

The Texas Commission on Environmental Quality (commission) proposes amendments to §§303.1, 303.2, 303.21 - 303.23, 303.53, 303.55, and 303.72. The commission also proposes new §§303.18, 303.40, and 303.74 - 303.93.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The Rio Grande below Fort Quitman is regulated by the Rio Grande Watermaster under Texas Water Code, §11.326 and §11.327. Chapter 303, Operation of the Rio Grande, of 30 Texas Administrative Code (TAC) contains the Rio Grande Watermaster's rules. These rules recognize that the water rights in this area were adjudicated by a court, *State v. Hidalgo County Water Control & Improv. Dist. No. 18*, 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.*, and that below Amistad Reservoir, water rights are not based on the priority system (first in time is first in right) as in the rest of the state.

Senate Bill (SB) 1902, and House Bill (HB) 2250, 78th Legislature, 2003, amended Texas Water Code (TWC), §11.3271, Powers and Duties of Rio Grande Watermaster, by amending Subsection (e), and adding Subsections (f) - (k). The provisions of the two bills are identical except for Subsection (j), relating to central repositories for documents.

Subsection (e) of the bills was amended to provide that the Rio Grande Watermaster's duties shall include activities relating to situations of imminent threat to public health and safety or the environment and required that the commission adopt rules which define situations of imminent threat and address the watermaster's duties in response to terrorism.

Subsections (f) - (i) provide that the commission may issue a permit which allows a person to convey groundwater in the river, which may include, but does not require, storage in a reservoir for release at a later time. The commission is to write rules which will account for any discharge, delivery, conveyance, storage, diversion, or associated loss of water conveyed down the Rio Grande. The rules must also protect other water right holders which store water in the reservoir and be consistent with the 1944 Treaty between the United States and Mexico. Because groundwater will be introduced into the Rio Grande and will be conveyed in the river under this permit, this water must be shared with Mexico under the 1944 Treaty. The commission may not issue this permit if it determines that the water to be conveyed would degrade the water quality of the Rio Grande. These permits will be called water-in-transit permits.

Subsection (j) of the two bills requires the watermaster to maintain a place available to the public that will contain copies of documents which the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande. SB 1902 provides that the watermaster is the “official recorder” of “all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens” filed in connection with water rights. HB 2250 provides that the watermaster shall “maintain a central repository” that includes “certified copies of all instruments, including deeds, deeds of trust, and liens” filed in connection with water rights.

SB 1902 also provides that an instrument should be filed “in the same manner as required by other law for the same type of instrument,” and that “the filing of an instrument under this subsection results in the same legal and administrative status and consequences as a filing under other law for the same type

of instrument.” Further, an instrument filed under this law “shall be construed by a court, financial institution, or other affected person in the same manner as an instrument of the same type that is filed under other law.” HB 2250 does not include any of this quoted language, but instead provides that “a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster,” but that the law “does not affect the validity of a lien as between the holder of the water right and the holder of the lien or the requirements or validity of any other law governing the perfection and recordation of these instruments.”

Both bills allow a fee to be collected for filing these instruments. SB 1902 further states that the commission shall adopt rules which “prescribe the procedures necessary for the proper implementation of this subsection, including reasonable transition provisions, if appropriate.”

The proposed rules implement the provisions of the two bills. Concerning rules for terror threats, the proposed commission rules require the Watermaster to communicate with the agency Homeland Security Coordinator if activities are noted which may be suspicious. Concerning the bed and banks provisions of these two bills, the commission proposes procedures that will protect existing surface water right holders in the Rio Grande and will allow the commission and State of Texas to comply with the Rio Grande Treaty between the United States and Mexico.

Concerning the provisions of the bills relating to filing documents with the Rio Grande Watermaster, the two bills are in conflict relating to the effect of filing and failure to file. The commission has determined that it should not adopt rules relating to the legal effect of filing or failing to file documents

with the Rio Grande Watermaster because the commission does not regulate these matters. Therefore, the commission leaves the questions of the ramifications and effect of filing or failing to file documents with the commission to interpretation of the statutes by the courts. These rules will provide procedures for filing documents with the Rio Grande Watermaster.

SECTION BY SECTION DISCUSSION

The proposed amendment to §303.1, General, would clarify which water rights will be regulated under Chapter 303, Operation of the Rio Grande. Also, the proposed amendment states that any other rules, regulations, and orders relating to water rights will apply to water rights regulated under Chapter 303 unless Chapter 303 expressly provides otherwise. These amendments are needed to describe what rules will apply to water rights in the Rio Grande below Fort Quitman.

The proposed addition of new §303.2(19) is necessary to define the Treaty between the United States and Mexico because reference to the Treaty is made in the new rules for water-in-transit permits.

Proposed new §303.2(23) is necessary to define “Water-in-transit” permits, which are required by HB 2250 and SB 1902. This definition of “Water-in-transit” tracks the language in the statutes. Section 303.2(19) - (21) is renumbered §303.2(20) - (22), and §303.2(22) and (23) is renumbered §303.2(24) and (25) because of these added definitions. Water-in-transit is groundwater that may or may not be stored in a reservoir for later use.

Proposed new §303.18 concerns threats to public health and safety and the environment and would provide that the Rio Grande Watermaster will implement the agency’s Homeland Security Coordination

Plan. Additionally, under §303.18, the Watermaster shall require water right holders to cease diversions if the Watermaster determines that continued diversion would pose a hazard to public health and safety and the environment. These provisions are necessary to implement the requirements of SB 1902 and HB 2250 that require that the Rio Grande Watermaster determine situations of threat and the duties he will perform.

The proposed amendment to §303.21 adds subsection (b)(4), which provides that water-in-transit accounts are not eligible for allocation under §303.22, Allocations to Accounts, and that these accounts are regulated in Subchapters I and J of Chapter 303. These accounts are not subject to allocation to other accounts because the water is under contractual sale to a buyer. These additions to the rules are necessary for the allocation process for water right holders to work after water-in-transit permits have been issued.

Proposed amendments to §303.22(a) provide that this subsection allowing allocation does not apply to water-in-transit accounts. Also, the amendments to subsection (a), relating to allocations of water, provide that allocations to accounts shall be based on water in the usable storage of Falcon and Amistad Reservoirs minus the water-in-transit held in storage in these reservoirs. Water in water-in-transit accounts are deducted from usable storage after the municipal, domestic, and industrial reserve water is deducted. The amount of water in the water-in-transit accounts must be deducted from the water that will be allocated to other accounts because the water in the water-in-transit accounts is not available for allocation. This water is going to the buyer of this groundwater. These rules are needed to provide how allocation will be done with the addition of this new type of permit.

Proposed amendments to §303.22(f)(3) add water-in-transit accounts to accounts that will have water deducted when the operating reserve is less than zero acre-feet. Accounts will be deducted by the amount necessary to provide 48,000 acre-feet for the operating reserve. Once the operating reserve is back to 75,000 acre-feet, other accounts will be restored to the amount in the account before the negative allocation, but water-in-transit accounts will not be restored. This requirement is necessary because the water in water-in-transit accounts is specific water that has been purchased and that has been added to the river outside of the normal allocation process. Thus, using water that is normally in the Rio Grande to replace this additional water could injure water right holders who are allocated water that is normally in the Rio Grande.

Section 303.23 is proposed to be amended to delete water-in-transit from the water that can be distributed to water rights accounts in subsection (a). This subsection is necessary because requiring water for existing water right holders to be given to water-in-transit accounts would impair the rights of the existing water right holders. Proposed new subsection (d) provides that water available to water right holders above Amistad and all Rio Grande tributaries shall not be distributed to water-in-transit accounts. This section is necessary because water above Amistad is available to the water right holders in a priority system.

