--A person holding an authorization by rule, individual permit, or general permit to undertake an aquifer storage and recovery project or an aquifer recharge project.

(94) [(93)] Public water system--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances as defined in §290.38 of this title (relating to Definitions).

(95) [(94)] Radioactive waste--Any waste which contains radioactive material in concentrations which exceed those listed in 10 Code of Federal Regulations Part 20, Appendix B, Table II, Column 2, and as amended.

(96) Recharge injection well--A Class V injection well used for the injection of water into a geologic formation for an aquifer recharge project, including an improved sinkhole or cave connected to an aquifer.

(97) [(95)] Registered Well--A well registered in accordance with the requirements of §331.221 of this title (relating to Registration of Wells).

(98) [(96)] Restoration demonstration--A test or tests conducted by a permittee to simulate production and restoration conditions and verify or modify the fluid handling values submitted in the permit application.

(99) [(97)] Restored aquifer--An aquifer whose local groundwater quality, within a production area, has, by natural or artificial processes, returned to the restoration table values established in accordance with the requirements of §331.107 of this title (relating to Restoration).

(100) [(98)] Salt cavern--A hollowed-out void space that has been purposefully constructed within a salt formation, typically by means of solution mining by circulation of water from a well or wells connected to the surface.

(101) [(99)] Salt cavern disposal well--For the purposes of this chapter, regulations of the commission, and not to underground injection control (UIC) Class II or UIC Class III wells in salt caverns regulated by the [Texas] Railroad Commission of Texas, a salt cavern disposal well is a type of UIC Class I injection well used:

(A) to solution mine a waste storage or disposal cavern in naturally occurring salt; and/or

(B) to inject nonhazardous, industrial, or municipal waste into a salt cavern for the purpose of storage or disposal of the waste.

(102) [(100)] Salt dome--A geologic structure that includes the caprock, salt stock, and deformed strata surrounding the salt stock.

(103) [(101)] Salt dome cavern confining zone--A zone between the salt dome cavern injection zone and all underground sources of drinking water and freshwater aquifers, that acts as a barrier to movement of waste out of a salt dome cavern injection zone, and consists of the entirety of the salt stock excluding any portion of the salt stock designated as an underground injection control (UIC) Class I salt dome cavern injection zone or any portion of the salt stock occupied by a UIC Class II or Class III salt dome cavern or its disturbed salt zone.

(104) [(102)] Salt dome cavern injection interval--That part of a salt dome cavern injection zone consisting of the void space of the salt dome cavern into which waste is stored or disposed of, or which is capable of receiving waste for storage or disposal.

(105) [(103)] Salt dome cavern injection zone--The void space of a salt dome cavern that receives waste through a well, plus that portion of the salt stock enveloping the salt dome cavern, and extending from the boundaries of the cavern void outward a sufficient thickness to contain the disturbed salt zone, and an additional thickness of undisturbed salt sufficient to ensure that adequate separation exists between the outer limits of the injection zone and any other activities in the domal area.

(106) [(104)] Salt stock--A geologic formation consisting of a relatively homogeneous mixture of evaporite minerals dominated by halite (NaCl) that has migrated from originally tabular beds into a vertical orientation.

(107) [(105)] Sanitary waste--Liquid or solid waste originating solely from humans and human activities, such as wastes collected from toilets, showers, wash basins, sinks used for cleaning domestic areas, sinks used for food preparation, clothes washing operations, and sinks or washing machines where food and beverage serving dishes, glasses, and utensils are cleaned.

(108) [(106)] Septic system--A well that is used to emplace sanitary waste below the surface, and is typically composed of a septic tank and subsurface fluid distribution system or disposal system.

(109) [(107)] Stratum--A sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock or material.

(110) [(108)] Subsurface fluid distribution system--An assemblage of perforated pipes, drain tiles, or other similar mechanisms intended to distribute fluids below the surface of the ground. This definition includes subsurface area drip dispersal systems as defined in §222.5 of this title (relating to Definitions).

(111) [(109)] Surface casing--The first string of casing (after the conductor casing, if any) that is set in a well.

(112) [(110)] Temporary injection point--A method of Class V injection that uses push point technology (injection probes pushed into the ground) for the one-time injection of fluids into or above an underground source of drinking water.

(113) [(111)] Total dissolved solids--The total dissolved (filterable) solids as determined by use of the method specified in 40 Code of Federal Regulations Part 136, as amended.

(114) [(112)] Transmissive fault or fracture--A fault or fracture that has sufficient permeability and vertical extent to allow fluids to move between formations.

(115) [(113)] Underground injection--The subsurface emplacement of fluids through a well.

(116) [(114)] Underground injection control--The program under the federal Safe Drinking Water Act, 42 United States Code, Part C, including the approved Texas state program.

(117) [(115)] Underground source of drinking water--An "aquifer" or its portions:

(A) which supplies drinking water for human consumption; or

(B) in which the groundwater contains fewer than 10,000 milligrams per liter total dissolved solids; and

(C) which is not an exempted aquifer.

(118) [(116)] Upper limit--A parameter value established by the commission in a permit/production area authorization which when exceeded indicates mining solutions may be present in designated monitor wells.

(119) [(117)] Verifying analysis--A second sampling and analysis or measurement with instrumentation of control parameters for the purpose of confirming a routine sample analysis or measurement which indicated an increase in any control parameter to a level exceeding the upper limit. Mining solutions are assumed to be present in a designated monitor well if a verifying analysis confirms that any control parameter in a designated monitor well is present in concentration equal to or greater than the upper limit value.

(120) [(118)] Well--A bored, drilled, or driven shaft whose depth is greater than the largest surface dimension, a dug hole whose depth is greater than the largest surface dimension, an improved sinkhole, or a subsurface fluid distribution system but does not include any surface pit, surface excavation, or natural depression.

(121) [(119)] Well injection--The subsurface emplacement of fluids through a well.

(122) [(120)] Well monitoring--The measurement by on-site instruments or laboratory methods of any chemical, physical, radiological, or biological property of the subsurface strata or their contained fluids penetrated by the wellbore.

(123) [(121)] Well stimulation--Several processes used to clean the well bore, enlarge channels, and increase pore space in the injection interval, thus making it possible for fluid to move more readily into the formation including, but not limited to, surging, jetting, and acidizing.

(124) [(122)] Workover--An operation in which a down-hole component of a well is repaired, the engineering design of the well is changed, or the mechanical integrity of the well is compromised. Workovers include operations such as sidetracking, the addition of perforations within the permitted injection interval, and the addition of liners or patches. For the purposes of this chapter, workovers do not include well stimulation operations.

§331.7. Permit Required.

(a) Except as provided in §331.9 of this title (relating to Injection Authorized by Rule) and by subsections (d) - (f) of this section, all injection wells and activities must be authorized by an individual permit.

(b) For Class III in situ uranium solution mining wells, Frasch sulfur wells, and other Class III operations under commission jurisdiction, an area permit authorizing more than one well may be issued for a defined permit area in which wells of similar design and operation are proposed. The wells must be operated by a single owner or operator. Before commencing operation of those wells, the permittee may be required to obtain a production area authorization for separate production or mining areas within the permit area.

(c) The owner or operator of a large capacity septic system, a septic system which accepts industrial waste, or a subsurface area drip dispersal system, as defined in §222.5 of this title (relating to Definitions) must obtain a wastewater discharge permit in accordance with Texas Water Code, Chapter 26 or Chapters 26 and 32, and Chapter 305 of this title (relating to Consolidated Permits), and must submit the inventory information required under §331.10 of this title (relating to Inventory of Wells Authorized by Rule).

(d) Pre-injection units for Class I nonhazardous, noncommercial injection wells and Class V injection wells permitted for the disposal of nonhazardous waste must be either authorized by a permit issued by the commission or registered in accordance with §331.17 of this title (relating to Pre-Injection Units Registration). The option of registration provided by this subsection shall not apply to pre-injection units for Class I injection wells used for the disposal of byproduct material, as that term is defined in

Chapter 336 of this title (relating to Radioactive Substance Rules). Pre-injection units for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals are not subject to authorization by registration but are subject to authorization by an individual permit or under the general permit issued under Subchapter L of this chapter (relating to General Permit Authorizing Use of a Class I Injection Well to Inject Nonhazardous Desalination Concentrate or Nonhazardous Drinking Water Treatment Residuals).

(e) The commission may issue a general permit under Subchapter L of this chapter. The commission may determine that an injection well and the injection activities are more appropriately regulated under an individual permit than under a general permit based on findings that the general permit will not protect ground and surface fresh water from pollution due to site-specific conditions.

(f) Regardless of [Notwithstanding] subsection (a) of this section, an injection well authorized by the Railroad Commission of Texas to use nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes does not require a permit from the commission. The use or disposal of radioactive material under this subsection is subject to the applicable requirements of Chapter 336 of this title.

(g) Permits issued before September 1, 2007 for Class III wells for uranium mining will expire on September 1, 2012 unless the permit holder submits an application for permit renewal under §305.65 of this title (relating to Renewal) before September 1, 2012. Any holders of permits for Class III wells for uranium mining issued before September 1, 2007 who allow those permits to expire by not submitting a permit renewal application by September 1, 2012 are not relieved from the obligations under the expired permit or applicable rules, including obligations to restore groundwater and to plug and abandon wells in accordance with the requirements of the permit and applicable rules.

(h) Class V injection wells associated with an aquifer storage and recovery (ASR) project or an aquifer recharge project may be authorized by individual permit, general permit, or by rule. The executive director will notify a groundwater conservation district of an ASR project proposed to be authorized by rule that is located within the jurisdictional boundary of that groundwater conservation district.

§331.9. Injection Authorized by Rule.

(a) Plugging and abandonment of a well authorized by rule at any time after January 1, 1982, shall be accomplished in accordance with the standards of §331.46 of this title (relating to Closure Standards). Class V wells shall be closed according to standards under §331.133 of this title (relating to Closure Standards for Injection

Wells). Motor vehicle waste disposal wells, large capacity septic systems, large capacity cesspools, subsurface fluid distribution systems, and drywells shall be closed according to standards under §331.136 of this title (relating to Closure Standards for Motor Vehicle Waste Disposal Wells, Large Capacity Septic Systems, Large Capacity Cesspools, Subsurface Fluid Distribution Systems, and Drywells).

(b) Injection into Class V wells, unless otherwise provided in subsection (c) of this section, §331.7 of this title (relating to Permit Required), or §331.137 of this title (relating to Permit for Motor Vehicle Waste Disposal Wells), is authorized under this rule.

(1) Well authorization under this section expires upon the effective date of a permit issued under §331.7 of this title.

(2) An owner or operator of a Class V well is prohibited from injecting into the well:

(A) upon the effective date of permit denial;

(B) upon failure to submit a permit application in a timely manner under subsection (c) of this section;

(C) upon failure to submit inventory information in a timely manner under §331.10 of this title (relating to Inventory of Wells Authorized by Rule);

(D) upon failure to comply with a request for information from the executive director in a timely manner;

(E) upon failure to comply with provisions contained in Subchapter H of this chapter (relating to Standards for Class V Wells) and, if applicable, Subchapter K of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects) or Subchapter O of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Recharge Projects); or

(F) upon failure of the owner or operator to comply with provisions contained in paragraph (3) of this subsection for a Class V well that is authorized to inject certain wastes into a Class II disposal well permitted by the Railroad Commission of Texas.

(3) Unless otherwise provided in subsection (c) of this section, a disposal well authorized by an active Class II permit issued by the Railroad Commission of Texas whose operator has an active Form P-5 Organization Report in good standing with the Railroad Commission of Texas may be authorized by rule of the commission

as a Class V injection well for the disposal by injection of nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals.

(A) Subchapter H of this chapter and subsection (a) of this section are not applicable to a Class V well authorized by rule under this paragraph.

(B) The use or disposal of radioactive material under this paragraph is subject to the applicable requirements of Chapter 336 of this title (relating to Radioactive Substance Rules).

(c) The executive director may require the owner or operator of an injection well authorized by rule to apply for and obtain an injection well permit. The owner or operator shall submit a complete application within 90 days after the receipt of a letter from the executive director requesting that the owner or operator of an injection well submit an application for permit. Cases for which a permit may be required include, but are not limited to, wells not in compliance with the standards required by this section.

(d) Class IV wells injecting hazardous waste-contaminated groundwater that is of acceptable quality to aid remediation and that is being reinjected into the same formation from which it was drawn, as authorized by §331.6 of this title (relating to Prohibition of Class IV Well Injection), shall be authorized by rule.

SUBCHAPTER H: STANDARDS FOR CLASS V WELLS

§331.131

Statutory Authority

This amendment is adopted under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §27.003, which allows the commission to use all reasonable methods to implement its policy of maintaining the quality of fresh water in the state of Texas; TWC, §27.011, which establishes the commission's jurisdiction over certain injection well permits; TWC, §27.019, which specifically authorizes the commission to adopt rules and procedures necessary for performance of its powers, duties, and functions under TWC, Chapter 27; and House Bill (HB) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The adopted amendment implements HB 720.

§331.131. Applicability.

This subchapter applies to all Class V injection wells under the jurisdiction of the commission except those Class V wells authorized by rule under §331.9(b)(3) of this title (relating to Injection Authorized by Rule). Aquifer storage and recovery injection wells must also comply with Subchapter K of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects) in addition to this subchapter. Aquifer recharge injection wells must also comply with Subchapter O of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Recharge Projects) in addition to this subchapter.

SUBCHAPTER O: ADDITIONAL REQUIREMENTS FOR CLASS V INJECTION WELLS

ASSOCIATED WITH AQUIFER RECHARGE PROJECTS

§§331.262 - 331.267

Statutory Authority

The new sections are adopted under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §27.003, which allows the commission to use all reasonable methods to implement its policy of maintaining the quality of fresh water in the state of Texas; TWC, §27.011, which establishes the commission's jurisdiction over certain injection well permits; TWC, §27.019, which specifically authorizes the commission to adopt rules and procedures necessary for performance of its powers, duties, and functions under TWC, Chapter 27; and, House Bill (HB) 720 Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The adopted new sections implement HB 720.

§331.262. Applicability.

In addition to the requirements of Subchapter H of this chapter (relating to Standards for Class V Wells), the requirements of this subchapter apply to all Class V aquifer recharge projects that use a recharge injection well, whether by means of an injection well or improved sinkhole or cave connected to an aquifer. The requirements of this subchapter do not apply to aquifer storage and recovery projects.

§331.263. Area of Review.

The area of review for an aquifer recharge (AR) project is the area determined by a radius of at least 1/2 mile from each the proposed AR injection well. For an AR project that includes more than one proposed AR injection well, the area of review is the area determined by a radius of at least 1/2 mile from the centroid of the AR injection well field. In the application for authorization, the applicant shall provide information on the activities within the area of review, including the following factors and any adverse interactions between the factors and the AR project:

(1) locations of:

(A) all artificial penetrations that penetrate the injection interval, including but not limited to: water wells and abandoned water wells from commission well files or groundwater district files; oil and gas wells and saltwater injection wells from the Railroad Commission of Texas files; and waste disposal wells/other injection wells from the commission disposal well files; and

(B) springs, quarries, and any other bodies of water, surface or subsurface features that connect to the injection interval;

(2) completion and construction information, where available, for identified artificial penetrations;

(3) site-specific, significant geologic features, such as faults and fractures;

(4) land surface elevations for projects used to mitigate subsidence;

(5) land use in the drainage basin and geographic extent of the drainage basin for projects using improved sinkholes and caves; and

(6) all information required for the consideration of an AR injection well under §331.267(a) of this title (relating to Additional Requirements).

§331.264. Construction and Closure Standards.

All Class V aquifer recharge (AR) injection wells shall be designed, constructed, completed, and closed to prevent commingling, through the wellbore and casing, of injection waters with other fluids outside of the authorized injection zone; mixing through the wellbore and casing of fluids from aquifers of substantively different water quality; and infiltration through the wellbore and casing of water from the surface into groundwater zones.

(1) Plans and specifications. Except as specifically required in the terms of the Class V AR injection well authorization, the drilling and completion of a Class V AR injection well shall be done in accordance with the requirements of §331.132 of this title (relating to Construction Standards) and the closure of a Class V AR injection well shall be done in accordance with the requirements of §331.133 of this title (relating to Closure Standards for Injection Wells).

