

The Texas Commission on Environmental Quality (commission) proposes the repeal of §§261.1 - 261.6 and 261.21 - 261.23.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEALS

Chapter 261 was originally adopted by the former Texas Water Rights Commission (TWRC). The TWRC rule (formerly §129.03.25.008) allowed environmental impact assessment information created for proposed projects to be introduced into evidence in commission proceedings where statutory criteria for the review of an application included public welfare. The rule later was readopted with four subchapters under the Chapter 261, General Provisions, of the procedural rules of the Texas Department of Water Resources. In 1996, the Texas Natural Resource Conservation Commission (the predecessor to the commission) removed Subchapters A and C from Chapter 261 and renumbered them as procedural rules. Subchapters B and D were left intact and were relettered as Subchapters A and B.

A quadrennial review of Chapter 261 found that the chapter is redundant because other commission rules and state statutes provide for all actions in Chapter 261. See the DRAFT REGULATORY IMPACT ANALYSIS section of this preamble for a full description of the legal reasoning for the repeal.

SECTION BY SECTION DISCUSSION

Chapter 261, Impact Statements, which includes Subchapter A, Environmental, Social, and Economic Impacts Statements, which contains §261.1, Relevance of Impacts Evidence; §261.2, Filing of Federal Statement Required; §261.3, Executive Director's Recommendation; §261.4, Statement Filed with

Executive Director; §261.5, Impacts Statement Guidelines; and §261.6, Impact Statement Supplemented by Testimony; and Subchapter B, Guidelines for Preparation of Environmental, Social, and Economic Impacts Statements, which contains §261.21, Introduction; §261.22, Impact Assessment Process; and §261.23, Specific Guidelines for the Impacts Statement, is proposed to be repealed because commission staff have determined that the Chapter 261 rules are redundant and are not needed. Under other commission rules, the commission and executive director may require an applicant to submit an environmental impact statement, if one has been prepared and is relevant to the application. 30 TAC §281.4(7) states that applications for the use of state water must include any other information as the executive director or the commission may reasonably require. Under Texas Water Code (TWC), §11.147, the commission is required to consider the effect that a water right application will have on bays and estuaries, existing instream uses, water quality of the stream, and fish and wildlife habitats. Also, under TWC, §11.134(b)(3), the commission shall grant a water right application only if the proposed appropriation is not detrimental to the public welfare. If an environmental impact statement has been prepared and addresses these environmental and public welfare issues, the commission or executive director could reasonably require the applicant to submit the environmental impact statement with its water right application under §281.4(7). Additionally, under 30 TAC §281.5(7) the executive director or commission may request any other information, which could include an environmental impact statement, in applications for wastewater discharge, underground injection, municipal solid waste, radioactive material, and hazardous waste and industrial solid waste management permits.

FISCAL NOTE

Jan Washburn, Analyst in the Strategic Planning and Appropriations Section, determined that for the first five years that the proposed repeals are in effect, there will be no fiscal impact to the state or local governments from these proposed repeals. Ms. Washburn also determined that for each of the first five years the proposed repeals are in effect, the public benefit anticipated from these repeals is to eliminate the duplication between state statutes and rules, thus enhancing readability of the rules.

No fiscal implications are anticipated for any individual or business due to the repeal of these rules as all requirements in Chapter 261 are provided for in either state statute or 30 TAC Chapter 281.

Additionally, no fiscal implications are anticipated for any small or micro-businesses due to the repeal of the rules for the same reasons as stated previously.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission determined that a local employment impact statement is not required because the proposed repeals do not adversely affect a local economy in a material way for the first five years that the proposed repeals are in effect.

DRAFT REGULATORY IMPACT ANALYSIS

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the criteria for a "major environmental rule" as set out in that statute. The proposal would not meet the definition of major environmental rule because it would not adversely

affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking would repeal Chapter 261 because commission staff have determined that the Chapter 261 rules are redundant and are not needed. The commission and executive director may use other commission rules to require an applicant to submit an environmental impact statement if one has been prepared and is relevant to the application. Section 281.4(7) states that applications for the use of state water must include any other information as the executive director or the commission may reasonably require. Under TWC, §11.147, the commission is required to consider the effect that a water right application will have on bays and estuaries, existing instream uses, water quality of the stream, and fish and wildlife habitats. Also, under TWC, §11.134(b)(3), the commission shall grant a water right application only if the proposed appropriation is not detrimental to the public welfare. If an environmental impact statement has been prepared and addresses these environmental and public welfare issues, the commission or executive director could reasonably require the applicant to submit the environmental impact statement with its water right application under §281.4(7). Additionally, under §281.5(7) the executive director or commission may request any other information, which could include an environmental impact statement, in applications for wastewater discharge, underground injection, municipal solid waste, radioactive material, and hazardous waste and industrial solid waste management permits.

The proposed repeals also do not meet the criteria for a “major environmental rule” as set out in the Texas Government Code, because §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. A regulatory analysis is not required in this instance because the proposed repeals do not meet the definition of major environmental rule and do not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed a preliminary assessment of the proposed rulemaking in accordance with Texas Government Code, §2007.043. The specific purpose of the proposed rulemaking is to repeal Chapter 261. The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007, does not apply to these proposed repeals because this is an action that does not adversely affect real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this proposed rulemaking and found the proposal to be a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) relating to rules governing agency actions subject to the Coastal Management Program (CMP). The commission has determined the rulemaking is consistent with applicable CMP goals and policies, because all actions provided for in Chapter 261 are also provided for in Chapter 281 and in TWC, Chapter 11. Since the provisions contained in Chapter 281 and TWC, Chapter 11 require the same level of review and evaluation for subject actions, the agency has deemed Chapter 261 as redundant, and recommended for

repeal. Therefore, this rulemaking will not result in a lessening of agency review for subject actions, nor will it result in a violation of any standards for the identified CMP goals and policies.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2003-052-261-WT. Comments must be received by 5:00 p.m., December 22, 2003. For further information, please contact Emily Barrett, Policy and Regulations Division, (512) 239-3546.

SUBCHAPTER A: ENVIRONMENTAL, SOCIAL, AND ECONOMIC IMPACTS

STATEMENTS

§§261.1 - 261.6

STATUTORY AUTHORITY

The repeals are proposed under TWC, §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; and Texas Government Code, §2001.039, which requires state agencies to review and consider for re adoption each of their rules every four years and either readopt, readopt with amendments, or repeal the rule.

No other codes, rules, or statutes will be affected by this proposal.

§261.1. Relevance of Impacts Evidence.

§261.2. Filing of Federal Statement Required.

§261.3. Executive Director's Recommendation.

§261.4. Statement Filed with Executive Director.

§261.5. Impacts Statement Guidelines.

§261.6. Impact Statement Supplemented by Testimony.

**SUBCHAPTER B: GUIDELINES FOR PREPARATION OF ENVIRONMENTAL, SOCIAL,
AND ECONOMIC IMPACTS STATEMENTS**

§§261.21 - 261.23

STATUTORY AUTHORITY

The repeals are proposed under TWC, §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state; and Texas Government Code, §2001.039, which requires state agencies to review and consider for re adoption each of their rules every four years and either readopt, readopt with amendments, or repeal the rule.

No other codes, rules, or statutes will be affected by this proposal.

§261.21. Introduction.

§261.22. Impact Assessment Process.

§261.23. Specific Guidelines for the Impacts Statement.