Proposed new §303.40 provides that Subchapter E, Amendments to and Sales of Water Rights, does not apply to water-in-transit permits. Amendments to and sales of water-in-transit permits are governed by Subchapters I and J of Chapter 303, therefore, this exclusion from §303.40 is necessary.

The proposed amendment to §303.53(b) provides that contracts of sale relating to water-in-transit contractual sales which are filed with the commission shall include an aerial photograph or United States Geological Survey topographic map with the location of the discharge point or points. This language needs to be added to the section because contracts of sale regarding water-in-transit permits will need to include photographs or maps of the discharge points, as well as diversion points, which are required in maps and photographs in the existing rule. This requirement for water-in-transit permits is necessary because the Rio Grande Watermaster needs to know where this water is coming into the river in order to properly administer all the water rights in the river.

The proposed amendments to §303.55(e) would prohibit buyer's or seller's water in storage accounts from exceeding their annual authorized amount while a buyer's or seller's Class A or Class B storage may not exceed 1.41 times the water right holder's recognized amount in acre-feet. This change is included in this rule package to clarify to what type of storage the requirement relates.

The proposed amendments to §303.72(a) add "water-in-transit diversion" and "water-in-transit discharge" to the formula for calculating assessment rates for water right holders in the Rio Grande Watermaster's Division. Also, these two terms are defined in this subsection. These changes are necessary in order to assess water-in-transit permit holders for the watermaster's services.

Proposed new Subchapter I, §§303.74 - 303.90, sets out the requirements for obtaining a bed and banks permit for water-in-transit. These rules are necessary to provide the procedural requirements for preparing and filing an application for water-in-transit with the commission.

Proposed new §303.74, General, provides that Subchapter I is applicable to water rights permits for water-in-transit. Other rules and orders of the commission related to water rights are also applicable unless in conflict with the provisions of Subchapter I.

Proposed new §303.75 sets out the requirements for an application for a water-in-transit permit. The section specifies specific application contents, including a description of the water quality of the water to be discharged, the date of the proposed discharge, an analysis of the losses that must be calculated, and the maximum amount of water which may be stored in the reservoirs. The loss calculations will become part of the water-in-transit permit. The water source, including a hydrological determination regarding any interaction between surface water and groundwater, is also required because any pumping of groundwater that is connected to surface water would impact treaty obligations to Mexico. This rule is necessary to provide what an applicant must put in an application to obtain a water-in-transit permit.

Proposed new §303.76 relates to forms which will be provided to applicants. While the forms are not mandatory, the information required by the forms is mandatory. Requirements for supplemental information are set out.

Proposed new §303.77 describes how to prepare an application and when the application may be changed, and by whom.

Proposed new §303.78 would provide that the applicant must provide a name and address, as well as other information, even if acting as an agent for another. A partnership must designate that it is a partnership and a trustee must designate that it is a trustee.

Proposed new §303.79 would provide that the applicant must clearly state the name and location of the underground reservoir which will serve as the source of the groundwater. This information is necessary for the executive director to determine the water quality and location of the discharge.

Proposed new §303.80 would provide that the applicant must give the executive director the total specific amount of water to be discharged and diverted. This information is necessary for the watermaster to account for this water in the river and in the reservoir.

Proposed new §303.81 would provide that the application must include the method and rate of diversion for each diversion point, and would provide that the applicant provide the location of each discharge and diversion point. This information is necessary for the watermaster to administer water-in-transit permits and requires that the applicant provide the location of each discharge and diversion point.

Proposed new §303.82 contains requirements for who should sign the application. Requirements for who signs an application for individuals, joint applications, partnerships, estates, corporations, political subdivisions, and trustees, are given. These requirements are necessary for the commission to ensure that signatories to these applications actually represent the applicant.

Proposed new §303.83 requires that the application be sworn. This requirement is necessary to ensure that the commission bases its permits on accurate information.

Proposed new §303.84 provides that the applicant provide information describing how the application addresses a water supply need in a manner that is consistent with the state water plan or the approved regional plan of the area. The applicant may also request a waiver. This requirement is necessary for the commission to comply with TWC, §11.134, which requires the commission to grant a water right permit only if the application addresses a water supply need in a manner consistent with the state or regional plan.

Proposed new §303.85 addresses filing fees for these applications. Subsection (a) would provide that fees are to be submitted with the application and staff cannot further process an application without the fees. Subsection (b) sets out the filing, recording, and notices fees. The application fee is based on the total amount of water to be discharged. Amendments are \$100 per right requested to be amended, and recording fees are \$1.25 per page of application. Subsections (b)(3) and (c) set out that the applicant must pay the cost of any required mailed and published notice. These fees are necessary to reimburse the state for the expenses of processing an application for a water-in-transit permit.

Subsection (d) sets out a one-time transit fee of \$1.00 per acre-foot of water discharged. This fee is necessary to reimburse the state for use of the bed and banks of the river.

Under subsection (e), if the fee is over \$1,000, the applicant must pay at least half, and then pay the rest within 180 days of receiving notice that the application is granted. The permit will be annulled if

the fee is not paid. Subsection (f) provides that the total one-time transit fee shall not exceed \$50,000. Subsection (g) provides that inquiries as to fees should be made in advance to the executive director. In case of a disagreement between the applicant and the executive director over the amount of the fee, the application will be filed “under protest” and the amount will be placed in suspense until the issue is resolved. Under subsection (h), all fees other than filing and recording fees will be returned to the applicant if they have not been expended or if the permit is not granted. The applicant must notify the executive director of his social security or federal identification number to receive these fees. These rules are necessary to administer the fee requirements for these permits.

Proposed new §303.86 provides notice requirements for water-in-transit applications. Subsection (a) requires notice by mail to the persons set out in subsection (d) and published notice as set out in subsection (c). Subsection (b) describes the required content of a notice. Subsection (c) requires published notice in each county in the Rio Grande water division at least 30 days before the commission or executive director considers the application. Subsection (d)(1) provides mailed notice must be received by water right holders within the Rio Grande division 30 days before the commission or the executive director considers the application. Subsection (d)(2) provides who received mailed notice. These rules are required to provide notice of an application in compliance with Texas Water Code, Chapter 11.

Proposed new §303.87 provides notice requirements for hearings. No further notice, other than the notice of the commission’s agenda to consider the hearing request, of the time and place of the hearing is necessary other than advising the applicant, executive director, public interest council, and persons

who have notified the commission of their interest in the application. This rule is required for providing notice of hearings to interested persons.

Proposed new §303.88 would provide requirements for requesting a hearing on a water rights application. Subsection (b) would provide that Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment) would govern hearing requests and commission consideration of hearing requests.

Proposed new §303.89 requires the commission to conduct public hearings under the provisions of Chapter 80 of this title (relating to Contested Case Hearings). Proposed new §303.90 provides that the executive director may issue a permit if the provisions of Chapter 50 of this title (relating to Actions on Applications and Other Authorizations) are met. These rules are necessary to ensure that procedural rules for hearings for water-in-transit permits are consistent with the procedural rules for hearings for other permits.

Proposed new Subchapter J, §303.91 and §303.92 pertains to the administration of Rio Grande bed and banks permits for water-in-transit.

Proposed new §303.91(a) provides that the purpose of the subchapter is to describe the administrative responsibilities of the watermaster regarding water-in-transit permits. Subsection (b) sets out how the accounts in Amistad and Falcon Reservoirs are established, and how water-in-transit will be accounted for in those accounts. Water-in-transit accounts are the first accounts to be eliminated if there is not

storage space left in the reservoir. Water lost due to storage space limitations will not be restored.