(A) If the project operator proposes to change the injection interval to one not reviewed and approved during the authorization process, the project operator shall notify the executive director immediately. The project operator may not inject into any unauthorized zone without prior written approval from the executive director.

(B) The executive director shall be notified immediately of any other changes, including but not limited to, changes in the completion of the AR injection well, changes in the setting of screens, and changes in the injection intervals within the authorized injection zone.

(2) Construction materials. Casing materials for Class V AR injection wells shall be constructed of materials resistant to corrosion.

(3) Construction and workover supervision. All phases of any AR injection well construction, workover or closure shall be supervised by qualified individuals who are knowledgeable and experienced in practical drilling engineering, as applicable, and who are familiar with the special conditions and requirements of injection well and water well construction.

§331.265. Operating Requirements.

(a) All Class V aquifer recharge (AR) injection wells shall be operated in such a manner that injection will not endanger drinking water sources. Underground injection endangers drinking water sources if such injection may result in the presence of any contaminant in underground water which supplies or can reasonably be expected to supply any public water system, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation, or

may otherwise adversely affect the health of persons.

(b) Injection pressure and volume at the wellhead shall not exceed a maximum which shall be calculated so as to assure the pressure and volume in the injection zone does not cause movement of fluid out of the injection zone.

(c) The owner or operator of an AR injection well that has ceased operations for more than two years shall provide verification of the well's mechanical integrity and notification of intent to resume operations to the executive director at least 30 days prior to resuming operation of the well.

(d) The owner or operator shall maintain the mechanical integrity of all wells operated under this section.

(e) The quality of the water injected at an AR injection well must meet the requirements in §331.267(a)(1) of this title (relating to Additional Requirements).

(f) All AR injection wells must be installed with a flow meter for measuring the volume of water injected.

§331.266. Monitoring and Reporting Requirements.

(a) An aquifer recharge (AR) project operator shall monitor each AR injection well associated with an AR project. By no later than March 1 of each ~~Each~~ calendar year, the project operator shall provide the executive director a written report of the following information for the previous year:

(1) the volume of water injected for recharge; and

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

(b) At least on an annual basis and each time the source changes, an AR project operator shall perform water-quality testing on water to be injected at an AR injection well. All environmental laboratory analyses shall be performed by laboratories accredited under the Texas Laboratory Accreditation Program using National Environmental Laboratory Accreditation Conference standards. Within 60 days of sampling, the ~~The~~ AR project operator shall provide to the executive director a written report of the results of this testing. The report shall include the test results for all water-quality parameters identified in the individual permit, general permit, or authorization by rule.

§331.267. Additional Requirements.

(a) The executive director or commission shall consider the following before issuing an individual permit, a general permit, or an authorization by rule for an aquifer recharge (AR) injection well:

(1) whether the injection of water will comply with the standards set forth under the federal Safe Drinking Water Act (42 United States Code, §§300f, *et seq*);

(2) the effect of the AR project on existing water wells;

(3) the effect of the AR project on existing springs and other surface features that connect to the injection interval; and

(4) whether the introduction of water into the receiving geologic formation will alter the physical, chemical, or biological quality of the native groundwater to a degree that would:

(A) render the groundwater produced from the receiving formation harmful or detrimental to people, animals, vegetation, or property; or

(B) require an unreasonably higher level of treatment of the groundwater produced from the receiving geologic formation than is necessary before

AR project initiation for the native groundwater to render the groundwater suitable for beneficial use.

(b) Upon completion of an AR injection well, the following information, as applicable, shall be submitted to the executive director within 30 days of receipt of the results of all analyses and test results:

(1) as-built drilling and completion data on the well;

(2) all logging and testing data on the well;

(3) formation fluid analyses;

(4) injection fluid analyses;

(5) injectivity and pumping tests determining well capacity and reservoir characteristics;

(6) hydrogeologic modeling, with supporting data, predicting the results of injection fluid interaction with the receiving formation and the native groundwater, and predicting injection fluid movement; and

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

(3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; ~~and~~

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation; ~~and~~[-]

(5) any correlation between the elements of the crime and the duties and responsibilities of the licensed occupation.

~~(d)~~ [(e)] When determining a person's present fitness for a license, the Commission shall also consider [the following evidene]:

(1) the extent and nature of the person's past criminal activity;

(2) the age of the person at the time of the commission of the offense;

(3) the amount of time that has elapsed since the person's last criminal activity;

(4) the conduct and work activity of the person before and following the criminal activity;

(5) the person's compliance with the court-ordered terms and conditions while on parole, supervised release, probation, or community supervision;

(6) the time remaining, if any, on the person's term of parole, supervised release, probation, or community supervision;

(7) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or following release; and

(8) other evidence of the person's present fitness, including letters of recommendation [from: prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the person; the sheriff and chief of police in the community where the person resides; and any other persons in contact with the person].

~~[(d)]~~ It is the responsibility of the applicant to provide to the Commission:

~~[(1)]~~ the recommendations of prosecution, law enforcement, and correctional authorities;

~~[(2)]~~ signed letters of character reference from persons in the applicant's business or professional community which confirm that the writer knows about the applicant's prior criminal conduct;

~~[(3)]~~ proof in such form as may be required by the Commission that he or she has maintained a record of steady employment;

~~[(4)]~~ proof that the applicant has supported his or her dependents, if any;

~~[(5)]~~ proof that the applicant has maintained a record of good conduct;

~~[(6)]~~ proof that the applicant has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases; and

~~[(7)]~~ if the applicant submits a letter of character reference from a prospective sponsor, the letter must confirm that the writer knows about the applicant's prior criminal conduct.

(e) It is the applicant's or license holder's responsibility to obtain and provide the recommendations described in subsection (d)(8) of this section.

(f) When determining a person's fitness to perform the duties and discharge the responsibilities of a licensed occupation regulated by the Commission, the Commission does not consider an arrest that did not result in a conviction or placement on deferred adjudication community supervision.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 2019.

TRD-201904457
Chelsea Buchholtz
General Counsel

Texas Real Estate Commission
Earliest possible date of adoption: January 12, 2020
For further information, please call: (512) 936-3177

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 39. PUBLIC NOTICE

SUBCHAPTER L. PUBLIC NOTICE OF INJECTION WELL AND OTHER SPECIFIC APPLICATIONS

30 TAC §39.651

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §39.651.

Background and Summary of the Factual Basis for the Proposed Rule

This rulemaking implements House Bill (HB) 720, 86th Texas Legislature, 2019, addressing the commission's regulation of aquifer recharge (AR) projects in Texas. HB 720 added Texas Water Code (TWC), §27.203(c). Texas Water Code, §27.203(c) requires applicants for AR individual permits to provide notice to any groundwater conservation district in which the AR project will be located and publish notice in a newspaper of general circulation in the county in which the wells will be located.

Chapter 39 does not currently contain notice requirements for AR projects. Section 39.651(h) contains similar notice requirements for aquifer storage and recovery projects, therefore, the proposed amendment adds AR projects to this rule.

In addition, on June 12, 2019, the commission determined that certain rules in Chapter 39 (Non-Rule Project Number 2019-013-039-LS) are obsolete and no longer needed (June 28, 2019, issue of the *Texas Register* (44 TexReg 3304)). As a result, the commission has proposed to repeal obsolete rules in Chapter 39 (Rule Project Number 2019-119-039-LS) and to update other rules, primarily to remove obsolete text and update cross-references (Rule Project Number 2019-121-033-LS). The proposed amendment of §39.651(e) is included in this proposed rulemaking due to the necessary amendment of §39.651(h).

As part of this rulemaking, the commission is proposing amendments to 30 TAC Chapter 281, Applications Processing; Chapter 295, Water Rights, Procedural; Chapter 297, Water Rights, Substantive; and Chapter 331, Underground Injection Control.

Section Discussion

The commission proposes various stylistic, non-substantive changes, such as grammatical corrections and correct uses of references. These changes are non-substantive and are not specifically discussed in this preamble.

§39.651, Public Notice of Injection Well and Other Specific Applications

As a result of the quadrennial review, the commission proposes to amend §39.651, by removing obsolete text in §39.651(e)(1) and (2) regarding the requirement for a public meeting for an application for a new hazardous waste facility, or for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit because no applications filed before September 1, 2005 remain pending with the commission.

To implement HB 702, the commission proposes to amend §39.651(h), so that the notice requirements for individual Class V permit applications for aquifer storage and recovery projects also apply to individual Class V permit applications for AR projects.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, no 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.

This rulemaking addresses necessary changes in order to comply state law, specifically HB 720. The proposed rulemaking would amend §39.651(e) to remove obsolete text and amend §39.651(h) to state that notice requirements for individual Class V permit applications for aquifer storage and recovery projects also apply to individual Class V permit applications for AR projects.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated will be compliance with state law, and improved readability and minimized confusion with regard to applicable rules.

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, members of the public will not experience any significant fiscal impact. Any person who applies for an AR individual permit will be required to provide notice to any groundwater conservation district in which the AR project is located and will be required to publish notice in a newspaper of general circulation in the county in which the wells are located. The agency anticipates that the fiscal implications for businesses and individuals will be minimal because applicants will be able to utilize the authorization by rule option, which does not have newspaper publishing costs associated with it.

Local Employment Impact Statement

The commission 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.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rule does not adversely affect rural communities in a material way for the first five years that the proposed rule is in effect. The amendment would apply statewide and have the same effect in rural communities as in urban communities.

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.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rule does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation; however, it does have the potential to increase the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the 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. A "Major environmental rule" means a rule with a specific intent 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 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 rulemaking is to implement HB 720, which enacted requirements in TWC, Chapters 11 and 27, for aquifer storage projects and AR projects, and to remove obsolete text.

Second, the rulemaking does not meet the statutory definition of a "Major environmental rule" because the rule will 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 there will be a significant cost to comply with the proposed rule because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or

jobs. The proposed amendment removes obsolete text and establishes notice requirements consistent with the requirement of HB 720; therefore, will not adversely affect in a material way the public health and safety of the state or a sector of the state.

Finally, the rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law for the commission's Underground Injection Control Program authorized for the State of Texas under the federal Safe Drinking Water Act; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because it is consistent with the requirements of the commission's Underground Injection Control Program; and is not based solely under the general powers of the agency, but is based specifically under TWC, §27.019, Texas Health and Safety Code, §§361.0666, 361.0791, and 361.082; and HB 720, Section 4, as well as under the other authority of the commission cited in the statutory authority section of this preamble.

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 and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed action implements legislative requirements in HB 720, for aquifer storage or AR projects.

The commission determined that the proposed rule would be neither a statutory nor a constitutional taking of private real property. The proposed rule establishes public notice requirements consistent with the requirements of HB 720 for an AR project application and removes obsolete text. The proposed rule does not affect a landowner's rights in private real property because this rulemaking 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 regulation.

Therefore, the rule would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(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 rule 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.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on January 7, 2020, at 10:00 a.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 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Andreea Vasile, 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: <https://www6.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 2019-116-297-OW. The comment period closes on January 21, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Carol Dye, Underground Injection Control Permits Section, at (512) 239-1504.

Statutory Authority

This amendment is proposed under the authority of Texas Water Code (TWC), Chapter 5, Subchapter M, which establishes environmental permitting procedural requirements; 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §27.003, which allows the commission to use all reasonable methods to implement its policy of maintaining the quality of fresh water in the state of Texas; TWC, §27.011, which establishes the commission's jurisdiction over certain injection well permits; TWC, §27.019, which specifically authorizes the commission to adopt rules and procedures necessary for performance of its powers, duties, and functions under TWC, Chapter 27; Texas Health and Safety Code (THSC), §361.017, which establishes the commission's jurisdiction over all aspects of the management of hazardous waste; THSC, §361.024, which provides the commission with rulemaking authority; THSC, §361.0666, which establishes public meeting and notice requirements for solid waste facilities; THSC, §361.0791, which establishes public meetings and notice requirements for new hazardous waste management facilities; THSC, §361.082, which establishes notice and hearing requirements for hazardous waste permit applications; Texas Government Code, §2001.004, which requires state agencies

to adopt procedural rules; and House Bill (HB) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158, and TWC, Chapter 27, Subchapter H.

The proposed amendment implements TWC, Chapter 5, Subchapter M; THSC, §§361.0666, 361.0791, and 361.082; and HB 720.

§39.651. *Application for Injection Well Permit.*

(a) **Applicability.** This subchapter applies to applications for injection well permits that are declared administratively complete on or after September 1, 1999.

(b) **Preapplication local review committee process.** If an applicant decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant shall submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. In addition, if the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice must be mailed to the mayor of the municipality.

(c) **Notice of Receipt of Application and Intent to Obtain Permit.**

(1) On the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete, notice must be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit). This notice must contain the text as required by §39.411(b)(1) - (9) and (11) of this title (relating to Text of Public Notice). Notice under §39.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness).

(3) After the executive director determines that the application is administratively complete, in addition to the requirements of §39.418 of this title, notice must be given to the School Land Board, if the application will affect lands dedicated to the permanent school fund. The notice must be in the form required by Texas Water Code, §5.115(c).

(4) For Notice of Receipt of Application and Intent to Obtain a Permit concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) The chief clerk or executive director shall also mail a copy of the application or a summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located and to the county judge and the health authority of the county in which the facility is located.

(6) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(d) **Notice of Application and Preliminary Decision.** The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) must be published once under §39.405(f)(2) of this title (relating to General Notice Provisions) after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. This notice must contain the text as required by §39.411(c)(1) - (6) of this title. In addition to the requirements of §39.405(h) and §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county that is adjacent or contiguous to each county in which the proposed facility is located. One notice may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(3) The chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice) and to local governments located in the county of the facility. "Local governments" have the meaning as defined in Texas Water Code, Chapter 26.

(4) For Notice of Application and Preliminary Decision concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(A) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(B) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(C) persons who own mineral rights underlying the existing or proposed injection well facility;

(D) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(E) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(5) If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title (relating to Application for Industrial or Hazardous Waste Facility Permit).

(6) The deadline for public comments on industrial solid waste, Class III, or Class V injection well permit applications will be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) For [H] an application for a new hazardous waste facility, the agency [is filed]:

~~{(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; or}~~

~~{(B) on or after September 1, 2005, the agency:}~~

(A) [(+)] may hold a public meeting under §55.154 of this title (relating to Public Meetings) in the county in which the facility is proposed to be located to receive public comment concerning the application; but

(B) [(+)] shall hold a public meeting under §55.154 of this title in the county in which the facility is proposed to be located to receive public comment concerning the application:

(i) [(+)] on the request of a member of the legislature who represents the general area in which the facility is proposed to be located; or

(ii) [(+)] if the executive director determines that there is substantial public interest in the proposed facility.

(2) For [H] an application for a major amendment to or a Class 3 modification of an existing hazardous waste facility permit, the agency [is filed]:

~~{(A) before September 1, 2005, the agency shall hold a public meeting in the county in which the facility is located to receive public comment on the application if a person affected files with the chief clerk a request for a public meeting concerning the application before the deadline to file public comment or to file requests for reconsideration or hearing; or}~~

~~{(B) on or after September 1, 2005, the agency:}~~

(A) [(+)] may hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment on the application; but

(B) [(+)] shall hold a public meeting under §55.154 of this title in the county in which the facility is located to receive public comment concerning the application:

(i) [(+)] on the request of a member of the legislature who represents the general area in which the facility is located; or

(ii) [(+)] if the executive director determines that there is substantial public interest in the facility.

(3) For purposes of this subsection, "substantial public interest" is demonstrated if a request for a public meeting is filed by:

(A) a local governmental entity with jurisdiction over the location in which the facility is located or proposed to be located by formal resolution of the entity's governing body;

(B) a council of governments with jurisdiction over the location in which the facility is located or proposed to be located by formal request of either the council's solid waste advisory committee, executive committee, or governing board;

(C) a homeowners' or property owners' association formally organized or chartered and having at least ten members located in the general area in which the facility is located or proposed to be located; or

(D) a group of ten or more local residents, property owners, or businesses located in the general area in which the facility is located or proposed to be located.

(4) A public meeting is not a contested case proceeding under the Administrative Procedure Act. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of this subsection if public notice is provided in accordance with this subsection.

(5) The applicant shall publish notice of the public meeting once each week during the three weeks preceding a public meeting under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters).

(6) The chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of contested case hearing.

(1) Applicability. This subsection applies if an application is referred to the State Office of Administrative Hearings for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) Newspaper notice.

(A) If the application concerns a facility other than a hazardous waste facility, the applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area that is adjacent or contiguous to each county in which the proposed facility is located.

(B) For Class I underground injection wells, the published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters) and the notice must appear in the section of the newspaper containing state or local news items.

(C) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice must be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least three inches (7.6 centimeters). The notice must appear in the section of the newspaper containing state or local news items. The text of the notice must include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) For all applications concerning underground injection wells, the chief clerk shall mail notice to persons listed in §39.413 of this title.

(B) For notice of hearings concerning Class I or Class III underground injection wells, the chief clerk shall also mail notice to:

(i) persons who own the property on which the existing or proposed injection well facility is or will be located, if different from the applicant;

(ii) landowners adjacent to the property on which the existing or proposed injection well facility is or will be located;

(iii) persons who own mineral rights underlying the existing or proposed injection well facility;

(iv) persons who own mineral rights underlying the tracts of land adjacent to the property on which the existing or proposed injection well facility is or will be located; and

(v) any groundwater conservation district established in the county in which the existing or proposed injection well facility is or will be located.

(C) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address, not listed under subparagraph (A) of this paragraph, located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice must be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the contested case hearing. Within 30 days after the date of mailing, the applicant shall file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(4) Radio broadcast. If the application concerns a hazardous waste facility, the applicant shall broadcast notice under §39.503(d)(2) of this title.

(5) Deadline. Notice under paragraphs (2)(A), (3), and (4) of this subsection must be completed at least 30 days before the contested case hearing.

(g) Approval. All published notices required by this section must be in a form approved by the executive director prior to publication.

(h) Applications for individual Class V injection well permits for aquifer storage and recovery (ASR) projects and aquifer recharge (AR) projects. Notwithstanding the requirements of subsections (c) and (d) of this section, this subsection establishes the public notice requirements for [an application for] an individual Class V injection well permit application for either an ASR project or an AR project. Issuance of the Notice of Receipt of Application and Intent to Obtain a Permit is not required for [an application for] an individual Class V injection well permit application for an ASR project or an AR project. The notice required by §39.419 of this title must be published by the applicant once in a newspaper of general circulation in the county in which the injection well will be located after the chief clerk has mailed the preliminary decision and the Notice of Application and Preliminary Decision to the applicant. The chief clerk shall provide notice by first class mail to any groundwater conservation district in which the wells associated with the ASR project or AR project will be located. The chief clerk shall also mail notice to the persons listed in §39.413(7) - (9) of this title. This notice must contain the text as required by §39.411(c)(1) - (6) of this title.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: January 12, 2020

For further information, please call: (512) 293-1806



CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER J. EXPEDITED PERMITTING

30 TAC §101.601

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §101.601.

Background and Summary of the Factual Basis for the Proposed Rule

Senate Bill (SB or bill) 698, 86th Texas Legislature, 2019, amended the Texas Health and Safety Code (THSC), Chapter 382, Texas Clean Air Act, allowing TCEQ to cover the costs of utilizing full-time equivalent employees to process expedited permits. The bill specifies that the money collected from the surcharge may be used to support processing air permits under the expedited program. The bill also clarifies that the commission is allowed to set the rate for overtime compensation for full-time equivalent employees supporting the expedited processing of air permit projects.

Processing air permits through the expedited program would continue to apply to projects filed under 30 TAC Chapters 106, 116, or 122. Applicants are still required to comply with all applicable federal and state requirements, including existing public notice requirements. In addition, when public notice is required, and an applicant pays a surcharge for expedited processing of their air permit, the published public notice must indicate that the application is being processed in an expedited manner.

Section Discussion

§101.601, Surcharge

The commission proposes to amend §101.601(a) to allow the costs incurred for full-time equivalent commission employees expediting an application as an expense that may be fully funded with the surcharge collected for the expedited processing of an air permit application.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, 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.

This rulemaking addresses necessary changes in order to maintain consistency with state law. The proposed rule clarifies that the agency is allowed to use the expedited air permit surcharge revenue from an applicant to cover expenses incurred in the processing of that application, including all costs associated with full-time employees.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated would be compliance with state law and a probable decrease in the processing times for expedited air permits.

The proposed rulemaking is not anticipated to result in any change to significant fiscal implications for businesses or individuals that utilize the optional expedited air permit application process.

Local Employment Impact Statement

riod closes on January 21, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Sherry Davis, Air Permits Division, at (512) 239-2141.

Statutory Authority

The rule is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission, which establishes the general jurisdiction of the commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The rule is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; concerning Rules, which authorizes the commission to issue permits and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under the Texas Clean Air Act; THSC, §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; THSC, §382.0515, concerning Application for Permit, which specifies permit application requirements; THSC, §382.0518, concerning Preconstruction Permits, which authorizes the commission to grant a permit before work is begun on the construction of a new facility or a modification of an existing facility; THSC, §382.05195, concerning standard permits, which allows the commission to issue a standard permit for new or existing similar facilities; THSC, §382.01596, concerning permits by rule, which allows the commission to adopt permits by rule for certain types of facilities; THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, which authorizes the commission to provide notice of permit applications; and THSC, §382.0561, concerning Federal Operating Permit: Hearing, which allows the commission to issue, revise, reopen, or renew a federal operating permit.

The proposed rule would implement Senate Bill 698, 86th Texas Legislature, 2019; and THSC, §§382.051, 382.0513, 382.0515, 382.0518, 382.05195, 382.05196, 382.056, and 382.0561.

§101.601. Surcharge.

(a) The executive director may add a surcharge for an expedited application filed under Chapter 106, 116, or 122 of this title (relating to Permits by Rule; Control of Air Pollution by Permits for New Construction or Modification; and Federal Operating Permits Program, respectively) in an amount sufficient to cover the expenses incurred by expediting it, including overtime, full-time equivalent commission employees, contract labor, and other costs.

(b) Any surcharge will be remitted in the form of a check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality (TCEQ) or TCEQ and delivered with the application to the TCEQ, P.O. Box 13088, MC 214, Austin, Texas 78711-3088. Applications filed under Chapter 106, 116, or 122 of this title as described in this subchapter will not be considered for expedited processing until the surcharge is received.

(c) If the cost of processing an expedited application under this subchapter exceeds the collected surcharge amount, the executive director may assess and collect additional surcharge(s) from the applicant to cover the additional costs of expediting the permit. The executive director will not grant final approval under Chapter 106, 116, or 122 of this title if an outstanding surcharge amount is due.

(d) The executive director may refund any unused portion of the surcharge.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 293-1806



CHAPTER 281. APPLICATIONS PROCESSING SUBCHAPTER A. APPLICATIONS PROCESSING

30 TAC §281.19

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §281.19.

Background and Summary of the Factual Basis for the Proposed Rule

In 2019, the 86th Texas Legislature passed House Bill (HB) 720. HB 720 added Texas Water Code (TWC), §11.157, related to new appropriations of water for aquifer storage and recovery (ASR) and aquifer recharge (AR) projects. Under TWC, §11.157(f), the commission has 180 days to complete technical review of applications for new appropriations of water for ASR and AR. The commission must adopt rules implementing TWC, §11.157, by June 1, 2020.

This rulemaking implements the requirement in TWC, §11.157(f), for the commission to complete technical review for applications for new appropriations of water for ASR and AR projects in 180 days.

As part of this rulemaking, the commission is proposing amendments to 30 TAC Chapter 39, Public Notice; Chapter 295, Water Rights, Procedural; Chapter 297, Water Rights, Substantive; and Chapter 331, Underground Injection Control, to implement HB 720.

Section Discussion

§281.19, Technical Review

The commission proposes to amend §281.19(a). Currently, §281.19(a), requires that technical review of a water rights application be completed within 75 working days after the initial review period. TWC, §11.157(f), provides for a 180-day technical review period for new appropriations of water for ASR and AR projects. Proposed §281.19(a) would require that technical review for new appropriations of water for ASR and AR projects be completed 180 days after the application is determined to be administratively complete. Additionally, the commission proposes to further amend §281.19(a) to remove obsolete language referring to 30 TAC §291.102 and §291.109, because it relates to areas that were transferred to the Public Utility Commission of Texas (applications for certificates of public convenience and necessity and applications for sale, transfer, or merger requests).

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, no 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.

This rulemaking addresses necessary changes in order to comply with state law and implement the requirements in the TWC, §11.157(f), which require the commission to complete the technical review of applications for new appropriations of water for ASR and AR projects within 180 days.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated will be compliance with state law, specifically HB 720, which relates to appropriations of water for recharge of aquifers or use in ASR projects.

The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission 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.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rule does not adversely affect rural communities in a material way for the first five years that the proposed rule is in effect. The amendment would apply statewide and have the same effect in rural communities as in urban communities.

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.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rule does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the 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. A "Major environmental rule" means a rule with a specific intent 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 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 rulemaking is to implement HB 720, which enacted requirements in TWC, Chapters 11 and 27, for ASR and AR projects.

Second, the rulemaking does not meet the statutory definition of a "Major environmental rule" because the rule will 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 there will be a significant cost to comply with the proposed rule because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The proposed rule establishes a time period consistent with the requirements of HB 720 for technical review of applications for a new appropriation of water for an ASR project or AR project, therefore, will not adversely affect in a material way the public health and safety of the state or a sector of the state.

Finally, the rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law because there are no

federal standards governing water rights; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because there are no delegation agreements or contracts between the commission and the federal government for the commission's water rights program; and is not based solely under the general powers of the agency, but is based specifically under TWC, §27.019, and HB 720, Section 4, as well as, under the other authority of the commission cited in the statutory authority section of this preamble.

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 and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed action implements legislative requirements in HB 720 for ASR or AR projects.

The commission determined that the proposed rule would be neither a statutory nor a constitutional taking of private real property. The proposed rule establishes the time period consistent with the requirements of HB 720 for technical review of an application for a new appropriation of water for an ASR or AR project. The proposed rule does not affect a landowner's rights in private real property because this rulemaking 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 regulation.

Therefore, the 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 (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.

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 January 7, 2020, at 10:00 a.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 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Andreea Vasile, 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: <https://www6.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 2019-116-297-OW. The comment period closes on January 21, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757.

Statutory Authority

This amendment is proposed under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The proposed amendment implements HB 720.

§281.19. Technical Review.

(a) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of these sections, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 75 working days. [In the case of applications filed under §291.102 of this title (relating to Criteria for Considering and Granting Certificates or Amendments), the technical review period is that period of time beginning 30 days after notice of the application has been given in accordance with §291.109 of this title (relating to Report of Sale, Merger, etc.; Investigation; Disallowance of Transaction) and will continue for a period of time not to exceed 75 working days.] In the case of applications filed under §335.43 of this title (relating to Permit Required) or §331.7 of this title (relating to Permit Required), the technical review period shall commence upon assignment of the application to a staff member and continue for a period of time not to exceed 120 days. For applications filed under Chapter 336 of this title (relating to Radioactive Substance Rules) and subject to the Notice of Deficiency (NOD) process established in this section, the technical review period shall begin the day after the date of determination of administrative completeness and for issuance, renewal, or major amendments, shall continue for a period of time not to exceed 255 days; however, this time frame may be extended to a maximum of 600 days if an application is technically deficient; or, for applications

for minor amendments, shall continue for a period of time not to exceed 90 days; however, this time frame may be extended to a maximum of 150 days if an application is technically deficient. In the case of applications filed under Chapter 295 of this title (relating to Water Rights, Procedural) that request a new appropriation of water for aquifer storage and recovery or aquifer recharge projects, the technical review shall commence on the date the application is administratively complete and will continue for a period of time not to exceed 180 days.

(b) Except as provided in subsection (c) of this section, the applicant shall be promptly notified of any additional technical material as may be necessary for a complete review. If the applicant provides the information within the period of time prescribed by subsection (a) of this section, the executive director will complete processing of the application within the technical review period extended by the number of days required for the additional data. If the necessary additional information is not received by the executive director prior to expiration of the technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 30 days to provide the technical data before an application is returned. Decisions to return material to the applicant during the technical review stage will be made on a case by case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision instead of having the application returned.

(c) For applications for radioactive material licenses, the applicant shall be promptly notified of any additional technical information necessary to complete technical review. For new applications, renewal applications, or major amendment applications, the executive director shall complete application processing within the technical review period (600 days) if the applicant provides the information within 75 days of the date of the first NOD and 60 days of the subsequent NODs. For minor amendments, the applicant must provide the information within 20 days from the date of the first NOD and 20 days from the date of the second NOD. If the necessary additional information is not received by the executive director prior to the end of the response period, the executive director may return the application to the applicant. In no instance shall the executive director issue more than four NODs before returning the application. The applicant has the option of having the question of sufficiency of necessary technical information referred to the commission for a decision instead of having the application returned. The applicant may request additional time to respond to a notice of technical deficiency. The request must be in writing, set forth the reasons why the applicant cannot respond within the time provided and specify the amount of additional time requested. Any extension of time must be approved by the executive director in writing. The executive director may extend or delay the schedule for the processing of an application under this subsection to comply with the priority established by law for processing and review of radioactive material licenses.

(d) This subsection applies to the technical review of applications for radioactive material licenses submitted to the Texas Department of State Health Services on or before June 18, 2007. For new applications, renewal applications, or major amendment applications, the executive director shall complete application processing within the technical review period (600 days) if the applicant provides the information within 75 days of the date of the first NOD and 60 days of the second NOD. For minor amendments, the applicant must provide the information within 20 days from the date of the first NOD and 20 days from the date of the second NOD. If the necessary additional information is not received by the executive director prior to the end of the response period, the executive director may return the application to

the applicant. In no instance shall the executive director issue more than two NODs before returning the application. The applicant has the option of having the question of sufficiency of necessary technical information referred to the commission for a decision instead of having the application returned. The applicant may request additional time to respond to a notice of technical deficiency. The request must be in writing, set forth the reasons why the applicant cannot respond within the time provided and specify the amount of additional time requested. Any extension of time must be approved by the executive director in writing. The executive director may extend or delay the schedule for the processing of an application under this subsection to comply with the priority established by law for processing and review of radioactive material licenses.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 293-1806

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CHAPTER 295. WATER RIGHTS, PROCEDURAL

SUBCHAPTER C. NOTICE REQUIREMENTS FOR WATER RIGHTS APPLICATIONS

30 TAC §295.158

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §295.158.

Background and Summary of the Factual Basis for the Proposed Rule

In 2019, the 86th Texas Legislature passed House Bill (HB) 1964. HB 1964 streamlines the water rights permitting process for simple amendments to a water right that do not affect other water rights or the environment. The types of amendments covered by HB 1964 include changes to the purpose or place of use and small moves of diversion points. Amendments covered by HB 1964 will not be subject to notice and technical review.

The 86th Texas Legislature also passed HB 720, which removes permitting barriers for aquifer storage and recovery (ASR) and aquifer recharge (AR) projects for both new water rights and existing water rights. HB 720 adds recharge as a beneficial use of water and sets out a process for new appropriations for ASR and AR projects. These new appropriations are subject to notice and contested case hearings and TCEQ has 180 days to complete technical review of the application. HB 720 addresses amendments to existing water rights for reservoirs that have not been constructed or existing reservoirs that have lost storage capacity because of sedimentation. A water right holder with a water right authorizing storage that has not been constructed can remove the storage authorization without notice and hearing if other water rights and the environment are not affected by the amendment.

A water right holder can also request to remove the storage authorization and increase the amount of water to be diverted or the diversion rate, based on an evaporation credit, to increase the amount of water available for ASR. A water right holder can also amend their water right to replace storage capacity lost to sedimentation with an ASR project. These two types of amendments are subject to notice and contested case hearing.

This rulemaking implements changes to notice rules in Chapter 295 required by HB 1964 and HB 720.

As part of this rulemaking, the commission is proposing amendments to 30 TAC Chapter 39, Public Notice; Chapter 281, Applications Processing; Chapter 297, Water Rights, Substantive; and Chapter 331, Underground Injection Control, to implement HB 720.

Section Discussion

§295.158, Notice of Amendments to Water Rights

The commission proposes to amend §295.158(b)(3), by adding the word "use" to correct a typographic error in the rule.