These provisions are necessary to provide how accounting for water-in-transit accounts will be done to ensure existing water rights are protected.

Proposed new §303.91(c) requires that the watermaster keep records of all authorized discharges and diversions and advise the operator of those facts. All discharges and diversions must be metered.

Notice to the watermaster is required for replacements of a permanent facility or any changes in rating and a change in location of a discharge or diversion point. Subsection (d) requires that the accounting be consistent with the 1944 Treaty with Mexico. No water can be credited to water-in-transit accounts unless it has been discharged to the Rio Grande under a water-in-transit permit and has been credited to the United States' share of water by the International Boundary and Water Commission (IBWC). Any accounting must be consistent with any accounting done by the IBWC. These rules are necessary to ensure that accounting for these permits will protect existing water rights and comply with the 1944 Treaty.

Proposed new subsection (e) provides that each diverter must obtain a certification from the watermaster prior to diversion and provides requirements for certifications. Subsection (f) provides that diverters shall be charged for their diversions and sets out provisions for this. Subsection (g) requires ownership records for diversions. Subsection (h) requires certification to be posted and provides requirements for that posting. Subsection (i) requires diverters to install and maintain measuring devices. The watermaster must approve the installation and operation, and the diverter shall bear the costs of these devices. Proposed new subsection (j) states that each diverter shall divert water

only in accordance with the approved certification. These rules are necessary for the watermaster to be able to accurately enforce water rights in the Rio Grande.

Proposed new subsection (k) establishes requirements for reports to be made to the commission.

Water right holders are responsible for reporting use based on their records. Proposed new subsection (l) provides that the watermaster shall maintain an accurate inventory of the water in Falcon and Amistad Reservoirs, including water-in-transit and maintain accurate records and institute necessary procedures to perform this function. Proposed new subsection (m) provides that the watermaster shall submit monthly reports to each water right holder showing the status of the account. Water right holders must tell the watermaster of any errors in the report within 20 days of distribution of the report. Proposed new subsection (n) requires certification requests to be submitted in advance to allow for travel time. The watermaster may waive travel time in cases of excess flow in the river. These rules are necessary for the water right holders to have accurate information on which to base their decisions to request water.

Proposed new subsection (o) provides that the watermaster may not authorize “no charge water” to water-in-transit accounts. This rule is necessary because water-in-transit permits only apply to private groundwater discharged into the Rio Grande and by allowing such rights to divert “no charge water” existing water rights could be affected.

Proposed new §303.92 provides that any action of a watermaster may be appealed to the executive director by any person. This rule is necessary to provide a mechanism for a water right holder to obtain review of the watermaster's action.

Proposed new Subchapter K provides procedures for filing certified copies of instruments with the watermaster. Proposed new §303.93 sets out what copies should be filed, when they should be filed, and the fee to be charged. These rules are proposed to provide procedures to comply with SB 1902 and HB 2250, new §11.3271(j) of the Water Code.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, has determined that, for the first five-year period the proposed rules are in effect, fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed amendments address additional duties and responsibilities of the Rio Grande Watermaster as well as procedures to allow for the storage of water-in-transit in the Rio Grande system. No fiscal implications are anticipated for local governments since typically they do not transport water to sell to customers outside their constituency base. A local government would be subject to the same costs as other entities holding this type of water right if it decides to apply for a water-in-transit permit.

The proposed rulemaking seeks to implement provisions of SB 1902 and HB 2250, 78th Legislature, that amended the Texas Water Code and affected the duties and functions of the Rio Grande Watermaster. The rulemaking proposes changes to Chapters 295, 297, and 303 of the Texas

Administrative Code. The proposed amendments to Chapters 295 and 297 provide that water-in-transit permits for the Rio Grande are governed by provisions in Chapter 303 instead of Chapters 295 and 297.

The proposed rulemaking would implement provisions to: give the Rio Grande Watermaster the authority to take actions when there are imminent threats to public health, public safety, and the environment; provide for the permitting of privately owned groundwater that an owner may wish to sell and transport (water-in-transit) to a buyer using the Rio Grande River and its reservoirs as a means of delivery; and maintain, for public use, a central repository that includes certified copies of instruments the commission requires to be filed in connection with water rights in the lower, middle, and upper Rio Grande basins.

The proposed rulemaking would require the Rio Grande Watermaster to modify the water accounting methods currently in use. New procedures to issue a permit for this type of water right will have to be developed. It will be necessary to investigate and verify the increased volume and diversions of water flowing through the Rio Grande system because of these new permits. Daily monitoring and evaluation will be needed to compute the direct and indirect losses of privately owned water put into, and diverted from, the Rio Grande system so that current existing water rights will not be impacted by this new water right.

This proposed rulemaking may generate additional fee revenue for the agency. Revenue generated by application fees under this proposed rulemaking may range from \$100 to \$53,000 per application

depending on the size and type of the groundwater source. Revenue from recording fees will also be generated at \$1.25 per page of the application. Revenue from annual assessment fees for water-in-transit will be determined by the water holder's apportioned share of fees needed to cover Rio Grande Watermaster operations. This fee, which varies on an annual basis, could be as much as \$45,000 per 100,000 acre-feet of water-in-transit.

Fees assessed to administer the Watermaster programs are deposited into the Watermaster Administration Account 158. The amount of fee revenue available for use by the agency to administer the Watermaster programs is determined through the legislative appropriations process. Projected revenue collected in this account is approximately \$2.2 million over the 2006/2007 biennium. Of this amount, the agency is authorized to use \$1.7 million in the 2006/2007 biennium. Currently, additional revenue generated by water-in-transit permits could not be used to cover the cost of implementing the proposed rulemaking. The agency submitted an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2006 and 2007 to allow it to use the total amount of revenue collected in Account 158 to administer the Watermaster programs, however, this exceptional item request was not approved. The agency will again submit an exceptional item request in its Legislative Appropriation Request for Fiscal Years 2008 and 2009 to allow usage of the total amount of revenue collected.

This proposed rulemaking will have a number of operational impacts for the Rio Grande Watermaster. The costs of developing and implementing the procedures needed to account for additions and diversions of water-in-transit, monitor and investigate water activities on a daily basis, and establish

and maintain a central repository for required documentation of water rights within the Rio Grande Watermaster division is estimated to be \$90,000 per year, roughly the equivalent of three full-time employees at the level of a Watermaster Specialist I.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be the possible availability of more water in a region where water is scarce, greater accessibility to public records pertaining to water rights in the Rio Grande basins, and increased protection of public health, public safety, and the environment when situations of imminent threat arise.

Fiscal implications are anticipated for businesses and individuals who apply for a water-in-transit permit under this proposed rulemaking. Costs for obtaining this type of permit will vary depending on the characteristics of the site and the number of acre-feet of water placed in the system.