The commission proposes to add §295.158(b)(9), to implement Texas Water Code (TWC), §11.158(f). The commission is proposing that amendment applications to: a) increase the amount of water diverted or the diversion rate based on an evaporation credit, or b) to convert storage in a reservoir that has lost capacity due to sedimentation to an ASR project, be subject to full basin mailed and published notice.

The commission proposes to add §295.158(c)(2) to implement TWC, §11.122(b-3) which describes applications that are not subject to notice or technical review. The subsequent paragraph will be renumbered.

The commission proposes to delete renumbered §295.158(c)(3)(C) because this language is now obsolete due to the implementation of TWC, §11.122, as previously stated. Subsequent subparagraphs will be re-lettered.

The commission proposes to amend re-lettered §295.158(c)(3)(C) and (D) to clarify that some changes to the point of diversion in a water right are exempt from notice and technical review under proposed §295.158(c)(2)(C). The commission further proposes to amend re-lettered §295.158(c)(3)(C) and (D) to clarify that the provisions in these subparagraphs relating to interjacent notice apply to water right holders of record and that only existing water right holders of record receive notice of these applications.

The commission proposes to add §295.158(c)(3)(F) to implement the provisions of TWC, §11.158(e) by specifying that applications to amend a water right to remove an authorization for storage in a storage reservoir that has not been constructed may not require additional notice if the water authorized for diversion will be stored in an aquifer storage and recovery project, the diversion amount or diversion rate are not increased, and if the executive director determines after an administrative review that other water rights and the environment would not be affected by the request.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, 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.

This rulemaking implements changes to notice rules in Chapter 295 and is required in order to comply with state law, specifically HB 720 and HB 1964. The proposed rule is intended to streamline the water rights permitting process for amendment applications covered by HB 1964 and to implement the notice requirements for applications for AR and ASR projects under HB 720. As a result, the agency may experience a reduction in permit processing times for both types of applications.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated will be compliance with state law and the streamlining of water rights permitting process for certain amendment applications.

There may be a cost savings for water rights applicants due to the reduction in information required for submission for amendments under HB 1964. The amount of the cost savings cannot be estimated.

The removal of permit barriers for ASR and AR projects may incentivize the development of this water source to meet the state's growing water needs.

Local Employment Impact Statement

The commission 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.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rule does not adversely affect rural communities in a material way for the first five years that the proposed rule is in effect. The amendment would apply statewide and have the same effect in rural communities as in urban communities.

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.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rule does not require the creation of new employee positions, eliminate current employee positions, nor does it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does it increase or decrease the number of individuals subject to its applicability. However, the proposed rulemaking does limit the notice and contested case hearing requirements for certain applications, as required by state law. During the first five years,

the proposed rule should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the 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. A "Major environmental rule" means a rule with a specific intent 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 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 rulemaking is to implement laws enacted by the Texas Legislature. HB 720 sets forth requirements in TWC, Chapters 11 and 27, for ASR and AR projects. HB 1964 sets forth notice requirements in TWC, Chapter 11, for certain applications to amend water rights.

Second, the rulemaking does not meet the statutory definition of a "Major environmental rule" because the rule will 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 there will be a significant cost to comply with the proposed rule because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The proposed rule establishes notice requirements consistent with the requirements of HB 720 and HB 1964, therefore, will not adversely affect in a material way the public health and safety of the state or a sector of the state.

Finally, the rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law because there are no federal standards governing water rights; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because there are no delegation agreements or contracts between the commission and the federal government for the commission's water rights program; and is not based solely under the general powers of the agency, but is based specifically under TWC, §11.122(c) and HB 720, Section 4, as well as, under the other authority of the

commission cited in the statutory authority section of this preamble.

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 and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed action implements legislative requirements in HB 720 for ASR or AR projects and in HB 1964 for notice requirements for certain water right amendment applications.

The commission determined that the proposed rule would be neither a statutory nor a constitutional taking of private real property. The proposed rule establishes notice requirements for ASR and AR project applications consistent with the requirements in HB 720 and notice requirements for certain applications to amend water rights consistent with the requirements in HB 1964. It is not anticipated that there will be many ASR or AR project applications and the cost of complying with the regulations is not expected to be substantial. The proposed rule will also streamline notice requirements for certain water right amendment applications, allowing these applications to be processed more quickly without imposition of additional fees or costs since no new fees are proposed. The proposed rule does not affect a landowner's rights in private real property because this rulemaking 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.

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 (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.

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 January 7, 2020, at 10:00 a.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 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Andreea Vasile, 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: <https://www6.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 2019-116-297-OW. The comment period closes on January 21, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757.

Statutory Authority

This amendment is proposed under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §11.122(c), which requires the commission to adopt rules to effectuate the provisions of §11.122; and HB 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158, and TWC, Chapter 27, Subchapter H.

The proposed amendment implements HB 720 and HB 1964.

§295.158. Notice of Amendments to Water Rights.

(a) On motion of executive director.

(1) If the executive director determines to file a petition to amend a water right, notice of the determination stating the grounds therefore and a copy of a proposed amendment draft shall be personally served on or mailed by certified mail to the water right holder at the last address of record with the commission.

(2) This notice shall be given at least 15 days before a petition is filed with the commission.

(b) Requiring mailed and published notice. Unless authorized by subsection (c) of this section, applications for amendments to permits, certified filings, or certificates of adjudication, including, but not limited to, those of the following nature, must comply with requirements for a water use permit, including the notice requirements in the Texas Water Code, §11.132, and this subchapter:

(1) to change the place of use when other water users of state water may be affected;

(2) to increase an appropriation and/or rate or period of diversion;

(3) to change the purpose of use when the change would authorize a greater consumption of state water or would materially alter the period of time when state water could be diverted;

(4) to add points of diversion which would result in a greater rate of diversion or impair other water rights;

(5) to remove or modify the requirements or conditions of a water right which were included for the protection of other water rights;

(6) to change a point of diversion which may impair other water rights;

(7) to relocate or enlarge a reservoir; [or]

(8) to extend the period of duration of any term permit; or

[:]

(9) to remove the authorization for storage in a reservoir that has not been constructed if the application requests:

(A) an increase in the amount of water to be diverted or the diversion rate based on an evaporation credit; or

(B) to change the use or purpose of use of a water right authorizing an appropriation of water for storage in an on-channel storage reservoir that has lost storage because of sedimentation to storage as part of an aquifer storage and recovery project for later retrieval and use as authorized by the original water right.

(c) Not requiring mailed and published notice.

(1) Only an application to amend an existing permit, certified filing, or certificate of adjudication which does not contemplate an additional consumptive use of state water or an increased rate or period of diversion and which, in the judgment of the commission, has no potential for harming any other existing water right, is subject to amendment by the commission without notice other than that provided to the record holder. Once the technical review of an application is complete and the technical memoranda have been filed with the chief clerk of the commission, the commission shall consider whether additional notice is required based on the particular facts of the application.

(2) Applications for the following do not require notice, except to the record holder, and do not require technical review:

(A) to add a purpose of use that does not substantially alter:

(i) the nature of the water right from a water right authorizing only non-consumptive use to a water right authorizing consumptive use; or

(ii) a pattern of use that is explicitly authorized by or required by the original water right;

(B) to add a place of use located in the same river basin as the place of use authorized in the original water right;

(C) to change the point of diversion provided that:

(i) the authorized rate of diversion is not increased;

(ii) the original point of diversion and the new point of diversion are located on the same contiguous tract of land;

(iii) there are no other water right holders with points of diversion located on the same watercourse between the original point of diversion and the new point of diversion;

(iv) there are no streamflow gages located on the watercourse between the original point of diversion and the new point of diversion that are referenced in the original water right or in another water right authorizing a diversion from the same watercourse; and

(v) there are not tributary watercourses that enter the watercourse that is the source of supply located between the original point of diversion and the new point of diversion.

(3) [(2)] Applications of the following descriptions may not require additional notice:

(A) to cure ambiguities or ineffective provisions in a water right;

(B) to reduce an appropriation or rate of diversion;

~~(C) to change the place of use when there will be no increased use of state water and the change will not operate to the injury of any other lawful user of state water. If a water right is owned by more than one party, all other parties will be notified of the proposed changes by certified mail and given two weeks to protest. If no protest is received, further notice will not be required;~~

~~(C) [(D)] to change the point of diversion, except for applications under paragraph (2)(C) of this subsection, when the existing rate of diversion will not be increased and there are no interjacent water right holders [users] of record between the originally authorized point of diversion and the new one, or when interjacent water users agree in writing to the amendment. If written agreements are not obtained, interjacent water right holders [users] will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;~~

~~(D) [(E)] to add additional points of diversion, except for applications under paragraph (2)(C) of this subsection, where the existing rate of diversion will not be increased and there are no water right holders [users] of record between any originally authorized point of diversion and the new one to be added, or when interjacent water right holders [users] agree in writing to the amendment. If written agreements are not obtained, interjacent water users will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;~~

~~(E) [(F)] to increase the rate or period for diversion from a storage reservoir; and [-]~~

~~(F) to remove the authorization for storage in a reservoir that has not been constructed, provided that:~~

~~(i) the application does not request an increase in the diversion amount or rate; and~~

~~(ii) the executive director determines after an administrative review that the application will not cause a negative impact on other water rights or the environment that is greater than the effect the original permit would have had were the permit rights exercised to the full extent of the original permit.~~

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: January 12, 2020

For further information, please call: (512) 293-1806



CHAPTER 297. WATER RIGHTS, SUBSTANTIVE

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §297.1 and §§297.41 - 297.43, concerning Water Rights, Substantive.

Background and Summary of the Factual Basis for the Proposed Rules

In 2019, the 86th Texas Legislature passed HB 720, which removes permitting barriers for aquifer storage and recovery (ASR) and aquifer recharge (AR) projects for both new water rights and existing water rights. HB 720 adds recharge as a beneficial use of water and sets out a process for new appropriations for ASR and AR projects. These new appropriations are subject to notice and contested case hearings and TCEQ has 180 days to complete technical review of the application. HB 720 also requires TCEQ to adopt rules providing for the considerations for determining water availability for new appropriations for ASR and AR.

HB 720 also addresses amendments to existing water rights for reservoirs that have not been constructed or existing reservoirs that have lost storage capacity because of sedimentation. A water right holder with a water right authorizing storage in a reservoir that has not been constructed can remove the storage authorization without notice and hearing if other water rights and the environment are not affected by the amendment.

A water right holder can also request to remove the storage authorization and increase the amount of water to be diverted or the diversion rate, based on an evaporation credit, to increase the amount of water available for ASR or AR project. A water right holder can also amend their water right to replace storage capacity lost to sedimentation with an ASR project. These two types of amendments are subject to notice and contested case hearing.

This rulemaking implements changes to Chapter 297 required by HB 720.

As part of this rulemaking, the commission is proposing amendments to 30 TAC Chapter 39, Public Notice; Chapter 281, Applications Processing, Chapter 295, Water Rights, Procedural; and Chapter 331, Underground Injection Control, to implement HB 720.

Section by Section Discussion

§297.1, Definitions

The commission proposes §297.1(5) to provide a definition of an AR project consistent with the definition in Texas Water Code (TWC), §27.201. The commission proposes this change to implement TWC, §11.157(a) which allows water to be appropriated for AR. The subsequent paragraphs will be renumbered.

The commission proposes to remove the sentence in renumbered §297.1(52) stating that water injected into the ground for an ASR project remains state water. This change is to implement TWC, §11.023(d).

§297.41, General Approval Criteria

The commission proposes to amend §297.41(a)(3)(D) to implement TWC, §11.157(b)(1) and (c)(1), and §11.158(g)(2). These provisions require the commission to consider the requirements in TWC, §§11.134, 11.147, and 11.1471 in granting an application for a water right. Proposed amended §297.41(a)(3)(D) follows the language of TWC, §11.134.

§297.42, Water Availability

The commission proposes to amend §297.42(b). The proposed changes to §297.42(b) implement TWC, §11.157(b)(1) and 11.157(c)(1) and (2), and §11.158(g)(2), which require the commission to consider the requirements in TWC, §§11.134, 11.147, and 11.1471 in granting an application for a water right. This change is to clarify that the commission can condition new and amended water rights for AR and ASR to protect the adopted environmental flow standards in 30 TAC Chapter 298 (Environmental Flow Standards for Surface Water).

The commission proposes to amend §297.42(d) to remove references to water availability for AR and ASR because water availability for these types of projects is specifically addressed in proposed §297.42(e). The commission also proposes to amend §297.42(d) to clarify the non-consumptive instream uses for which water may be appropriated to ensure consistency with TWC, §11.0235(d).

The commission proposes to add §297.42(e) to specify the water availability criteria for new appropriations for ASR and AR as required by TWC, §11.157(g). Proposed §297.42(e) states that new appropriations of water for these types of projects need not be continuously available as set out in TWC, §11.157(c)(3). The commission proposes that the minimum water availability criteria for these types of projects is that the full amount of the request be available at least one year in the period of record of the commission's water availability model for the applicable river basin. This availability criteria is consistent with the commission's current practice in reviewing applications that are not required to be based on historic normal streamflow. The commission further proposes that this availability criteria would apply provided the project is viable for the intended purpose and the water can be beneficially used without waste.

The commission proposes to add §297.42(f) to specify water availability criteria for new appropriations of water based on an evaporation credit, as described by TWC, §11.158(c). The commission proposes that evaporation credits would apply to on-channel storage that has not been constructed. The volume of water diverted for an off-channel project likely already includes the amount of water that would be lost to evaporation and the commission does not anticipate changes to the volume of water diverted from the stream if a water right holder removes the authorization for an off-channel reservoir from its water right. Further, substituting an ASR project for off-channel storage would not require an amendment to the underlying water right under TWC, §11.153, provided the terms of the water right are not changed and the water right holder obtains the required authorizations specified in that section. The commission proposes that water for these types of projects need not be continuously available. The commission further proposes that the evaporation credit be determined based on the evaporation calculations used in developing the terms of the original water right and cannot exceed the maximum annual modeled evaporation as determined in the commission's water availability model for the applicable river basin. The commission proposes these criteria for the protection of other water right holders. If an applicant for an amendment to a water right requests more water than would be available as an evaporation credit, TWC, §11.157, and the availability criteria under proposed §297.42(e) would apply to the additional volume of water requested in the application.

The commission proposes to add §297.42(g) to set out criteria for determining the volume of water available for conversion to an ASR project for water right holders with reservoirs which have lost storage capacity because of sedimentation under

TWC, §11.158(d). The commission proposes that the volume of water be limited to the lesser of the calculated volume that has been lost to sedimentation and the volume of storage in an ASR project that is necessary to restore the yield of the reservoir that has been lost to sedimentation. The commission proposes these criteria for the protection of other water right holders. If an applicant for an amendment to a water right requests more water than would be needed to restore the yield lost to sedimentation, then TWC, §11.157, and the availability criteria under proposed §297.42(e) would apply to the additional volume of water requested in the application. The subsequent subsections will be re-lettered.

§297.43, Beneficial Uses

The commission proposes to amend §297.43 to ensure consistency with TWC, §11.023. The commission proposes amending subsection (a) to insert the language in TWC, §11.023(a), and amending paragraph (10) by removing the existing language relating to instream uses, water quality, aquatic and wildlife habitat, or freshwater inflows to bays and estuaries because these uses are not specified in TWC, §11.023. To the extent the commission has the authority to appropriate water for any of those uses, they would be covered in §297.43(a)(11). Finally, the commission incorporates the language in TWC, §11.023(9) into §297.43(10) to clarify that water appropriated for AR or ASR is a beneficial use of water, as set out in TWC, §11.023.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no 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.

This rulemaking addresses necessary changes in order to comply with state law, specifically HB 720, which relates to appropriations of water for AR and use in ASR projects.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be compliance with state law. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission 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.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rules do not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

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 rulemaking is in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years the proposed rulemaking is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does not increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rulemaking should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the 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. A "Major environmental rule" means a rule with a specific intent 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 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 rulemaking is to implement HB 720 which enacted requirements in TWC, Chapters 11 and 27, for ASR and AR projects.

Second, the rulemaking does not meet the statutory definition of a "Major environmental rule" because the rulemaking will 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 there will be a significant cost to comply with the proposed rules because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendments will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The proposed rules establish program requirements consistent with the requirements of HB 720, therefore, will not adversely impact in a material way the public health and safety of the state or a sector of the state.