Applicants will be required to conduct a hydrological assessment of the water source, which staff experience indicates could cost between \$15,000 to \$30,000, depending on the location and geological formation of the groundwater aquifer. Geological engineering models may be required to complete the evaluation regarding any groundwater surface water connection. Applicants will also be required to publish notices in the newspapers of 16 counties of the Rio Grande Water division that they intend to obtain this type of permit. This cost is estimated to be between \$300 to \$500 per newspaper publication. Applicants will also have to mail a notice to the 1,600 water right account holders in the

Rio Grande Watermaster division costing approximately \$600 total. Applicants will also have to pay an application fee and a user fee for the permit. These costs could range from \$100 to \$52,000, depending upon the amount of water discharged for transit. These fees are based on the amount of water that is being transported and therefore increases if more water is used. There is a \$50,000 maximum on use fees. Recording fees will be \$1.25 per page of the permit application. Fees for filing copies of liens will be assessed at \$16 for the first page and \$2.00 for each additional page of the document. If a water-in-transit right had to be amended, the applicant would have to pay \$100 per amendment. A water-in-transit holder will have to pay an annual assessment fee that all water right holders in the Rio Grande division pay. This fee varies from year to year, but a water-in-transit permit holder could pay as much as \$45,000 per each 100,000 acre-feet of water-in-transit, depending on the annual assessment rate calculated by the watermaster and approved by the commission to provide for compensation of all watermaster activities multiplied by the authorized amount of water both discharged into the Rio Grande and maximum authorized diverted and the intended and authorized use of that water. Entities with this type of water right will be required to install pumping and metering equipment. Pumping equipment ranges from an estimated \$800 - \$5,000 per unit, and metering equipment will cost about \$500 per site.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses due to the administration and implementation of the proposed rules. Small and micro-businesses are not expected to apply for a water-in-transit permit. If a small or micro-business elected to obtain a water-in-transit permit, it would be subject to the same costs that other entities pay to obtain that permit.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. The intent of the rulemaking concerning terror threats is not to reduce risks to human health from environmental exposure, but to provide new duties for the Rio Grande Watermaster relating to actions during terror threats. The rules relating to terror threats could be considered to protect the environment. However, these rules do not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government, and these rules are not adopted under the general powers of the agency instead of a specific state law. The rules relating to bed and banks permits are not for the purpose of protecting the environment or protecting from environmental exposure, but are to allow the conveyance and storage of groundwater in the river and to protect existing water rights. The recordkeeping rules are not for the purpose of protecting the environment or reducing risks from environmental exposure but are to provide a local public place for documents to be filed.

The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. Concerning actions to be taken by the Rio Grande Watermaster due to terror threats, the rules are written in response to a real and substantial threat to public health and safety, are designed to significantly advance the health and safety purpose, and do not impose a greater burden than is necessary to achieve the health and safety purpose.

For the bed and banks permits and the recordkeeping requirements of the rules, none of the exceptions in §2007.003(b) apply to this rulemaking.

The commission further evaluated these proposed rules and performed a preliminary assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to allow the commission to issue bed and banks permits for conveyance of groundwater to be stored in a reservoir, and to provide new duties for the Rio Grande Watermaster relating to bed and banks permits for conveyance of groundwater to be stored in a reservoir, recordkeeping, and monitoring water right activities in the Rio Grande basin. The proposed rules would substantially advance this stated purpose by providing procedures for each of these duties.

There are no burdens imposed on private real property due to these rules requiring the Rio Grande Watermaster to issue bed and banks permits and keep records. The rules on recordkeeping do not impact real property. The new rules relating to these bed and banks permits in the Rio Grande are specifically written to prevent any impact on existing water rights in the Rio Grande. Any impact on

landowners' groundwater is not a burden on their property because under the "Rule of Capture" persons may pump water from their land if they are not wasting the water or causing subsidence or other damage to other land. These rules do not affect that law. Additionally, a permittee will not be allowed to remove all of the water put into the river under the permit. This limit on how much water can be taken from the river is necessary to protect water right holders and to comply with the 1944 Treaty, both of which are required in Texas Water Code, §11.3271. Thus, these new rules do not constitute a taking under the Texas Government Code.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The purpose of the rulemaking is to define situations of imminent threat to public health and safety and the environment, including terrorism response; provide for the method and procedures by which water-in-transit permits will be issued; and provide for the methods that the Rio Grande Watermaster will account for any discharge, delivery, conveyance, storage, diversion, or associated loss of water conveyed down the bed and banks of the Rio Grande. Additionally, this rulemaking establishes procedures and fees for the Watermaster to maintain a central repository for all instruments that the commission requires to be filed in connection with water rights relating to the water division of the Rio Grande. None of these activities are identified in the rules. Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, 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.

All comments should reference Rule Project Number 2004-014-295-CE. Comments must be received by 5:00 p.m., May 30, 2006. Copies of the proposed rules can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Tracy Callen, Field Operations Division, at (512) 239-4127.

SUBCHAPTER A: INTRODUCTORY PROVISIONS

§303.1, §303.2

STATUTORY AUTHORITY

The amendments are proposed under amendments to Texas Water Code (TWC), §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed amendments are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.1. General.

This chapter is [These sections are] applicable to water rights in the Rio Grande Basin below Fort Quitman, and water rights in that portion of the Nueces-Rio Grande Coastal Basin in Starr, Hidalgo, Willacy, and Cameron Counties whose source of water is the Rio Grande, excluding the Pecos and Devils watersheds. All other rules, regulations, or orders promulgated or issued by the commission relating to water rights are also applicable to these water rights unless expressly stated otherwise or in conflict with the provisions of this chapter, in which event this chapter shall govern.

§303.2. Definitions.

The following words and terms when used in this chapter shall have the following meanings.

(1) - (18) (No change.)

(19) **Treaty**--The 1944 water sharing treaty between the United States and Mexico, and all related amendments and minute orders adopted by the International Boundary Water Commission.

(20) [(19)] **Tributary diverter**--A water right holder, an agent, or an exempt domestic and livestock user on the Rio Grande below Fort Quitman and above Amistad Reservoir or on a tributary of the Rio Grande with no right to call for releases from Amistad or Falcon Reservoirs.

(21) [(20)] **Upper Rio Grande**--That portion of the Rio Grande Basin, including tributaries, in Texas from Amistad dam upstream to Fort Quitman, excluding the Pecos and Devils watersheds.

(22) [(21)] **Usable balance**--The quantity of water in acre-feet an allottee has available for use, and is based upon whichever is less:

(A) the sum of allottee's annual authorized amount of water minus actual use for the year to date, plus the allottee's contract water balance; or

(B) the amount in the allottee's storage account.

(23) **Water-in-transit**--Privately owned water, not including state water, that a person has pumped from an underground reservoir and that is in transit between the point of discharge into the Rio Grande and the place or the point of diversion by a person who has contracted with the owner of the water to purchase the water, and that may be stored in a reservoir for later use.

(24) [(22)] **Water right**--A right acquired under the laws of the state to impound, divert, and/or use water.

(A) **Class A water right**--A water right in the Lower or Middle Rio Grande Basin designated as a Class A right and held under a certificate of adjudication, granted in the

Adjudication of the Lower and Middle Rio Grande River in *State v. Hidalgo County Water Control & Improv. Dist. No. 18* [*State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*], 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.* [writ ref'd n.r.e.], or issued by the commission. If converted to a domestic, municipal, and industrial (DMI) water right, a Class A water right is converted to 50% of the existing water right.

(B) Class B water right--A water right in the Lower or Middle Rio Grande Basin designated as a Class B right and held under a certificate of adjudication, granted in the Adjudication of the Lower and Middle Rio Grande River in *State v. Hidalgo County Water Control & Improv. Dist. No. 18* [*State v. Hidalgo Co. Water Con. & Irr. Dist. No. Eighteen*], 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.* [writ ref'd n.r.e.], or issued by the commission. If converted to a DMI water right, a Class B water right is converted to 40% of the existing water right.

(25) [(23)] **Water right holder**--One who owns a water right.

SUBCHAPTER B: WATERMASTER--REGULATORY FUNCTIONS

§303.18

STATUTORY AUTHORITY

The new section is proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.18. Threats to Public Health and Safety and the Environment.

(a) The watermaster shall implement the procedures adopted by the agency during times of threats to public health and safety and the environment related to the waters of the Rio Grande below Fort Quitman, Texas.

(b) The watermaster shall report activities that pose a threat to public health, safety, and the environment regarding waters of the Rio Grande under the watermaster's jurisdiction as required by the agency's procedures regarding homeland security.