Finally, the rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or

representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law because there are no federal standards governing water rights; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because there are no delegation agreements or contracts between the commission and the federal government for the commission's water rights program; and is not based solely under the general powers of the agency, but is based specifically under HB 720, Section 4, as well as under the other authority of the commission cited in the statutory authority section of this preamble.

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 and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed action implements legislative requirements in HB 720 for ASR or AR projects.

The commission determined that the proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules establish program requirements for aquifer storage or AR project applications consistent with the requirements of HB 720. It is not anticipated that there will be many ASR or AR project applications and the cost of complying with the regulations is not expected to be substantial because no new fees are proposed. The proposed rules do not affect a landowner's rights in private real property because this rulemaking 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.

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 that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and, therefore, must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22, and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the proposed rules include those contained in 31 TAC §501.33. The proposed rules require that the commission consider the

adopted environmental flow standards in Chapter 298 in determining whether to grant an application and provide that the new water rights can be conditioned as appropriate to protect the adopted standards. The adopted standards provide adequate protection of the state's streams, rivers, bays, and estuaries. Since one of the purposes of the proposed rules is to ensure that the commission consider protection of coastal natural resources in considering applications for new or amended water rights that request additional water and can condition these water rights to ensure that coastal natural resources are protected, the rules are consistent with CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies, because the proposed rules are consistent with these CMP goals and policies; do not create or have a direct or significant adverse effect on any coastal natural resource areas; and one of the purposes of the proposed rules is to ensure protection of coastal natural resources as the commission issues new or amended water rights that request additional water.

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 January 7, 2020, at 10:00 a.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 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Andreea Vasile, 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: <https://www6.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 2019-116-297-OW. The comment period closes on January 21, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757.

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

30 TAC §297.1

Statutory Authority

This amendment is proposed under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The proposed amendment implements HB 720.

§297.1. Definitions.

The following words and terms, when used in this chapter and in Chapters 288 and 295 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements; and Water Rights, Procedural, respectively), shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agriculture or agricultural--Any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management;

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure; and

(G) aquaculture as defined in Texas Agriculture Code, §134.001, which reads "'aquaculture' or 'fish farming' means the business of producing and selling cultured species raised in private facilities. Aquaculture or fish farming is an agricultural activity."

(2) Agricultural use--Any use or activity involving agriculture, including irrigation.

(3) Appropriations--The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water.

(4) Appropriative right--The right to impound, divert, store, take, or use a specific quantity of state water acquired by law.

(5) Aquifer recharge project--A project involving the intentional recharge of an aquifer by means of an injection well or other means of infiltration, as described in Texas Water Code, §27.201(1).

(6) [~~5~~] Aquifer Storage and Recovery Project--A project involving the injection of water into a geologic formation for the purpose of subsequent recovery and beneficial use by the project operator.

(7) [~~6~~] Baseflow or normal flow--The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, agricultural, or other uses of ground or surface waters may be included at times.)

(8) [(7)] Beneficial inflows--Freshwater inflows providing for a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(9) [(8)] Beneficial use--Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

(10) [(9)] Certificate of adjudication--An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of Texas Water Code, §11.323, or the final judgment and decree in State of Texas v. Hidalgo County Water Control and Improvement District No. 18, 443 S.W.2d 728 (Texas Civil Appeals - Corpus Christi 1969, writ ref. n.r.e.).

(11) [(10)] Certified filing--A declaration of appropriation or affidavit which was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, §14, as amended.

(12) [(11)] Claim--A sworn statement filed under Texas Water Code, §11.303.

(13) [(12)] Commencement of construction--An actual, visible step beyond planning or land acquisition, which forms the beginning of the on-going (continuous) construction of a project in the manner specified in the approved plans and specifications, where required, for that project. The action must be performed in good faith with the bona fide intent to proceed with the construction.

(14) [(13)] Conservation--Those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(15) [(14)] Conserved water--That amount of water saved by a water right holder through practices, techniques, or technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from the storage, transportation, distribution, or application of the water. Conserved water does not mean water made available simply through its non-use without the use of such practices, techniques, or technologies.

(16) [(15)] Dam--Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam. A structure used only for diverting water from a watercourse by gravity is a diversion dam.

(17) [(16)] Diffused surface water--Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)

(18) [(17)] District--Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(19) [(18)] Domestic use--Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If

the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

(20) [(19)] Drought of record--The historic period of record for a watershed in which the lowest flows were known to have occurred based on naturalized streamflow.

(21) [(20)] Firm yield--That amount of water, that the reservoir could have produced annually if it had been in place during the worst drought of record. In performing this simulation, naturalized streamflows will be modified as appropriate to account for the full exercise of upstream senior water rights is assumed as well as the passage of sufficient water to satisfy all downstream senior water rights valued at their full authorized amounts and conditions as well as the passage of flows needed to meet all applicable permit conditions relating to instream and freshwater inflow requirements.

(22) [(21)] Groundwater--Water under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.

(23) [(22)] Habitat Mitigation--Actions taken to off-set anticipated adverse environmental impacts from a proposed project. Such actions and their sequence include:

(A) avoiding the impact altogether by not taking a certain action or parts of an action or pursuing a reasonably practicable alternative;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(24) [(23)] Hydropower use--The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(25) [(24)] Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric, but does not include agricultural use.

(26) [(25)] Instream use--The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other instream use recognized by law. An instream use is a beneficial use of water. Water necessary to protect instream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

(27) [(26)] Irrigation--The use of water for the irrigation of crops, trees, and pasture land, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(28) [(27)] Irrigation water efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include but are not limited to evapotranspiration needs for vegetative maintenance and growth and salinity management and leaching requirements associated with irrigation.

(29) [(28)] Livestock use--The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in Texas Agriculture Code, §142.001, and the terms game animals and fur-bearing animals are to be used as defined in Texas Parks and Wildlife Code, §63.001 and §71.001, respectively.

(30) [(29)] Mariculture--The propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.

(31) [(30)] Marine seawater--Water that is derived from the Gulf of Mexico.

(32) [(31)] Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(33) [(32)] Municipal per capita water use--The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(34) [(33)] Municipal use--

(A) The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, other public or recreational spaces; or

(B) the use of reclaimed water in lieu of potable water for the preceding purposes; or

(C) the use of return flows authorized pursuant to Texas Water Code, §11.042, in lieu of potable water for the preceding purposes. Return flows used for human consumption as defined in §290.38(34) of this title (relating to Definitions) must be of a quality suitable for the authorized beneficial use as may be required by applicable commission rules; or

(D) the application of municipal sewage effluent on land, under a Texas Water Code, Chapter 26, permit where:

(i) the application site is land owned or leased by the Chapter 26 permit holder; or

(ii) the application site is within an area for which the commission has adopted a no-discharge rule.

(35) [(34)] Navigable stream--By law, Texas Natural Resources Code, §21.001(3), any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more, at which point it becomes statutorily nonnavigable.

(36) [(35)] Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to

sale or lease and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(37) [(36)] One-hundred-year flood--The flood peak discharge of a stream, based upon statistical data, which would have a 1.0% chance of occurring in any given year.

(38) [(37)] Permit--The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.

(39) [(38)] Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful or detrimental to humans, animal life, vegetation, or property, or the public health, safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(40) [(39)] Priority--As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law.

(41) [(40)] Reclaimed water--Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or agricultural tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized beneficial use.

(42) [(41)] Recreational use--The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including aquatic and wildlife enjoyment, and aesthetic land enhancement of a subdivision, golf course, or similar development.

(43) [(42)] Register--The *Texas Register*.

(44) [(43)] Reservoir system operations--The coordinated operation of more than one reservoir or a reservoir in combination with a direct diversion facility in order to optimize available water supplies.

(45) [(44)] Return water or return flow--That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(46) [(45)] Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(47) [(46)] River basin--A river or coastal basin designated by the Texas Water Development Board as a river basin under Texas Water Code, §16.051. The term does not include waters originating in bays or arms of the Gulf of Mexico.

(48) [(47)] Runoff--That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(49) [(48)] Secondary use--The reuse of state water for a purpose after the original, authorized use.

(50) [(49)] Sewage or sewage effluent--Water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with any groundwater infiltration and surface waters with which it may be commingled.

(51) [(50)] Spreader dam--A levee-type embankment placed on alluvial fans or within a flood plain of a watercourse, common to land use practices, for the purpose of overland spreading of diffused waters and overbank flows.

(52) [(51)] State water--The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, and watercourse in the state. State water also includes water which is imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state. [Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water.] State water does not include percolating groundwater; nor does it include diffuse surface rainfall runoff, groundwater seepage, or springwater before it reaches a watercourse.

(53) [(52)] Stormwater or floodwater--Water flowing in a watercourse as the result of recent rainfall.

(54) [(53)] Streamflow--The water flowing within a watercourse.

(55) [(54)] Surplus water--Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law. Water that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

(56) [(55)] Unappropriated water--The amount of state water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.

(57) [(56)] Underflow of a stream--Water in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(58) [(57)] Waste--The diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system, or the diversion or use of water in any manner that causes or threatens to cause pollution of water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance with all applicable rules and standards prior to its discharge into or adjacent to water in the state so that it may be subsequently beneficially used.

(59) [(58)] Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for preventing or reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate planning document or may be contained within another water management document(s).

(60) [(59)] Water in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers,

streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(61) [(60)] Watercourse--A definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter with some degree of regularity, depending on the characteristics of the sources.)

(62) [(61)] Water right--A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water.

(63) [(62)] Watershed--A term used to designate the area drained by a stream and its tributaries, or the drainage area upstream from a specified point on a stream.

(64) [(63)] Water supply--Any body of water, whether static or moving, either on or under the surface of the ground, available for beneficial use on a reasonably dependable basis.

(65) [(64)] Wetland--An area (including a swamp, marsh, bog, prairie pothole, playa, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include:

- (A) irrigated acreage used as farmland;
- (B) man-made wetlands of less than one acre; or
- (C) man-made wetlands not constructed with wetland creation as a stated objective, including, but not limited to, impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts.

This definition does not apply to man-made wetlands described under this subparagraph constructed or created on or after August 28, 1989. If this definition conflicts with the federal definition in any manner, the federal definition prevails.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 2019.

TRD-201904444

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: January 12, 2020

For further information, please call: (512) 293-1806



SUBCHAPTER E. ISSUANCE AND CONDITIONS OF WATER RIGHTS

30 TAC §§297.41 - 297.43

Statutory Authority

These amendments are proposed under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and 11.158 and TWC, Chapter 27, Subchapter H.

The proposed amendments implement HB 720.

§297.41. General Approval Criteria.

(a) Except as otherwise provided by this chapter, the commission shall grant an application for a water right only if:

(1) the application conforms to the requirements prescribed by Chapter 295 of this title (relating to Water Rights, Procedural) and is accompanied by the prescribed fee;

(2) unappropriated water is available in the source of supply;

(3) the proposed appropriation:

(A) is intended for a beneficial use;

(B) does not impair existing water rights or vested riparian rights;

(C) is not detrimental to the public welfare;

(D) considers any applicable environmental flow standards established under Texas Water Code (TWC), §11.1471 and, if applicable, the assessments performed under TWC [Texas Water Code (TWC)], §§11.147(d) and (e), and 11.150 - 11.152; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that new, changed, or unaccounted for conditions warrant waiver of this requirement;

(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 of this title (relating to Definitions); and

(5) the applicant has completed and returned all Texas Water Development Board surveys of groundwater and surface water use required since September 1, 2001 under TWC, §16.012.

(b) Beginning January 5, 2002, the commission will not issue a water right for municipal purposes in a region that does not have an approved regional water plan in accordance with TWC, §16.053(i) unless the commission determines that new, changed, or unaccounted for conditions warrant the waiver of this requirement.

§297.42. Water Availability.

(a) Except as provided by Texas Water Code (TWC), §11.1381, and §297.19 of this title (relating to Term Permit under ~~Under~~ Texas Water Code, §11.1381 [§§11.1381 and 11.153, 11.155]), an application for a new or increased appropriation will be denied

unless there is a sufficient amount of unappropriated water available for a sufficient amount of the time to make the proposed project viable and ensure the beneficial use of water without waste.

(b) A new water right may be conditioned as appropriate to protect any applicable environmental flow standards as described in Chapter 298 of this title (relating to Environmental Flow Standards for Surface Water), and, if applicable, instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries as provided by TWC, §§11.147, 11.150, 11.152, and 16.059.

(c) For the approval of an application for a direct diversion from a stream without sufficient on or off channel water storage facilities for irrigation, approximately 75% of the water requested must be available approximately 75% of the time when distributed on a monthly basis and based upon the available historic stream flow record. Lower availability percentages may be acceptable if the applicant can demonstrate that a long-term, reliable, alternative source or sources of water of sufficient quantity and quality are economically available to the applicant to make the proposed project viable and ensure the beneficial use of state water without waste.

(d) Projects that are not required to be based upon the continuous availability of historic, normal stream flow include, but are not limited to: ~~[the artificial recharge of the Edwards Aquifer under TWC, §11.023(e);]~~ conjunctive ground and surface water management projects ~~[such as aquifer storage and recovery projects];~~ diversions or impoundments at times of above-normal stream flow (e.g., "scalping" operations) for seasonal or supplemental use; a system operation in conjunction with other water rights; non-consumptive instream uses except for instream flows dedicated to environmental needs or inflows to the state's bay and estuary systems or other similar beneficial uses; or other similar type projects. The required availability of unappropriated water for these special type projects shall be determined on a case-by-case basis based upon whether the proposed project can be viable for the intended purposes and the water will be beneficially used without waste.

(e) New appropriations of water for recharge into an aquifer underlying this state, including aquifer recharge projects as defined by TWC, §27.201 may be for water that is not continuously available. Water availability for the full amount of water requested for these types of projects must, at a minimum, be available at least one year in the period of record based on the commission's water availability model for the applicable river basin, and the proposed project must be viable for the intended purposes and the water must be beneficially used without waste.

(f) New appropriations of water based on an increase in the amount of water diverted or the rate of diversion resulting from an evaporation credit under TWC, §11.158(c) may be for water that is not continuously available. Water availability for projects under this subsection that request an increase in the amount of water diverted or the rate of diversion from an on-channel reservoir that has not been constructed shall be based on the evaporation calculations that were used in developing the terms of the water right for which the amendment is sought and cannot exceed the maximum annual modeled evaporation as determined in the commission's water availability model for the applicable river basin.

(g) The volume of water available for conversion of a water right that authorizes storage in a reservoir that has lost storage capacity because of sedimentation to storage as part of an aquifer storage and recovery project, as described in TWC, §11.158(d), does not have to be continuously available. The volume of water that can be converted to storage in an aquifer storage and recovery project under this subsection is limited to the lesser of:

(1) the storage volume that is demonstrated to have been lost to sedimentation, as determined by a survey performed by the Texas Water Development Board; or

(2) the volume of storage in the aquifer storage and recovery project that would restore the amount of previously authorized yield lost to sedimentation.

(h) [(e)] For an application for an on-channel storage facility to be authorized for domestic or municipal water use, the proposed diversion right of the reservoir must be equal to its firm yield. The purpose of this limitation is to ensure a secure and dependable source of water supply for uses necessary to protect the public health, safety, and welfare (see also [30 TAC] §290.41(b) of this title (relating to Water Sources) requiring public water systems to have a "safe" yield capable of supplying the maximum daily demands during extended periods of peak usage and "critical hydrologic conditions"). Such reservoir may be authorized in excess of its firm yield when the implementation of a drought management plan or alternative sources of water supply such as groundwater, other reservoir systems, or other means are available to satisfy water needs during drought periods when the reservoir's normal supply capabilities would be exceeded.

(i) [(f)] Except for an application for an emergency, temporary, seasonal, or term permit, or as provided by this section, the commission may require an applicant to provide storage sufficient to yield the requested annual diversion.

(j) [(g)] In order to make the optimum beneficial use of available water, a water right may be granted based upon the availability of return flows or discharges. However, a water right granted upon return flows or discharges that may cease in the future because of new or increased direct reuse (i.e., the lawful reuse of water before it is returned or discharged into the stream) or that may cease for other lawful reasons will be granted with the express provision that the water available for the water right is dependent upon potentially interruptible return flows or discharges.