(c) The watermaster shall gather and distribute information from and to the Rio Grande water users, and assist water users in efforts to recover from an emergency.

(d) The watermaster shall require water users to immediately cease any and all diversions of water during emergency periods when the watermaster declares that continued diversion and use of water would pose a hazard to public health and safety and the environment.

(e) The watermaster shall maintain records of water users to enable the watermaster to provide notification of a threat to the water users in the watermaster's division.

SUBCHAPTER C: ALLOCATION AND DISTRIBUTION OF WATERS

§§303.21, 303.22, 303.23

STATUTORY AUTHORITY

The amendments are proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed amendments are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.21. Amistad/Falcon Reservoirs Accounts. [Accounts--Amistad/Falcon Reservoirs.]

(a) (No change.)

(b) When there is adequate water to do so, the watermaster shall maintain the following accounts:

(1) (No change.)

(2) an operating reserve of 75,000 acre-feet; [and]

(3) (No change.)

(c) (No change.)

(d) Water-in-transit accounts are not eligible for an allocation under §303.22 of this title (relating to Allocations to Accounts) and are regulated under Subchapter I of this chapter (relating to Rio Grande Bed and Banks Permits for Water-in-Transit) and Subchapter J of this chapter (relating to Administration of Rio Grande Bed and Banks Permits for Water-in-Transit).

§303.22. Allocations to Accounts.

(a) Allocations to Middle and Lower Rio Grande accounts, which do not include water-in-transit accounts, shall be based on water in the usable storage of Falcon and Amistad Reservoirs minus the water-in-transit held in storage at Falcon and Amistad Reservoirs. Such storage shall be computed as the total storage in Amistad and Falcon Reservoirs as reported by the International Boundary and

Water Commission on the last Saturday of each month, less the water-in-transit and the amount of water in dead storage, which is water behind the dams that cannot be released due to hydrologic restrictions. To determine the amount of water to be allocated to the various accounts, computations shall be made in the following sequence:

(1) - (3) (No change.)

(4) from the remaining storage, deduct the total amount of water held in storage from water-in-transit.

[(4) after the deduction of the operating reserve, the remaining water will be allocated to the Class A and Class B accounts.]

(b) - (e) (No change.)

(f) If the amount of usable water is insufficient to carry out all the steps specified in subsections (a) and (b) of this section, the computations will be made in the specified sequence, with the following adjustments.

(1) - (2) (No change.)

(3) If the balance available for the operating reserve is less than 75,000 acre-feet, but greater than zero acre-feet, then that amount will be the amount allocated to the operating reserve. If the operating reserve is less than zero acre-feet, the watermaster will deduct from the Class A₂ [and] Class B₂ and water-in-transit accounts, via negative allocations, the amount necessary to provide 48,000 acre-feet for the operating reserve account. A negative allocation will be made on a pro rata basis, from all Class A₂ [and] Class B₂ and water-in-transit accounts containing water at the time, based on the amount of water in such accounts. The watermaster will keep accurate records of the negative allocations affecting each Class A₂ [and] Class B₂ and water-in-transit account. When the operating reserve has been restored to 48,000 acre-feet, negative allocations will cease. When the operating reserve has been restored to 75,000 acre-feet, and sufficient water is available, all accounts (excluding water-in-transit accounts) from which water has been deducted will be restored to the amount of water in each account prior to the negative allocation period and any new allotments will be made in accordance with subsections (a) and (b) of this section.

(g) - (h) (No change.)

§303.23. Distribution of Available Waters--Upper Rio Grande and All Rio Grande Tributaries.

(a) Distribution of waters in the Upper Rio Grande and all Rio Grande tributaries shall be based upon the amount of water authorized per annum and the priority date of the water right. Water rights holders in the Upper Rio Grande and all Rio Grande tributaries are entitled to waters flowing in these watercourses excluding water-in-transit, which can be beneficially used and which are used in

accordance with §303.11 of this title (relating to Records of Diversions--General) and §303.13 of this title (relating to Records--Upper Rio Grande and All Rio Grande Tributaries). All waters excluding water-in-transit which cannot be so used shall be available to the Lower and Middle Rio Grande system.

(b) - (c) (No change.)

(d) Distribution of available waters from the Rio Grande above Amistad and all Rio Grande tributaries shall not be eligible for distribution or use to water-in-transit accounts.

SUBCHAPTER E: AMENDMENTS TO AND SALES OF WATER RIGHTS

§303.40

STATUTORY AUTHORITY

The new section is proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.40. Applicability.

_____ This subchapter does not apply to water-in-transit permits. These permits are regulated under
Subchapter I of this chapter (relating to Rio Grande Bed and Banks Permits for Water-in-Transit) and
Subchapter J of this chapter (relating to Administration of Rio Grande Bed and Banks Permits for
Water-in-Transit).

SUBCHAPTER F: CONTRACTUAL SALES

§303.53, §303.55

STATUTORY AUTHORITY

The amendments are proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed amendments are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.53. Documents Needed To File.

- (a) (No change.)

(b) The contract will be accompanied by an aerial photograph or United States Geological Survey topographic map with the location of diversion points and areas to be irrigated described thereon. In water-in-transit contractual sales, the contract must also include an aerial photograph or United States Geological Survey topographic map with the location of the discharge point(s).

(c) (No change.)

§303.55. Accounting for Contract Sale Water.

(a) - (d) (No change.)

(e) At no time will buyer's or seller's Class A or Class B [irrigation] storage [account] exceed 1.41 times the water right holder's recognized amount in acre-feet.

SUBCHAPTER H: FINANCING RIO GRANDE WATERMASTER OPERATION

§303.72

STATUTORY AUTHORITY

The amendment is proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed, and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed amendments are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.72. Determination of Assessment Rates.

(a) After a commission order is issued approving the assessment income needed for the next fiscal year, the executive director shall calculate assessment rates for water use and storage based on the following formula:

Figure: 30 TAC §303.72(a)

[Figure: 30 TAC §303.72(a)]

$$\text{Municipal Assessment Rate} = \frac{I - M(N)}{(\text{RF}_s)(\text{AF}_s) + \text{AF}_1 + (\text{RF}_2)(\text{AF}_2) + (\text{RF}_3)(\text{AF}_3) \dots (\text{RF}_n)(\text{AF}_n)}$$

Where:

- I : Income needed to meet the adopted budget
- M : Base charge per account
- N : Total number of accounts to be assessed in the water division
- n : Code number corresponding to a category or type of use
- RF_n : Rate factor for each of the following categories of use:

municipal	-	RF ₁	=	1.00
industrial	-	RF ₂	=	1.00
irrigation	-	RF ₃	=	0.80
mining	-	RF ₄	=	1.00
hydroelectric	-	RF ₅	=	0.05
recreation	-	RF ₆	=	1.00
recharge	-	RF ₇	=	0.50
salt water	-	RF ₈	=	0.10
spreader dam diversion	-	RF ₉	=	0.40
secondary use	-	RF ₁₀	=	0.50
<u>water-in-transit discharge</u>	-	<u>RF₁₁</u>	=	<u>1.00</u>
<u>water-in-transit diversion</u>	-	<u>RF₁₂</u>	=	<u>1.00</u>
on-channel storage	-	RF _s	=	0.40

AF_n : Total water division authorization to be assessed for each of the above categories of use, which are used in this section as follows:

Municipal--The total amount of water authorized for diversion under a water right for this purpose.

Industrial, Mining, Recreation, or Salt Water Diversions--The total amount of water authorized for consumptive use for each of these categories of use under a water right; in the event there is no specific authorization for consumptive use, the assessment shall be based on the total amount of water authorized for diversion under the water right;

Irrigation, Hydroelectric, Recharge, Spreader Dam Diversions, or Secondary Use--The total amount of water authorized for diversion for each of these categories of use under a water right;

On-channel Storage--The total amount authorized for impoundment under a water right; this category only includes on-channel reservoirs authorized under the Texas Water Code, §11.121;

Water-in-Transit Discharge--The total amount of water authorized for discharge under a water right for water-in-transit;

Water-in-Transit Diversion--The total amount of water authorized for diversion under a water right for water-in-transit.

(b) - (c) (No change.)

SUBCHAPTER I: RIO GRANDE BED AND BANKS PERMITS FOR WATER-IN-TRANSIT

§§303.74 - 303.90

STATUTORY AUTHORITY

The new sections are proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new sections are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.74. General.

This subchapter is applicable to water rights permits for water-in-transit in the Rio Grande below Fort Quitman, Texas. All other rules, regulations, or orders promulgated or issued by the commission regarding water rights are also applicable to water-in-transit water rights unless in conflict with the provisions of this subchapter, in which event this subchapter shall govern.

§303.75. Requirements for an Application to Convey Water-in-Transit in the Bed and Banks of the Rio Grande.

(a) The purpose of this section is to provide the application content requirements for a bed and banks permit authorization for water-in-transit in the Rio Grande under Texas Water Code, §11.3271.

(b) A person who intends to discharge private water that originates from an underground reservoir into the Rio Grande and wishes to divert and use the discharged water must submit an application to the commission containing the following information:

(1) the name, mailing address, and telephone number of the applicant;

(2) the location(s) of the proposed groundwater reservoir from which the water will originate identified on a United States Geological Survey (USGS) 7.5 minute topographical map(s);

(3) the location(s) of the point of the proposed discharge(s) into the Rio Grande and diversion(s) as identified on a USGS 7.5 minute topographical map(s);

(4) the appropriate ownership or lease documents evidencing applicant's authority to develop the proposed project;

(5) the source, including a hydrological determination regarding any interaction between the groundwater source and state waters, amount, and rates of the proposed discharge and diversion;

(6) a description of the quality of the water proposed to be discharged and a description of the Rio Grande water quality at the proposed discharge point with documentation that the discharge will not degrade the Rio Grande;

(7) the date of the proposed discharge of the groundwater into the Rio Grande;

(8) an analysis of the amount of water that will be lost under differing flow regimes to transportation, evaporation, seepage, channel, treaty accounting, or other associated losses for each reach of the Rio Grande from the point of discharge to Amistad or Falcon Reservoir, including losses associated with storage in these reservoirs, and carriage losses from these reservoirs to the point of diversion. The losses shall be quantified for each reach of the Rio Grande below Amistad Reservoir as listed in §303.2 of this title (relating to Definitions) and for the appropriate reaches above Amistad Reservoir.

(9) the maximum amount of water which may be stored in Amistad and/or Falcon

Reservoir;

(10) any other information the executive director may need to complete an analysis of the application.

(c) The method and calculation of any losses including, but not limited to, carriage, treaty accounting completed by the International Boundary and Water Commission (IBWC), storage, and that are associated with any permit issued under this section shall be quantified and made a provision of the permit and shall be subject to the review and approval of the executive director. The method of loss calculation shall be consistent with procedures used by the IBWC.

§303.76. Use of Forms.

The executive director will furnish, without charge, forms and instructions for preparing an application. The use of such forms is not mandatory, but the information required by such forms must be provided. Supplements may be attached if there is not sufficient space on the printed form. If supplements are used, the data and information entered on the form must be separated into paragraphs numbered to correspond with those on the printed form. A supplement explaining the project and planned operation may be attached to an application.

§303.77. Preparation of Application.

(a) All applications must be typewritten or printed legibly in ink. Illegible applications will be returned to the applicant.

(b) Applicants will be notified if additional information is needed to process an application.

(c) Upon express written or verbal approval of the applicant or the applicant's agent, any employee of the commission may make non-substantive changes in any documents submitted by the applicant.

(d) Substantive changes in an application may be made only by the applicant or the applicant's agent who submitted the application and only in the form of a written, notarized amendment to the application signed by the proper person; provided, however, that no substantive changes may be made after an application has been filed with the chief clerk by the executive director.

(e) The executive director shall file the application with the chief clerk once the application has been determined to be administratively complete.

§303.78. Name and Address.

(a) Each applicant must provide its full name, post-office address, telephone number, and social security or federal identification number.

(b) If the applicant is a partnership, it must be designated by the firm name followed by the words "a partnership."

(c) If the applicant is acting as trustee for another, it must be designated by the trustee's name followed by the word "trustee."

(d) If one other than the named applicant executes the application, the name, position, post-office address, and telephone number of the person executing the application must be given.

§303.79. Source of Supply.

The applicant must clearly state the name and location of the underground reservoir from which the water will originate. If the source has no name, it may be designated as "an unnamed reservoir."

§303.80. Amount of Discharge and Diversion.

The total amount of water to be discharged and diverted must be stated in cubic feet per second and acre-feet annually.

§303.81. Rate and Method of Diversion.

The application must:

(1) include the maximum rate of diversion for each diversion point in gallons per minute or cubic feet per second;

(2) describe the method to be used as portable pump, stationary pump, or gravity flow;

(3) include the location of point(s) of discharge and diversion. These locations must also be shown on the application maps with reference to a corner of an original land survey and/or other survey point of record, giving both course and distance; and

(4) include the distance and direction from the nearest county seat or town.

§303.82. Signature of Applicant.

The application must be signed as follows.

(1) If the applicant is an individual, the application must be signed by the applicant or the applicant's duly appointed agent. An agent must provide written evidence with the application of his or her authority to represent the applicant. If the applicant is an individual doing business under an assumed name, the applicant must attach to the application an assumed name certificate from the county clerk of the county in which the principal place of business is located.

(2) A joint application must be signed by each applicant or each applicant's duly authorized agent, with written evidence of such agency to be submitted with the application. If land is owned by both husband and wife, each must sign the application. Joint applicants must select one among them to act for and represent the others in pursuing the application with the commission, with written evidence of such representation to be submitted with the application.

(3) If the application is by a partnership, the application must be signed by one of the general partners. If the applicant is a partnership doing business under an assumed name, it must attach to the application an assumed name certificate from the county clerk of the county in which the principal place of business is located.

(4) If the applicant is an estate or guardianship, the application must be signed by the duly appointed guardian or representative of the estate, and a current copy of the letters issued by the court must be attached to the application.

(5) If the applicant is a corporation, public district, county, municipality, or other corporate entity, the application must be signed by a duly authorized official. Written evidence in the form of by-laws, charters, or resolutions which specify the authority of the official to take such action must be submitted. A corporation may file a corporate affidavit as evidence of the official's authority to sign.

(6) If the applicant is acting as trustee for another, the applicant must sign as trustee, and in the application must disclose the nature of the trust agreement and give the name and current address of each trust beneficiary.

§303.83. Sworn Application Required.

Each applicant must subscribe and swear to the application before any person entitled to administer oaths, who must also sign his or her name and affix his or her seal of office to the application.

§303.84. Consistency With State And Regional Water Plans.

An application must contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan for any area in which the proposed appropriation is located or, in the alternative, describe conditions that warrant a waiver of this requirement.

§303.85. Fees for Filing an Application.

(a) Fees. Statutory fees must accompany an application in order for it to be considered by the commission. The executive director's staff are expressly prohibited from processing any application unless the proper fees are tendered. The executive director shall charge and collect for the benefit of

the state the applicable fees, and it shall be his duty to make a record at the time same becomes due and to render an account to the party charged. Each fee is a separate charge and is in addition to other fees, unless provided otherwise.