§297.43. *Beneficial Uses.*

(a) To the extent that State water has not been set aside by the commission under Texas Water Code (TWC), §11.1471(a)(2), to meet downstream instream flow needs or freshwater inflow needs, State water may be appropriated, stored, or diverted for the following purposes of use:

- (1) domestic and municipal;
- (2) industrial;
- (3) agriculture;
- (4) mining and the recovery of minerals;
- (5) hydroelectric power;
- (6) navigation;
- (7) recreation and pleasure;
- (8) public parks;
- (9) game preserves;

(10) recharge into an aquifer underlying this state other than an aquifer described under subsection (b) of this section through surface infiltration or an aquifer recharge project as defined by TWC, §27.201 [instream uses, water quality, aquatic and wildlife habitat, or freshwater inflows to bays and estuaries]; and

(11) other beneficial purposes of use recognized by law.

(b) Unappropriated storm water and floodwater may be appropriated to recharge freshwater bearing sands and aquifers in the portion

of the Edwards Aquifer located within Kinney, Uvalde, Medina, Bexar, Comal, and Hays Counties if it can be established by expert testimony that an unreasonable loss of state water will not occur and that the water can be withdrawn at a later time for application to a beneficial use. The normal or ordinary flow of a stream or watercourse may never be appropriated, diverted, or used by a water right holder for this recharge purpose.

(c) The amount of water appropriated for each purpose listed under this section shall be specifically appropriated for that purpose. The commission may authorize the appropriation of a single amount or volume of water for more than one purpose of use. In the event that a single amount or volume of water is appropriated for more than one purpose of use, the total amount of water actually diverted for all of the authorized purposes may not exceed the total amount of water appropriated.

(d) State policy regarding preferences for certain type uses provided by Texas Water Code (TWC), §11.024, does not alter the basic principle of priority based upon first in time established under TWC, §11.027. Rather, such preferences will be used, in part, by the commission in determining which competing new uses will be granted water rights as provided by TWC, §11.123.

(e) The water of any arm, inlet, or bay of the Gulf of Mexico may be changed from salt water to sweet or fresh water and held or stored by dams, dikes, or other structures and may be taken or diverted for any purpose authorized by this chapter.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 2019.

TRD-201904445

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 293-1806



CHAPTER 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§331.2, 331.7, 331.9, and 331.131 and proposes new §§331.262 - 331.267.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking implements House Bill (HB) 720, 86th Texas Legislature, 2019, addressing the commission's regulation of aquifer recharge (AR) projects in Texas. HB 720 adds Subchapter H, Aquifer Recharge Projects, to the Texas Water Code (TWC), Chapter 27. The proposed amendments add definitions, authorization mechanisms, standards, and requirements for Class V recharge wells associated with AR projects.

As part of this rulemaking, the commission is proposing amendments to 30 TAC Chapter 39, Public Notice; Chapter 281, Applications Processing; Chapter 295, Water Rights, Procedural; and Chapter 297, Water Rights, Substantive.

Section by Section Discussion

The commission proposes various stylistic, non-substantive changes, such as grammatical corrections and correct uses of references. These changes are non-substantive and are not specifically discussed in this preamble.

§331.2, *Definitions*

The commission proposes to add §331.2(7)(A) - (E) to define "Aquifer recharge project" to conform to HB 720 and TWC, §27.201(1). The subsequent definitions will be renumbered accordingly.

The commission proposes to amend renumbered §331.2(51) and (56) to correct the cross-reference from TWC, §27.023 to TWC, §27.025.

The commission proposes to amend renumbered §331.2(93) to add "or an aquifer recharge project" to the definition to conform to TWC, §27.201(3).

The commission proposes to add §331.2(96) to define "Recharge injection well" to conform to TWC, §27.201(4). The subsequent definitions will be renumbered.

§331.7, *Permit Required*

The commission proposes to amend §331.7(h) to add "or an aquifer recharge (AR) project" to the types of projects for which Class V injection wells may be authorized by rule, individual permit or general permit, to conform to TWC, §27.203(a).

§331.9, *Injection Authorized by Rule*

The commission proposes to amend §331.9(b)(2)(E) to include reference to proposed Subchapter O (Additional Requirements for Class V Injection Wells Associated with Aquifer Recharge Projects) to implement newly adopted TWC, Chapter 27, Subchapter H.

§331.131, *Applicability*

The commission proposes to amend §331.131 to include reference to proposed Subchapter O to implement newly adopted TWC, Chapter 27, Subchapter H.

§331.262, *Applicability*

The commission proposes new §331.262 to explain that the requirements of current Chapter 331, Subchapter H and proposed new Chapter 331, Subchapter O are both applicable to all Class V AR projects, as established by TWC, §§27.201 - 27.207.

§331.263, *Area of Review*

The commission proposes new §331.263 to provide the standards applicable to Class V AR projects for the identification and review of activities in the project area that may impact or be impacted by the AR project as established by TWC, §27.203(b) and §27.204(a).

§331.264, *Construction and Closure Standards*

The commission proposes new §331.264 to provide the construction and closure standards applicable to Class V AR projects as established by TWC, §27.204(a).

§331.265, *Operating Requirements*

The commission proposes new §331.265(a) - (e) to provide the operating requirements applicable to Class V AR projects, with the primary objectives of preventing the projects from being operated in a manner that endangers underground sources of

drinking water and preventing movement of injected fluid into unauthorized zones, as established by TWC, §27.203(b) and §27.204(a).

The commission proposes new §331.265(f) to require all AR injection wells be installed with a flow meter to measure the volume of water injected, a requirement established by TWC, §27.205.

§331.266, *Monitoring and Reporting Requirements*

The commission proposes new §331.266 to specify the operating functions to be monitored, the monitoring frequency, and the elements to be reported to the executive director for all Class V AR projects, as established by TWC, §27.205 and §27.206.

§331.267, *Additional Requirements*

The commission proposes new §331.267 to provide additional requirements applicable to Class V AR projects. These requirements include matters to be considered by the commission, as specified by TWC, §27.203(b), and information to be submitted to the executive director by the owner or operator of the AR project. This specific information is necessary to evaluate the requirements established by TWC, §27.203(b) and §27.204(a), and includes information on construction, logging and testing results, and modeling results.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rulemaking is in effect, no 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 rulemaking.

This rulemaking addresses necessary changes in order to comply with state law, specifically HB 720. The proposed rules add definitions, authorized mechanisms, standards and requirements for Class V recharge wells associated with AR projects.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be compliance with state law. The proposed rulemaking is not anticipated to result in any significant fiscal implications for businesses or individuals.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rulemaking is in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

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 rulemaking for the first five-year period the proposed rulemaking is in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for the first five years the proposed rulemaking is in effect.

Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation; however, it does increase the number of individuals subject to its applicability. During the first five years, the proposed rulemaking should not impact positively or negatively the state's economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the 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. A "Major environmental rule" means a rule with a specific intent 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 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 rulemaking is to implement HB 720 which enacted requirements in TWC, Chapters 11 and 27, for ASR and AR projects.

Second, the rulemaking does not meet the statutory definition of a "Major environmental rule" because the rulemaking will 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 there will be a significant cost to comply with the proposed rules because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The proposed rulemaking establishes program requirements consistent with the requirements of HB 720, therefore, will not adversely affect in a material way the public health and safety of the state or a sector of the state.

Finally, the rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general

powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law for the commission's Underground Injection Control Program authorized for the state of Texas under the federal Safe Drinking Water Act; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because it is consistent with the requirements of the commission's Underground Injection Control Program; and is not based solely under the general powers of the agency, but is based specifically under TWC, §27.019, and HB 720, Section 4, as well as, under the other authority of the commission cited in the statutory authority section of this preamble.

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 and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed action implements legislative requirements in HB 720 for aquifer storage or AR projects.

The commission determined that the proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules establish program requirements for AR projects consistent with HB 720. It is not anticipated that there will be many AR project applications and the cost of complying with the regulations is not expected to be substantial because no new fees are proposed. The proposed rules do not affect a landowner's rights in private real property because this rulemaking 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.

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 it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(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.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on January 7, 2020, at 10:00 a.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 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Andreea Vasile, 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: <https://www6.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 2019-116-297-OW. The comment period closes on January 21, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Carol Dye, Underground Injection Control Permits Section, at (512) 239-1504.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§331.2, 331.7, 331.9

Statutory Authority

These amendments are proposed under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §27.003, which allows the commission to use all reasonable methods to implement its policy of maintaining the quality of fresh water in the state of Texas; TWC, §27.011, which establishes the commission's jurisdiction over certain injection well permits; TWC, §27.019, which specifically authorizes the commission to adopt rules and procedures necessary for performance of its powers, duties, and functions under TWC, Chapter 27; and, House Bill (HB) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The proposed amendments implement HB 720.

§331.2. Definitions.

General definitions can be found in Chapter 3 of this title (relating to Definitions). The following words and terms, when used in this chapter, have the following meanings.

- (1) Abandoned well--A well which has been permanently discontinued from use or a well for which, after appropriate review and evaluation by the commission, there is no reasonable expectation of a return to service.
- (2) Activity--The construction or operation of any of the following:
 - (A) an injection well for disposal of waste;
 - (B) an injection or production well for the recovery of minerals;
 - (C) a monitor well at a Class III injection well site;

(D) pre-injection units for processing or storage of waste; or

(E) any other class of injection well regulated by the commission.

(3) Affected person--Any person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the proposed injection operation for which a permit is sought.

(4) Annulus--The space in the wellbore between the injection tubing and the long string casing and/or liner.

(5) Annulus pressure differential--The difference between the annulus pressure and the injection pressure in an injection well.

(6) Aquifer--A geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

(7) Aquifer recharge project--A project involving the intentional recharge of an aquifer by means of an injection well authorized under this chapter or other means of infiltration, including actions designed to:

(A) reduce declines in the water level of the aquifer;

(B) supplement the quantity of groundwater available;

(C) improve water quality in an aquifer;

(D) improve spring flows and other interactions between groundwater and surface water; or

(E) mitigate subsidence.

(8) [(7)] Aquifer restoration--The process used to achieve or exceed water quality levels established by the commission for a permit/production area.

(9) [(8)] Aquifer storage and recovery--The injection of water into a geologic formation, group of formations, or part of a formation that is capable of underground storage of water for later retrieval and beneficial use.

(10) [(9)] Aquifer storage and recovery injection well--A Class V injection well used for the injection of water into a geologic formation as part of an aquifer storage and recovery project.

(11) [(10)] Aquifer storage and recovery production well--A well used for the production of water from a geologic formation as part of an aquifer storage and recovery project.

(12) [(11)] Aquifer storage and recovery project--A project involving the injection of water into a geologic formation for the purpose of subsequent recovery and beneficial use by the project operator.

(13) [(12)] Area of review--The area surrounding an injection well described according to the criteria set forth in §331.42 of this title (relating to Area of Review) or in the case of an area permit, the project area plus a circumscribing area the width of which is either 1/4 mile or a number calculated according to the criteria set forth in §331.42 of this title.

(14) [(13)] Area permit--A permit that authorizes the construction and operation of two or more similar injection, production, or monitoring wells used in operations associated with Class III well activities within a specified area.

(15) [(14)] Artificial liner--The impermeable lining of a pit, lagoon, pond, reservoir, or other impoundment, that is made of a synthetic material such as butyl rubber, chlorosulfonated polyethylene,

elasticized polyolefin, polyvinyl chloride (PVC), other manmade materials, or similar materials.

(16) [(45)] Baseline quality--The parameters and their concentrations that describe the local groundwater quality of an aquifer prior to the beginning of injection operations.

(17) [(46)] Baseline well--A well from which groundwater is analyzed to define baseline quality in the permit area (regional baseline well) or in the production area (production area baseline well).

(18) [(47)] Bedded salt--A geologic formation, group of formations, or part of a formation consisting of non-domal salt that is layered and may be interspersed with non-salt sedimentary materials such as anhydrite, shale, dolomite, and limestone. The salt layers themselves often contain significant impurities.

(19) [(48)] Bedded salt cavern disposal well--A well or group of wells and connecting storage cavities which have been created by solution mining, dissolving or excavation of salt bearing deposits or other geological formations and subsequently developed for the purpose of disposal of nonhazardous drinking water treatment residuals.

(20) [(49)] Blanket material or blanket pad--A fluid placed within a salt cavern that is lighter than the water in the cavern and will not dissolve the salt or any mineral impurities that may be contained within the salt. The function of the blanket is to prevent unwanted leaching of the salt cavern roof, prevent leaching of salt from around the cemented casing, and to protect the cemented casing from internal corrosion. Blanket material typically consists of crude oil, mineral oil, or some fluid possessing similar noncorrosive, nonsoluble, low density properties. The blanket material is placed between the salt cavern's outermost hanging string and innermost cemented casing.

(21) [(20)] Buffer area--The area between any mine area boundary and the permit area boundary.

(22) [(21)] Caprock--A geologic formation typically overlying the crest and sides of a salt stock. The caprock consists of a complex assemblage of minerals including calcite (CaCO₃), anhydrite (CaSO₄), and accessory minerals. Caprocks often contain lost circulation zones characterized by rock layers of high porosity and permeability.

(23) [(22)] Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(24) [(23)] Casing--Material lining used to seal off strata at and below the earth's surface.

(25) [(24)] Cement--A substance generally introduced as a slurry into a wellbore which sets up and hardens between the casing and borehole and/or between casing strings to prevent movement of fluids within or adjacent to a borehole, or a similar substance used in plugging a well.

(26) [(25)] Cementing--The operation whereby cement is introduced into a wellbore and/or forced behind the casing.

(27) [(26)] Cesspool--A drywell that receives untreated sanitary waste containing human excreta, and which sometimes has an open bottom and/or perforated sides.

(28) [(27)] Commercial facility--A Class I permitted facility, where one or more commercial wells are operated.

(29) [(28)] Commercial underground injection control (UIC) Class I well facility--Any waste management facility that accepts, for a charge, hazardous or nonhazardous industrial solid waste for disposal in a UIC Class I injection well, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(30) [(29)] Commercial well--An underground injection control Class I injection well which disposes of hazardous or nonhazardous industrial solid wastes, for a charge, except for a captured facility or a facility that accepts waste only from facilities owned or effectively controlled by the same person.

(31) [(30)] Conductor casing or conductor pipe--A short string of large-diameter casing used to keep the top of the wellbore open during drilling operations.

(32) [(31)] Cone of influence--The potentiometric surface area around the injection well within which increased injection zone pressures caused by injection of wastes would be sufficient to drive fluids into an underground source of drinking water or freshwater aquifer.

(33) [(32)] Confining zone--A part of a formation, a formation, or group of formations between the injection zone and the lowermost underground source of drinking water or freshwater aquifer that acts as a barrier to the movement of fluids out of the injection zone.

(34) [(33)] Contaminant--Any physical, biological, chemical, or radiological substance or matter in water.

(35) [(34)] Control parameter--Any physical parameter or chemical constituent of groundwater monitored on a routine basis used to detect or confirm the presence of mining solutions in a designated monitor well. Monitoring includes measurement with field instrumentation or sample collection and laboratory analysis.

(36) [(35)] Desalination brine--The waste stream produced by a desalination operation containing concentrated salt water, other naturally occurring impurities, and additives used in the operation and maintenance of a desalination operation.

(37) [(36)] Desalination concentrate--Same as desalination brine.

(38) [(37)] Desalination operation--A process which produces water of usable quality by desalination.

(39) [(38)] Disposal well--A well that is used for the disposal of waste into a subsurface stratum.

(40) [(39)] Disturbed salt zone--Zone of salt enveloping a salt dome cavern, typified by increased values of permeability or other induced anomalous conditions relative to undisturbed salt which lies more distant from the salt dome cavern, and is the result of mining activities during salt dome cavern development and which may vary in extent through all phases of a cavern including the post-closure phase.

(41) [(40)] Drilling mud--A heavy suspension used in drilling an injection well, introduced down the drill pipe and through the drill bit.

(42) [(41)] Drinking water treatment residuals--Materials generated, concentrated or produced as a result of treating water for human consumption.

(43) [(42)] Drywell--A well, other than an improved sinkhole or subsurface fluid distribution system, completed above the water table so that its bottom and sides are typically dry except when receiving fluids.

(44) [(43)] Enhanced oil recovery project (EOR)--The use of any process for the displacement of oil from the reservoir other

than primary recovery and includes the use of an immiscible, miscible, chemical, thermal, or biological process. This term does not include pressure maintenance or water disposal projects.

(45) [(44)] Excursion--The movement of mining solutions, as determined by analysis for control parameters, into a designated monitor well.