(b) Filing, recording, and notice fees. The following fees must be submitted with any application for a water-in-transit permit or any application for an amendment to a water-in-transit permit.

(1) Application filing fees are established as follows.

(A) Fees for a water-in-transit permit application must be based upon the total amount of water requested to be discharged for transit as follows:

(i) less than 100 acre-feet - \$100;

(ii) 100 - 5,000 acre-feet - \$250;

(iii) 5,001 - 10,000 acre-feet - \$500;

(iv) 10,001 - 250,000 acre-feet - \$1,000; and

(v) greater than 250,000 acre-feet - \$2,000.

(B) Fees to amend a water-in-transit right are \$100 per right requested to be amended.

(2) Recording fees are \$1.25 per page of the application.

(3) The applicant must pay the total cost of mailing notice to persons in the Rio Grande water division. The executive director will advise the applicant of the number of persons to whom notice is mailed and the total mailing cost. A water-in-transit permit or amendment will require notice to all owners of water rights within the Rio Grande water division of any such application.

(c) Publication. The cost of any required publication must be paid by the applicant directly to the newspaper involved. Publication is required in newspapers of general circulation throughout the basin.

(d) One-time transit fees. A use fee of \$1.00 per acre-foot of water discharged for transit shall be charged.

(e) Payment of fees exceeding \$1,000. If the total fee for a permit exceeds \$1,000, the applicant must pay at least one-half of the use fee when the application is filed, and one-half within 180 days after notice is mailed to the applicant that the permit is granted. If the applicant does not pay all of the amount owed before beginning to use state water under the permit, the permit is annulled and

reverts to the status of a pending, filed application requiring notice, the payment of notice fees, and the balance of the use fees.

(f) Maximum fees. The one-time transit use fee shall not exceed \$50,000.

(g) Inquiries as to fees. Any inquiries as to fees must be made in advance to the executive director. The applicant is charged with the duty of tendering correct fees according to law. In case of disagreement between the applicant and the executive director over the proper amount of the fees required, the application will be filed "under protest" and the fees paid by the applicant will be placed in suspense until the issue is resolved.

(h) Return of fees.

(1) Other than the filing and recording fees required by statute, all fees paid pertaining to an application for a water-in-transit permit which have not been expended in the processing of the application will be placed in suspense until action is taken by the commission upon the application.

(2) If the permit is not granted, unexpended fees will be returned to the applicant.

(3) If the application is granted in part, excess use fees will be returned to the applicant.

(4) No fees will be returned to any applicant who has failed to notify the executive director of the applicant's social security or federal identification number.

§303.86. Notice Requirements for Water-in-Transit Applications.

(a) At the time an application for a water-in-transit permit has been filed by the executive director with the chief clerk, the commission shall give notice by mail to those persons specified in subsection (d) of this section. At such time, the chief clerk shall furnish a copy of the notice to the applicant, and the applicant must publish notice, pursuant to subsection (c) of this section.

(b) A notice of application and commission action must:

(1) include the name and address of the applicant;

(2) include the date on which the application was received by the commission;

(3) include the date the application was filed by the executive director with the chief clerk;

(4) include that the executive director has determined that the application is administratively complete;

_____ (5) include the application number;

_____ (6) include the type of permit the applicant is seeking;

_____ (7) include the purpose and extent of the proposed transfer of water;

_____ (8) identify the source of supply, place of discharge, and the place where the water is to be diverted;

_____ (9) specify the time and location where the commission will consider the application;

_____ (10) identify all potentially affected groundwater districts;

_____ (11) give any additional information the executive director considers necessary.

_____ (c) The applicant must publish the notice in newspapers of general circulation in each county within the Rio Grande water division. The date of publication must be on or before the date of publication directed by the chief clerk.

_____ (d) Notice by mail.

(1) The commission shall mail the notice by first-class mail, postage prepaid, to persons listed in this section after the executive director has declared the application administratively complete.

(2) For an application for a water-in-transit permit pursuant to Texas Water Code, §11.3271 or for an amendment to a Texas Water Code, §11.3271 permit, notice must be mailed to:

(A) each claimant or appropriator of water within the Rio Grande water division below Fort Quitman, Texas, the record of whose claim or appropriation has been filed with the commission or its predecessor agencies;

(B) all groundwater districts potentially impacted by the application; and

(C) other persons who in the judgment of the commission might be affected.

§303.87. Notice of Hearing.

A hearing on an application may be held without the necessity of issuing further notice other than advising the applicant, executive director, public interest counsel, and all persons who have in writing notified the commission of their interest in the application of the time and place where the hearing is to convene. The chief clerk will mail such notice to these persons not less than 30 days before the date of the hearing.

§303.88. Request for Public Hearing.

A request for public hearing on an application for a water-in-transit permit or amendment is governed by Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications).

§303.89. Public Hearing.

The commission may conduct a public hearing as provided by in Chapter 80 of this title (relating to Contested Case Hearings).

§303.90. Action on Application Without Public Hearing.

If no hearing requests are filed as provided for in §303.87 of this title (relating to Notice of Hearing) and §303.88 of this title (relating to Request for Public Hearing) the executive director may issue the permit if the requirements of Chapter 50 of this title (relating to Action on Applications and Other Authorizations) are met.

SUBCHAPTER J: ADMINISTRATION OF RIO GRANDE BED AND BANKS PERMITS

FOR WATER-IN-TRANSIT

§303.91, §303.92

STATUTORY AUTHORITY

The new sections are proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new sections are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.91. Water-in-Transit Permit Accounts.

(a) Purpose. The purpose of this section is to provide the administrative responsibilities of the watermaster regarding any water-in-transit permits.

(b) Storage and losses. For the purpose of establishing accounts in Amistad and Falcon Reservoirs, the two reservoirs are considered to constitute a single storage system.

(1) The watermaster shall establish an account of water stored in the Amistad - Falcon system for these water-in-transit permits only if there is storage space available in the reservoirs.

(2) The water stored shall be based upon the amount of water discharged into the Rio Grande minus appropriate losses to either Falcon or Amistad Reservoir.

(3) All associated losses will be calculated by the method specified in the permit. The water-in-transit storage accounts shall be subject to reductions as determined by the watermaster to cover losses while water is in storage. Any water diverted downstream from water released from these accounts will be reduced by the appropriate losses, including conveyance losses, from either Falcon or Amistad Reservoir. These losses will also be calculated by the method specified in the permit and by the 1944 Treaty.

(4) If and when Rio Grande treaty inflows to the reservoirs reach the point where the storage space occupied by the transit water authorized by these permits is required to store these inflows, the transit water accounts will be reduced or eliminated on a priority date basis to enable these

inflows to be stored. Water lost due to storage space limitations will not be restored by the watermaster.

(c) Records of inflows/diversions.

(1) The watermaster shall locate, number by river mile or other method, and rate as to capacity all authorized discharges and diversions associated with a permit for water transit, and the owner or operator of the water-in-transit shall be advised in writing of these facts.

(2) All discharges into the Rio Grande and all diversions from the Rio Grande pursuant to these permits shall be metered or measured by a method approved by the watermaster.

(3) When a permanent facility is replaced at the same location or when any changes in rating are made, the water-in-transit permittee must immediately inform the watermaster prior to diversion.

(4) Any change in the location of the discharges or diversion facilities and place of use on the Middle or Lower Rio Grande must be made pursuant to §295.71 of this title (relating to Applications to Amend a Permit) and §295.158(c) of this title (relating to Notice of Amendments to Water Rights), not requiring mailed and published notice.