(46) [(45)] Existing injection well--A Class I well which was authorized by an approved state or United States Environmental Protection Agency-administered program before August 25, 1988, or a well which has become a Class I well as a result of a change in the definition of the injected waste which would render the waste hazardous under §335.1 of this title (relating to Definitions).

(47) [(46)] Fluid--Material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

(48) [(47)] Formation--A body of rock characterized by a degree of lithologic homogeneity which is prevailing, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

(49) [(48)] Formation fluid--Fluid present in a formation under natural conditions.

(50) [(49)] Fresh water--Water having bacteriological, physical, and chemical properties which make it suitable and feasible for beneficial use for any lawful purpose.

(A) For the purposes of this chapter, it will be presumed that water is suitable and feasible for beneficial use for any lawful purpose only if:

- (i) it is used as drinking water for human consumption; or
- (ii) the groundwater contains fewer than 10,000 milligrams per liter (mg/L) total dissolved solids; and
- (iii) it is not an exempted aquifer.

(B) This presumption may be rebutted upon a showing by the executive director or an affected person that water containing greater than or equal to 10,000 mg/L total dissolved solids can be put to a beneficial use.

(51) [(50)] General permit--A permit issued under the provisions of this chapter authorizing the disposal of nonhazardous desalination concentrate and nonhazardous drinking water treatment residuals as provided by Texas Water Code, §27.025 [§27.023].

(52) [(51)] Groundwater--Water below the land surface in a zone of saturation.

(53) [(52)] Groundwater protection area--A geographic area (delineated by the state under federal Safe Drinking Water Act, 42 United States Code, §300j-13) near and/or surrounding community and non-transient, non-community water systems that use groundwater as a source of drinking water.

(54) [(53)] Hazardous waste--Hazardous waste as defined in §335.1 of this title (relating to Definitions).

(55) [(54)] Improved sinkhole--A naturally occurring karst depression or other natural crevice found in carbonate rocks, volcanic terrain, and other geologic settings which has been modified by man for the purpose of directing and emplacing fluids into the subsurface.

(56) [(55)] Individual permit--A permit, as defined in the Texas Water Code (TWC), §27.011 and §27.021, issued by the commission or the executive director to a specific person or persons in ac-

cordance with the procedures prescribed in the TWC, Chapter 27 (other than TWC, §27.025 [§27.023]).

(57) [(56)] Injection interval--That part of the injection zone in which the well is authorized to be screened, perforated, or in which the waste is otherwise authorized to be directly emplaced.

(58) [(57)] Injection operations--The subsurface emplacement of fluids occurring in connection with an injection well or wells, other than that occurring solely for construction or initial testing.

(59) [(58)] Injection well--A well into which fluids are being injected. Components of an injection well annulus monitoring system are considered to be a part of the injection well.

(60) [(59)] Injection zone--A formation, a group of formations, or part of a formation that receives fluid through a well.

(61) [(60)] In service--The operational status when an authorized injection well is capable of injecting fluids, including times when the well is shut-in and on standby status.

(62) [(61)] Intermediate casing--A string of casing with diameter intermediate between that of the surface casing and that of the smaller long-string or production casing, and which is set and cemented in a well after installation of the surface casing and prior to installation of the long-string or production casing.

(63) [(62)] Large capacity cesspool--A cesspool that is designed for a flow of greater than 5,000 gallons per day.

(64) [(63)] Large capacity septic system--A septic system that is designed for a flow of greater than 5,000 gallons per day.

(65) [(64)] Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(66) [(65)] Liner--An additional casing string typically set and cemented inside the long string casing and occasionally used to extend from base of the long string casing to or through the injection zone.

(67) [(66)] Long string casing or production casing--A string of casing that is set inside the surface casing and that usually extends to or through the injection zone.

(68) [(67)] Lost circulation zone--A term applicable to rotary drilling of wells to indicate a subsurface zone which is penetrated by a wellbore, and which is characterized by rock of high porosity and permeability, into which drilling fluids flow from the wellbore to the degree that the circulation of drilling fluids from the bit back to ground surface is disrupted or "lost."

(69) [(68)] Mine area--The area defined by a line through the ring of designated monitor wells installed to monitor the production zone.

(70) [(69)] Mine plan--A plan for operations at a mine, consisting of:

- (A) a map of the permit area identifying the location and extent of existing and proposed production areas; and
- (B) an estimated schedule indicating the sequence and timetable for mining and any required aquifer restoration.

(71) [(70)] Monitor well--Any well used for the sampling or measurement with field instrumentation of any chemical or physical property of subsurface strata or their contained fluids. The term "monitor well" shall have the same meaning as the term "monitoring well" as defined in Texas Water Code, §27.002.

(A) Designated monitor wells are those listed in the production area authorization for which routine water quality sampling or measurement with field instrumentation is required.

(B) Secondary monitor wells are those wells in addition to designated monitor wells, used to delineate the horizontal and vertical extent of mining solutions.

(C) Pond monitor wells are wells used in the subsurface surveillance system near ponds or other pre-injection units.

(72) [(71)] Motor vehicle waste disposal well--A well used for the disposal of fluids from vehicular repair or maintenance activities including, but not limited to, repair and maintenance facilities for cars, trucks, motorcycles, boats, railroad locomotives, and airplanes.

(73) [(72)] Native groundwater--Groundwater naturally occurring in a geologic formation.

(74) [(73)] New injection well--Any well, or group of wells, not an existing injection well.

(75) [(74)] New waste stream--A waste stream not permitted.

(76) [(75)] Non-commercial facility--A Class I permitted facility which operates only non-commercial wells.

(77) [(76)] Non-commercial underground injection control (UIC) Class I well facility--A UIC Class I permitted facility where only non-commercial wells are operated.

(78) [(77)] Non-commercial well--An underground injection control Class I injection well which disposes of wastes that are generated on-site, at a captured facility or from other facilities owned or effectively controlled by the same person.

(79) [(78)] Notice of change (NOC)--A written submittal to the executive director from a permittee authorized under a general permit providing changes to information previously provided to the agency, or any changes with respect to the nature or operations of the facility, or the characteristics of the waste to be injected.

(80) [(79)] Notice of intent (NOI)--A written submittal to the executive director requesting coverage under the terms of a general permit.

(81) [(80)] Off-site--Property which cannot be characterized as on-site.

(82) [(81)] On-site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which the owner controls and to which the public does not have access, is also considered on-site property.

(83) [(82)] Out of service--The operational status when a well is not authorized to inject fluids, or the well itself is incapable of injecting fluids for mechanical reasons, maintenance operations, or well workovers or when injection is prohibited due to the well's inability to comply with the in-service operating standards of this chapter.

(84) [(83)] Permit area--The area owned or under lease by the permittee which may include buffer areas, mine areas, and production areas.

(85) [(84)] Plugging--The act or process of stopping the flow of water, oil, or gas into or out of a formation through a borehole or well penetrating that formation.

(86) [(85)] Point of injection--For a Class V well, the last accessible sampling point prior to fluids being released into the subsurface environment.

(87) [(86)] Pollution--The contamination of water or the alteration of the physical, chemical, or biological quality of water:

(A) that makes it harmful, detrimental, or injurious:

(i) to humans, animal life, vegetation, or property; or

(ii) to public health, safety, or welfare; or

(B) that impairs the usefulness or the public enjoyment of the water for any lawful and reasonable purpose.

(88) [(87)] Pre-injection units--The on-site above-ground appurtenances, structures, equipment, and other fixtures including the injection pumps, filters, tanks, surface impoundments, and piping for wastewater transmission between any such facilities and the well that are or will be used for storage or processing of waste to be injected, or in conjunction with an injection operation.

(89) [(88)] Production area--The area defined by a line generally through the outer perimeter of injection and recovery wells used for mining.

(90) [(89)] Production area authorization--An authorization, issued under the terms of a Class III injection well area permit, approving the initiation of mining activities in a specified production area within a permit area, and setting specific conditions for production and restoration in each production area within an area permit.

(91) [(90)] Production well--A well used to recover uranium through in situ solution recovery, including an injection well used to recover uranium. The term does not include a well used to inject waste.

(92) [(91)] Production zone--The stratigraphic interval extending vertically from the shallowest to the deepest stratum into which mining solutions are authorized to be introduced.

(93) [(92)] Project operator--A person holding an authorization by rule, individual permit, or general permit to undertake an aquifer storage and recovery project or an aquifer recharge project.

(94) [(93)] Public water system--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances as defined in §290.38 of this title (relating to Definitions).

(95) [(94)] Radioactive waste--Any waste which contains radioactive material in concentrations which exceed those listed in 10 Code of Federal Regulations Part 20, Appendix B, Table II, Column 2, and as amended.

(96) Recharge injection well--A Class V injection well used for the injection of water into a geologic formation for an aquifer recharge project, including an improved sinkhole or cave connected to an aquifer.

(97) [(95)] Registered Well--A well registered in accordance with the requirements of §331.221 of this title (relating to Registration of Wells).

(98) [(96)] Restoration demonstration--A test or tests conducted by a permittee to simulate production and restoration conditions and verify or modify the fluid handling values submitted in the permit application.

(99) [(97)] Restored aquifer--An aquifer whose local groundwater quality, within a production area, has, by natural or

artificial processes, returned to the restoration table values established in accordance with the requirements of §331.107 of this title (relating to Restoration).

(100) [(98)] Salt cavern--A hollowed-out void space that has been purposefully constructed within a salt formation, typically by means of solution mining by circulation of water from a well or wells connected to the surface.

(101) [(99)] Salt cavern disposal well--For the purposes of this chapter, regulations of the commission, and not to underground injection control (UIC) Class II or UIC Class III wells in salt caverns regulated by the [Texas] Railroad Commission of Texas, a salt cavern disposal well is a type of UIC Class I injection well used:

(A) to solution mine a waste storage or disposal cavern in naturally occurring salt; and/or

(B) to inject nonhazardous, industrial, or municipal waste into a salt cavern for the purpose of storage or disposal of the waste.

(102) [(100)] Salt dome--A geologic structure that includes the caprock, salt stock, and deformed strata surrounding the salt stock.

(103) [(101)] Salt dome cavern confining zone--A zone between the salt dome cavern injection zone and all underground sources of drinking water and freshwater aquifers, that acts as a barrier to movement of waste out of a salt dome cavern injection zone, and consists of the entirety of the salt stock excluding any portion of the salt stock designated as an underground injection control (UIC) Class I salt dome cavern injection zone or any portion of the salt stock occupied by a UIC Class II or Class III salt dome cavern or its disturbed salt zone.

(104) [(102)] Salt dome cavern injection interval--That part of a salt dome cavern injection zone consisting of the void space of the salt dome cavern into which waste is stored or disposed of, or which is capable of receiving waste for storage or disposal.

(105) [(103)] Salt dome cavern injection zone--The void space of a salt dome cavern that receives waste through a well, plus that portion of the salt stock enveloping the salt dome cavern, and extending from the boundaries of the cavern void outward a sufficient thickness to contain the disturbed salt zone, and an additional thickness of undisturbed salt sufficient to ensure that adequate separation exists between the outer limits of the injection zone and any other activities in the domal area.

(106) [(104)] Salt stock--A geologic formation consisting of a relatively homogeneous mixture of evaporite minerals dominated by halite (NaCl) that has migrated from originally tabular beds into a vertical orientation.

(107) [(105)] Sanitary waste--Liquid or solid waste originating solely from humans and human activities, such as wastes collected from toilets, showers, wash basins, sinks used for cleaning domestic areas, sinks used for food preparation, clothes washing operations, and sinks or washing machines where food and beverage serving dishes, glasses, and utensils are cleaned.

(108) [(106)] Septic system--A well that is used to emplace sanitary waste below the surface, and is typically composed of a septic tank and subsurface fluid distribution system or disposal system.

(109) [(107)] Stratum--A sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock or material.

(110) [(108)] Subsurface fluid distribution system--An assemblage of perforated pipes, drain tiles, or other similar mechanisms intended to distribute fluids below the surface of the ground. This def-

inition includes subsurface area drip dispersal systems as defined in §222.5 of this title (relating to Definitions).

(111) [(109)] Surface casing--The first string of casing (after the conductor casing, if any) that is set in a well.

(112) [(110)] Temporary injection point--A method of Class V injection that uses push point technology (injection probes pushed into the ground) for the one-time injection of fluids into or above an underground source of drinking water.

(113) [(111)] Total dissolved solids--The total dissolved (filterable) solids as determined by use of the method specified in 40 Code of Federal Regulations Part 136, as amended.

(114) [(112)] Transmissive fault or fracture--A fault or fracture that has sufficient permeability and vertical extent to allow fluids to move between formations.

(115) [(113)] Underground injection--The subsurface emplacement of fluids through a well.

(116) [(114)] Underground injection control--The program under the federal Safe Drinking Water Act, 42 United States Code, Part C, including the approved Texas state program.

(117) [(115)] Underground source of drinking water--An "aquifer" or its portions:

(A) which supplies drinking water for human consumption; or

(B) in which the groundwater contains fewer than 10,000 milligrams per liter total dissolved solids; and

(C) which is not an exempted aquifer.

(118) [(116)] Upper limit--A parameter value established by the commission in a permit/production area authorization which when exceeded indicates mining solutions may be present in designated monitor wells.

(119) [(117)] Verifying analysis--A second sampling and analysis or measurement with instrumentation of control parameters for the purpose of confirming a routine sample analysis or measurement which indicated an increase in any control parameter to a level exceeding the upper limit. Mining solutions are assumed to be present in a designated monitor well if a verifying analysis confirms that any control parameter in a designated monitor well is present in concentration equal to or greater than the upper limit value.

(120) [(118)] Well--A bored, drilled, or driven shaft whose depth is greater than the largest surface dimension, a dug hole whose depth is greater than the largest surface dimension, an improved sinkhole, or a subsurface fluid distribution system but does not include any surface pit, surface excavation, or natural depression.

(121) [(119)] Well injection--The subsurface emplacement of fluids through a well.

(122) [(120)] Well monitoring--The measurement by on-site instruments or laboratory methods of any chemical, physical, radiological, or biological property of the subsurface strata or their contained fluids penetrated by the wellbore.

(123) [(121)] Well stimulation--Several processes used to clean the well bore, enlarge channels, and increase pore space in the injection interval, thus making it possible for fluid to move more readily into the formation including, but not limited to, surging, jetting, and acidizing.

(124) [(122)] Workover--An operation in which a downhole component of a well is repaired, the engineering design of the

well is changed, or the mechanical integrity of the well is compromised. Workovers include operations such as sidetracking, the addition of perforations within the permitted injection interval, and the addition of liners or patches. For the purposes of this chapter, workovers do not include well stimulation operations.

§331.7. *Permit Required.*

(a) Except as provided in §331.9 of this title (relating to Injection Authorized by Rule) and by subsections (d) - (f) of this section, all injection wells and activities must be authorized by an individual permit.

(b) For Class III in situ uranium solution mining wells, Frasch sulfur wells, and other Class III operations under commission jurisdiction, an area permit authorizing more than one well may be issued for a defined permit area in which wells of similar design and operation are proposed. The wells must be operated by a single owner or operator. Before commencing operation of those wells, the permittee may be required to obtain a production area authorization for separate production or mining areas within the permit area.

(c) The owner or operator of a large capacity septic system, a septic system which accepts industrial waste, or a subsurface area drip dispersal system, as defined in §222.5 of this title (relating to Definitions) must obtain a wastewater discharge permit in accordance with Texas Water Code, Chapter 26 or Chapters 26 and 32, and Chapter 305 of this title (relating to Consolidated Permits), and must submit the inventory information required under §331.10 of this title (relating to Inventory of Wells Authorized by Rule).

(d) Pre-injection units for Class I nonhazardous, noncommercial injection wells and Class V injection wells permitted for the disposal of nonhazardous waste must be either authorized by a permit issued by the commission or registered in accordance with §331.17 of this title (relating to Pre-Injection Units Registration). The option of registration provided by this subsection shall not apply to pre-injection units for Class I injection wells used for the disposal of byproduct material, as that term is defined in Chapter 336 of this title (relating to Radioactive Substance Rules). Pre-injection units for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals are not subject to authorization by registration but are subject to authorization by an individual permit or under the general permit issued under Subchapter L of this chapter (relating to General Permit Authorizing Use of a Class I Injection Well to Inject Nonhazardous Desalination Concentrate or Nonhazardous Drinking Water Treatment Residuals).

(e) The commission may issue a general permit under Subchapter L of this chapter. The commission may determine that an injection well and the injection activities are more appropriately regulated under an individual permit than under a general permit based on findings that the general permit will not protect ground and surface fresh water from pollution due to site-specific conditions.

(f) Regardless of [Notwithstanding] subsection (a) of this section, an injection well authorized by the Railroad Commission of Texas to use nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals as an injection fluid for enhanced recovery purposes does not require a permit from the commission. The use or disposal of radioactive material under this subsection is subject to the applicable requirements of Chapter 336 of this title.

(g) Permits issued before September 1, 2007 for Class III wells for uranium mining will expire on September 1, 2012 unless the permit holder submits an application for permit renewal under §305.65 of this title (relating to Renewal) before September 1, 2012. Any holders of permits for Class III wells for uranium mining issued before Septem-

ber 1, 2007 who allow those permits to expire by not submitting a permit renewal application by September 1, 2012 are not relieved from the obligations under the expired permit or applicable rules, including obligations to restore groundwater and to plug and abandon wells in accordance with the requirements of the permit and applicable rules.

(h) Class V injection wells associated with an aquifer storage and recovery (ASR) project or an aquifer recharge project may be authorized by individual permit, general permit, or by rule. The executive director will notify a groundwater conservation district of an ASR project proposed to be authorized by rule that is located within the jurisdictional boundary of that groundwater conservation district.

§331.9. *Injection Authorized by Rule.*

(a) Plugging and abandonment of a well authorized by rule at any time after January 1, 1982, shall be accomplished in accordance with the standards of §331.46 of this title (relating to Closure Standards). Class V wells shall be closed according to standards under §331.133 of this title (relating to Closure Standards for Injection Wells). Motor vehicle waste disposal wells, large capacity septic systems, large capacity cesspools, subsurface fluid distribution systems, and drywells shall be closed according to standards under §331.136 of this title (relating to Closure Standards for Motor Vehicle Waste Disposal Wells, Large Capacity Septic Systems, Large Capacity Cesspools, Subsurface Fluid Distribution Systems, and Drywells).

(b) Injection into Class V wells, unless otherwise provided in subsection (c) of this section, §331.7 of this title (relating to Permit Required), or §331.137 of this title (relating to Permit for Motor Vehicle Waste Disposal Wells), is authorized under this rule.

(1) Well authorization under this section expires upon the effective date of a permit issued under §331.7 of this title.

(2) An owner or operator of a Class V well is prohibited from injecting into the well:

(A) upon the effective date of permit denial;

(B) upon failure to submit a permit application in a timely manner under subsection (c) of this section;

(C) upon failure to submit inventory information in a timely manner under §331.10 of this title (relating to Inventory of Wells Authorized by Rule);

(D) upon failure to comply with a request for information from the executive director in a timely manner;

(E) upon failure to comply with provisions contained in Subchapter H of this chapter (relating to Standards for Class V Wells) and, if applicable, Subchapter K of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects) or Subchapter O of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Recharge Projects); or

(F) upon failure of the owner or operator to comply with provisions contained in paragraph (3) of this subsection for a Class V well that is authorized to inject certain wastes into a Class II disposal well permitted by the Railroad Commission of Texas.

(3) Unless otherwise provided in subsection (c) of this section, a disposal well authorized by an active Class II permit issued by the Railroad Commission of Texas whose operator has an active Form P-5 Organization Report in good standing with the Railroad Commission of Texas may be authorized by rule of the commission as a Class V injection well for the disposal by injection of nonhazardous brine from a desalination operation or nonhazardous drinking water treatment residuals.

(A) Subchapter H of this chapter and subsection (a) of this section are not applicable to a Class V well authorized by rule under this paragraph.

(B) The use or disposal of radioactive material under this paragraph is subject to the applicable requirements of Chapter 336 of this title (relating to Radioactive Substance Rules).

(c) The executive director may require the owner or operator of an injection well authorized by rule to apply for and obtain an injection well permit. The owner or operator shall submit a complete application within 90 days after the receipt of a letter from the executive director requesting that the owner or operator of an injection well submit an application for permit. Cases for which a permit may be required include, but are not limited to, wells not in compliance with the standards required by this section.

(d) Class IV wells injecting hazardous waste-contaminated groundwater that is of acceptable quality to aid remediation and that is being reinjected into the same formation from which it was drawn, as authorized by §331.6 of this title (relating to Prohibition of Class IV Well Injection), shall be authorized by rule.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 293-1806



SUBCHAPTER H. STANDARDS FOR CLASS V WELLS

30 TAC §331.131

Statutory Authority

This amendment is proposed under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §27.003, which allows the commission to use all reasonable methods to implement its policy of maintaining the quality of fresh water in the state of Texas; TWC, §27.011, which establishes the commission's jurisdiction over certain injection well permits; TWC, §27.019, which specifically authorizes the commission to adopt rules and procedures necessary for performance of its powers, duties, and functions under TWC, Chapter 27; and House Bill (HB) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The proposed amendment implements HB 720.

§331.131. *Applicability.*

This subchapter applies to all Class V injection wells under the jurisdiction of the commission except those Class V wells authorized by rule under §331.9(b)(3) of this title (relating to Injection Authorized by Rule). Aquifer storage and recovery injection wells must also comply with Subchapter K of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Storage and Recovery Projects) in addition to this subchapter. Aquifer recharge injection wells must also comply with Subchapter O of this chapter (relating to Additional Requirements for Class V Injection Wells Associated with Aquifer Recharge Projects) in addition to this subchapter.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER O. ADDITIONAL REQUIREMENTS FOR CLASS V INJECTION WELLS ASSOCIATED WITH AQUIFER RECHARGE PROJECTS

30 TAC §§331.262 - 331.267

Statutory Authority

The new sections are proposed under the authority of 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; TWC, §5.105, which establishes the commission's authority to set policy 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; TWC, §27.003, which allows the commission to use all reasonable methods to implement its policy of maintaining the quality of fresh water in the state of Texas; TWC, §27.011, which establishes the commission's jurisdiction over certain injection well permits; TWC, §27.019, which specifically authorizes the commission to adopt rules and procedures necessary for performance of its powers, duties, and functions under TWC, Chapter 27; and House Bill (HB) 720 Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The proposed new sections implement HB 720.

§331.262. *Applicability.*

In addition to the requirements of Subchapter H of this chapter (relating to Standards for Class V Wells), the requirements of this subchapter apply to all Class V aquifer recharge projects, whether by means of an injection well or improved sinkhole or cave connected to an aquifer.

§331.263. *Area of Review.*

The area of review for an aquifer recharge (AR) project is the area determined by a radius of at least 1/2 mile from the proposed AR injection well. For an AR project that includes more than one proposed AR injection well, the area of review is the area determined by a radius of at least 1/2 mile from the centroid of the AR injection well field. In the application for authorization, the applicant shall provide information on the activities within the area of review, including the following factors and any adverse interactions between the factors and the AR project:

(1) locations of:

(A) all artificial penetrations that penetrate the injection interval, including but not limited to: water wells and abandoned water wells from commission well files or groundwater district files; oil and gas wells and saltwater injection wells from the Railroad Commission of Texas files; and waste disposal wells/other injection wells from the commission disposal well files; and

(B) springs, quarries, and any other bodies of water, surface or subsurface features that connect to the injection interval;

(2) completion and construction information, where available, for identified artificial penetrations;

(3) site-specific, significant geologic features, such as faults and fractures;

(4) land surface elevations for projects used to mitigate subsidence;

(5) land use in the drainage basin and geographic extent of the drainage basin for projects using improved sinkholes and caves; and

(6) all information required for the consideration of an AR injection well under §331.267(a) of this title (relating to Additional Requirements).

§331.264. Construction and Closure Standards.

All Class V aquifer recharge (AR) injection wells shall be designed, constructed, completed, and closed to prevent commingling, through the wellbore and casing, of injection waters with other fluids outside of the authorized injection zone; mixing through the wellbore and casing of fluids from aquifers of substantively different water quality; and infiltration through the wellbore and casing of water from the surface into groundwater zones.

(1) Plans and specifications. Except as specifically required in the terms of the Class V AR injection well authorization, the drilling and completion of a Class V AR injection well shall be done in accordance with the requirements of §331.132 of this title (relating to Construction Standards) and the closure of a Class V AR injection well shall be done in accordance with the requirements of §331.133 of this title (relating to Closure Standards for Injection Wells).

(A) If the project operator proposes to change the injection interval to one not reviewed and approved during the authorization process, the project operator shall notify the executive director immediately. The project operator may not inject into any unauthorized zone without prior written approval from the executive director.

(B) The executive director shall be notified immediately of any other changes, including but not limited to, changes in the completion of the AR injection well, changes in the setting of screens, and changes in the injection intervals within the authorized injection zone.

(2) Construction materials. Casing materials for Class V AR injection wells shall be constructed of materials resistant to corrosion.

(3) Construction and workover supervision. All phases of any AR injection well construction, workover or closure shall be supervised by qualified individuals who are knowledgeable and experienced in practical drilling engineering, as applicable, and who are familiar with the special conditions and requirements of injection well and water well construction.

§331.265. Operating Requirements.

(a) All Class V aquifer recharge (AR) injection wells shall be operated in such a manner that injection will not endanger drinking water sources. Underground injection endangers drinking water sources if such injection may result in the presence of any contaminant in underground water which supplies or can reasonably be expected to supply any public water system, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation, or may otherwise adversely affect the health of persons.

(b) Injection pressure and volume at the wellhead shall not exceed a maximum which shall be calculated so as to assure the pressure and volume in the injection zone does not cause movement of fluid out of the injection zone.

(c) The owner or operator of an AR injection well that has ceased operations for more than two years shall provide verification of the well's mechanical integrity and notification of intent to resume operations to the executive director at least 30 days prior to resuming operation of the well.

(d) The owner or operator shall maintain the mechanical integrity of all wells operated under this section.

(e) The quality of the water injected at an AR injection well must meet the requirements in §331.267(a)(1) of this title (relating to Additional Requirements).

(f) All AR injection wells must be installed with a flow meter for measuring the volume of water injected.

§331.266. Monitoring and Reporting Requirements.

(a) An aquifer recharge (AR) project operator shall monitor each AR injection well associated with an AR project. Each calendar year the project operator shall provide the executive director a written report of the following information for the previous year:

(1) the volume of water injected for recharge; and

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

(b) At least on an annual basis and each time the source changes, an AR project operator shall perform water-quality testing on water to be injected at an AR injection well. All environmental laboratory analyses shall be performed by laboratories accredited under the Texas Laboratory Accreditation Program using National Environmental Laboratory Accreditation Conference standards. The AR project operator shall provide to the executive director a written report of the results of this testing. The report shall include the test results for all water-quality parameters identified in the individual permit, general permit, or authorization by rule.

§331.267. Additional Requirements.

(a) The executive director or commission shall consider the following before issuing an individual permit, a general permit, or an authorization by rule for an aquifer recharge (AR) injection well:

(1) whether the injection of water will comply with the standards set forth under the federal Safe Drinking Water Act (42 United States Code, §§300f, *et seq.*);

- (2) the effect of the AR project on existing water wells;
 - (3) the effect of the AR project on existing springs and other surface features that connect to the injection interval; and
 - (4) whether the introduction of water into the receiving geologic formation will alter the physical, chemical, or biological quality of the native groundwater to a degree that would:
 - (A) render the groundwater produced from the receiving formation harmful or detrimental to people, animals, vegetation, or property; or
 - (B) require an unreasonably higher level of treatment of the groundwater produced from the receiving geologic formation than is necessary before AR project initiation for the native groundwater to render the groundwater suitable for beneficial use.
- (b) Upon completion of an AR injection well, the following information, as applicable, shall be submitted to the executive director within 30 days of receipt of the results of all analyses and test results:
- (1) as-built drilling and completion data on the well;
 - (2) all logging and testing data on the well;
 - (3) formation fluid analyses;
 - (4) injection fluid analyses;
 - (5) injectivity and pumping tests determining well capacity and reservoir characteristics;
 - (6) hydrogeologic modeling, with supporting data, predicting the results of injection fluid interaction with the receiving formation and the native groundwater, and predicting injection fluid movement; and
 - (7) other information as determined by the executive director as necessary for the protection of underground sources of drinking water.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 22, 2019.

TRD-201904448
 Robert Martinez
 Director, Environmental Law Division
 Texas Commission on Environmental Quality
 Earliest possible date of adoption: January 12, 2020
 For further information, please call: (512) 293-1806



CHAPTER 331. UNDERGROUND INJECTION CONTROL

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §331.19

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §331.19.

Background and Summary of the Factual Basis for the Proposed Rule

This rulemaking implements Senate Bill (SB) 483 and SB 520, 86th Texas Legislature, 2019, addressing the commission's

regulation of certain injection wells in portions of the Edwards Aquifer and the storage and recovery of water in portions of the Edwards Aquifer. SB 483 revises the definition of "Edwards Aquifer" for a certain portion of Texas, expands commission authorization mechanisms to include rule and individual permit, adds to the permissible sources of injected water, and revises risk assessment requirements. SB 520 adds to the permissible sources of injected water in certain portions of the Edwards Aquifer and limits injection of those added sources to utilities owned by the City of New Braunfels.

Section 331.19 currently addresses injection into or through the Edwards Aquifer and must be revised to implement the changes enacted by SB 483 and SB 520.

Section Discussion

In addition to adopting amendments to implement SB 483 and SB 520, the commission adopts grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, and establish consistency in the rules. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§331.19, *Injection Into or Through the Edwards Aquifer*

The commission proposes §331.19(a)(4) to allow authorization of Class V wells operated by a City of New Braunfels-owned utility that inject water meeting certain requirements into a portion of the Edwards Aquifer as established by SB 520 in Texas Water Code (TWC), §27.051(i)(3).

The remaining changes are proposed to implement changes specified in SB 483.

The commission proposes to amend §331.19(b) to establish the applicability of the definition of "Edwards Aquifer" within the section.

The commission proposes to amend §331.19(c) to describe the geographic area applicable to §331.19(c), as described in TWC, §27.0516(b).

The commission proposes to remove Figure: 30 TAC §331.19(c) because illustrating the areas where the requirements of §331.19(c) apply is no longer necessary as SB 483 revised the area to apply to the entire geographic area within the boundaries of the Barton Springs-Edwards Aquifer Conservation District but not within the jurisdiction of the Edwards Aquifer Authority.

The commission proposes §331.19(c)(1), (2), and (3)(A) to incorporate the revisions to authorization mechanisms, exclusions for the geographic area described in §331.19(c), and definition of "Edwards Aquifer", as established in TWC, §27.0516(f); TWC, §27.0516(b); and TWC, §27.0516(a)(1), respectively. As a result, existing paragraphs or subparagraphs are proposed to be renumbered or re-lettered accordingly.

The commission proposes to amend renumbered §331.19(c)(5) to add the authorization mechanisms of "rule" and "individual permit," as established in TWC, §27.0516(f), for the geographic area described in §331.19(c).

The commission proposes §331.19(c)(5)(E)(i) - (v) to provide the detailed requirements, as established in TWC, §27.0516(f)(5), for injection wells that transect and isolate the Edwards Aquifer for the injection of certain water from a public water system as part of an aquifer storage and recovery facility.

Texas Commission on Environmental Quality



ORDER ADOPTING NEW AND AMENDED RULES

Docket No. 2019-1000-RUL

Rule Project No. 2019-116-297-OW

On May 6, 2020, the Texas Commission on Environmental Quality (Commission) adopted new and amended rules in 30 Texas Administrative Code Chapter 39, concerning Public Notice; Chapter 281, concerning Applications Processing; Chapter 295, concerning Water Rights, Procedural; Chapter 297, concerning Water Rights, Substantive; and Chapter 331, concerning Underground Injection Control. The proposed rules were published for comment in the December 13, 2019, issue of the *Texas Register* (44 TexReg 7603).

IT IS THEREFORE ORDERED BY THE COMMISSION that the new and amended rules are hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rules necessary to comply with *Texas Register* requirements. The adopted rules and the preamble to the adopted rules are incorporated by reference in this Order as if set forth at length verbatim in this Order.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Tex. Gov't Code Ann., Chapter 2001 (West 2016).

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Jon Niermann, Chairman

Date Signed