(5) Any change in the location of the discharge or diversion facilities and place of use on the Upper Rio Grande and tributaries to the Rio Grande must be made pursuant to §295.71 and §295.158(b) of this title, requiring mailed and published notice.

(d) Consistency with the Treaty. The watermaster will request releases from Amistad and Falcon Reservoirs in such a manner that promotes the efficient use and optimum yield of the United States' share of water in the Amistad/Falcon System, consistent with the 1944 Treaty between the United States and Mexico. Any water inflows, conveyance losses, and water stored in these water-in-transit accounts must be consistent with any accounting of waters by the International Boundary and Water Commission (IBWC) relating to the 1944 Treaty with Mexico. No water can be credited to such accounts unless it has first discharged to the Rio Grande under a water-in-transit permit. Water-in-transit will be subject to allocation under the Treaty. The watermaster will only credit water-in-transit accounts with the amount of water -in-transit included in the United States' share of water by the IBWC.

(e) Certification.

(1) Each diverter must request written certification from the watermaster prior to diverting water-in-transit by identifying the specific permit to be used and the pump number of the pump to be used.

(2) Certifications will be granted only for diversion from authorized diversion points associated with that permit.

(3) Any diversion of water released from an account for water-in-transit in Falcon or Amistad Reservoir will be subject to transportation losses to the point of diversion as specified by the permit.

(4) Each reach of the river shall constitute one day of travel time from Amistad Dam downstream.

(5) Certifications are limited to a maximum diversion period of one calendar week.

(f) Diversions. Diversions shall be charged against the appropriate accounts as follows.

(1) A diverter shall be charged with the actual amount diverted, without being penalized, if the total diversion is within plus or minus 10% of the amount requested, minus conveyance losses, pursuant to certification.

(2) A diverter shall be charged with 90% of the certification amount if the total diversion is less than 90% of the amount requested, minus conveyance losses.

(3) If the quantity of water diverted is more than 110% of the amount requested according to the certification, then the diverter will be charged with the actual amount of water diverted and the provisions of §303.31 of this title (relating to General) will apply.

(4) The watermaster shall have the discretion to waive the penalties for excessive or inadequate diversions due to circumstances beyond the control of the diverter.

(5) No certification will be issued that exceeds the maximum annual authorization of the permit. The watermaster is authorized to cancel a certification or to refuse or modify a request for the diversion of water.

(g) Ownership records. Except as provided in §303.44 of this title (relating to the Administration by Watermaster), the watermaster will refuse a request of a diverter if the water rights holder whose water is to be diverted does not have complete ownership records on file with the commission. The watermaster will maintain a list of all water rights holders with incomplete ownership records and will remove names from that list after the executive director notifies the watermaster that the ownership record has been completed.

(h) Certification to be posted.

(1) Each diverter must post at or near his diversion facility the watermaster certification authorizing the diversion of water.

(2) In the event the certification has been granted but is not received by the diverter by the time diversion is authorized, the diverter must post a written note at or near the diversion facility in lieu of the watermaster certification, stating the pump number and the dates and hours of the request and that verbal authority was given by the watermaster.

(3) The diverter must ensure that the written note conforms to the time and conditions shown on the watermaster certification.

(4) The diverter must replace the written note with the watermaster certification, upon receipt.

(i) Measuring devices.

(1) Each diverter must install and maintain meters or other measuring devices at the authorized point of discharge and diversion which will provide for accurate measurement and accounting of the quantities of water diverted.

(2) The installation, maintenance, and operation of measuring devices by the diverter must be subject to approval of the watermaster.

(3) The diverter must ensure the accessibility of the measuring device, so it can be conveniently and safely located and checked by the watermaster.

(4) The diverter must be liable for all expenses incurred in the acquisition, installation, maintenance, and operation of measuring devices.

(j) Diversion. Each diverter must divert water in accordance with the watermaster certification.

(k) Report by water-in-transit permittee.

(1) Each water right holder or his designated agent must submit to the watermaster a written report of the amount of water actually discharged, diverted, and used during the reporting period. All pumps used during the reporting period, including borrowed and rented pumps, must be shown by number on the pump operation report with metered readings or with the number of hours operated for each reporting period. The watermaster will accept as timely all pump operation reports for each diversion pump received within seven days or postmarked within five days from the termination of the certification period. If the pump operation report is incomplete or not timely filed, the watermaster will refuse to issue a new certification until the complete report is filed. Pump operation reports, other than International Boundary and Water Commission diversion reports, received in the watermaster's office are unacceptable:

(A) if unsigned; or

(B) if the measuring device reading is not shown.

(2) The water right holder is responsible for reporting actual use based on the records kept by the water right holder or diverter.

(3) The watermaster shall not prepare annual surface water use reports.

(l) Inventory of water in Falcon and Amistad Reservoirs. The watermaster shall maintain an accurate inventory of water in Falcon and Amistad Reservoirs including water-in-transit accounts and shall maintain records and institute necessary procedures with the International Boundary and Water Commission as may be appropriate to perform this function.

(m) Report by watermaster.

(1) The watermaster shall submit a monthly report to each water-in-transit permittee, or his designated agent, showing the current status of each water-in-transit permittee's account.

(2) The period of time covered by each report shall be from the last Saturday of a month at midnight to the last Saturday of the following month at midnight. The watermaster shall provide the date for the end of the watermaster's next reporting period.

(3) Each water-in-transit permittee must apply in writing to the watermaster for correction of any alleged errors in the report within 20 consecutive days following distribution of the monthly report.

(n) Request for travel time.

(1) A diverter must request written certification in advance to allow travel time for the released water to reach the river diversion point as scheduled.

(2) Each reach of the river shall constitute one day of travel time from Amistad Dam downstream.

(3) Whenever there is a flow of water in the Rio Grande in excess of downstream requirements, the watermaster may waive travel time requirements to allow immediate diversions, provided that the diverter shall post the certification at or near his diversion facility.

(o) No charge water. The watermaster shall not authorize no charge water as described in the August 4, 1981, Texas Water Commission order and any subsequent orders relating to the intermittent temporary diversion and use of Rio Grande waters, to water-in-transit accounts.

§303.92. Appeal of Watermaster Actions.

Any person dissatisfied with any action of a watermaster may apply to the executive director for relief under Texas Water Code, §11.326.

SUBCHAPTER K: FILING CERTIFIED COPIES OF INSTRUMENTS

WITH THE WATERMASTER

§303.93

STATUTORY AUTHORITY

The new section is proposed under amendments to Texas Water Code, TWC, §11.3271, which provide that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The proposed new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC, and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This proposal implements TWC, §11.3271, and TWC, §5.103.

§303.93. Filing Certified Copies of Instruments with the Watermaster.

(a) Certified copies of all instruments required to be filed under §295.31 and §295.32 of this title (relating to General and Enforcement Actions) for permits, certified filings, or certificates of adjudication in the watermaster's jurisdiction must be filed with the watermaster. Certified copies of other instruments relating to any permit, certified filing, or certificate of adjudication in the watermaster's jurisdiction, including deeds, deeds of trust, liens, financing statements, and security agreements, must be filed with the watermaster.

(b) Persons must file two certified copies of each instrument with the watermaster.

(c) If an applicant is required to file an instrument listed in subsection (a) of this section in connection with an application, the applicant must also file two certified copies of the document with the watermaster at the same time that the applicant files the application with the executive director. For water rights which have already been issued, the water right holder must file these documents as soon as possible with the watermaster.

(d) For filing certified copies of the instruments described in subsections (a) - (c) of this section, the watermaster shall charge a fee which is identical to the fee charged by the county clerk of Cameron County for recordation of similar instruments.