

The Texas Commission on Environmental Quality (commission) adopts amendments to §§301.1 - 301.4, 301.6, 301.21, 301.31, 301.38, 301.43, 301.45, 301.51, 301.71, 301.73, and 301.74; and the repeal of §§301.5, 301.22, and 301.23 *without changes* to the proposed text as published in the October 29, 2004, issue of the *Texas Register* (29 TexReg 10073), and the text will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission has the statutory duty and responsibility to create, supervise, and dissolve certain water and water-related districts and to approve the issuance and sale of bonds for district improvements in accordance with numerous chapters of the Texas Water Code (TWC). The commission oversees approximately 1,100 active water districts in Texas. Chapter 301 of the commission's rules governs the creation of levee improvement districts and the planning and review of levees and drainage projects for such districts.

A corresponding rulemaking published in this issue of the *Texas Register* includes changes to 30 TAC Chapter 293, Water Districts.

The adopted rulemaking revises existing requirements relating to levee improvement districts, levees and other improvements, and the commission's supervision of such districts under TWC, Chapters 5, 16, and 57, as amended by House Bill (HB) 1541, 78th Legislature, 2003. HB 1541 amends various sections of TWC, Chapter 57, to delete references to "plans of reclamation," to delete the requirement to obtain commission approval of such plans, and to add the requirement that an engineer's report be prepared in lieu of a plan of reclamation.

Specifically, the adopted rules delete all references to plans of reclamation, including deleting references to application requirements and having to obtain commission approval.

The adopted rules also correct a rule reference regarding fees and delete references to a previous name of the agency.

#### SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are adopted throughout the sections to bring the existing rule language into agreement with guidance provided in the *Texas Legislative Council Drafting Manual*, October 2002. These changes also update references to reflect the agency's name change.

Adopted amendments to §§301.1, 301.2, 301.4, 301.31, 301.38, 301.43, 301.45, 301.51, 301.73, and 301.74 exclude references to plans of reclamation, in accordance with HB 1541, §§34 - 55, which amend various sections of TWC, Chapter 57; and HB 1541, §57, which repeals various sections of TWC, Chapter 57.

Sections 301.5, 301.22, and 301.23 are adopted to be repealed to exclude references to plans of reclamation, in accordance with HB 1541, §§34 - 55, which amend various sections of TWC, Chapter 57; and HB 1541, §57, which repeals various sections of TWC, Chapter 57.

Adopted amendments to §301.71 correct the reference for fees from TWC, §5.235 to §5.701.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the statute. A “major environmental rule” means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the adopted rules is to primarily establish new or revise existing requirements relating to the administration of certain water districts and the commission’s supervision over their actions under TWC, Chapters 5, 16, and 57, as amended by HB 1541. Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). Specifically, the adopted rules do not exceed a federal standard because no applicable federal standards exist. The adopted rules do not exceed an express requirement of state law nor exceed a requirement of a delegation agreement. The adopted rules were not developed solely under the general powers of the agency; but were specifically developed to implement TWC, §§57.015, 57.092, 57.104, 57.108, 57.116 - 57.118, 57.177, 57.216, 57.260, 57.261, 57.265 - 57.267, 57.269, 57.270, and 57.273 - 57.275 as amended by HB 1541 and the adopted rules do not exceed the express requirements of those state statutes. The commission invited, but received, no public comment on the draft regulatory impact analysis determination.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed a preliminary assessment of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of this rulemaking is to establish new or revise existing requirements relating to the administration of certain water districts and the commission's supervision over the districts' actions under TWC, Chapters 5, 16, and 57, as amended by HB 1541. Promulgation and enforcement of this rulemaking will constitute neither a statutory nor a constitutional taking of private real property. This rulemaking will impose no burdens on private real property because the adopted rulemaking neither relates to, nor has any impact on the use or enjoyment of private real property, and there is no reduction in value of the property as a result of this rulemaking.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

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

The CMP goals applicable to the adopted rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas and to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

The CMP policy applicable to the adopted rules states that the commission's rules and approvals for the levee construction, modification, drainage, reclamation, channelization, or flood- or floodwater-control projects, under TWC, §16.263, must comply with the policies in 31 TAC §501.14(s).

The purpose of the adopted rules is to implement HB 1541. Specifically, the adopted rules delete all the requirements and references related to "plans of reclamation." Additionally, this rulemaking will update the name of the agency. HB 1541 amends TWC, Chapter 57, by deleting all references to plans of reclamation and replacing plans of reclamation with an engineer's report. Deleting the requirements related to plans of reclamation in the commission's rules should not have an adverse effect on coastal areas because the plans for construction projects will still be reviewed by counties. When the legislature originally passed TWC, Chapter 57, many counties did not have the staff to review projects that were part of a plan of reclamation, so the commission conducted the reviews. Most counties now have staff available to review construction plans and engineering reports, which have replaced the plans of reclamation. Additionally, counties are responsible for flood-related issues under the Federal Emergency Management Agency and, therefore, already review projects that are included in an engineer's report.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with the CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas, and because the rules do not alter the allowable location, standards, or

stringency of requirements for infrastructure on coastal barriers. The commission invited, but received, no comments on the consistency of this rulemaking with the CMP.

#### PUBLIC COMMENT

A public hearing was held November 18, 2004. The comment period closed on November 29, 2004, and was extended to December 15, 2004. No oral or written comments were received related to Chapter 301.

**SUBCHAPTER A: GENERAL PROVISIONS**

**§§301.1 - 301.4, 301.6**

**STATUTORY AUTHORITY**

The amendments are adopted under the authority of TWC, §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of the state.

The adopted amendments implement TWC, §5.103, relating to Rules.

**§301.1. Interpretation of Legislative Authority.**

The legislature of the State of Texas manifested an intention to protect the public interest by establishing a centralized and coordinated method for planning and review of drainage and reclamation activity. The legislature demonstrated such an intent by causing levees or other improvements and associated projects to be subject always to the supervision of a central statewide authority. It is the purpose of the commission under Texas Water Code, Chapters 5, 16, and 57, to implement this policy by the promulgation of these sections.

**§301.2. Definitions.**

The following words and terms, when used in this chapter, have the following meanings unless the context clearly indicates otherwise.

(1) **As-built plans** - The engineering plans and specifications for levees or other improvements which reflect the structures as actually built, for which preliminary plans and final plans were approved, and which are submitted to the executive director for issuance of notice of final approval.

(2) **Final plans** - The final engineering plans and specifications for levees or other improvements submitted to the executive director for review and approval, if not an exempt structure under Texas Water Code, §16.236.

(3) **Levee(s) or other improvement(s)** - Any levee or other improvement, including channel improvements, drainage works, or other projects on, along, or near any stream in this state that is subject to floods, freshets, or overflows, constructed so as to control, regulate, or otherwise change the floodwater of the stream. However, the term does not include:

(A) levees or other improvements for which approval by the commission is not required under Texas Water Code, §16.236;

(B) bridges, culverts, and roads that are not designed or constructed with the primary purpose to and that do not significantly control, regulate, or otherwise change the floodwaters of a stream;

(C) drainage works which do not directly connect to a stream;

(D) projects which, when completed, will receive runoff from an area of less than five square miles measured to the lowest point of construction;

(E) fences;

(F) cutting, clearing, or removing vegetation; and

(G) levees and landfills located within the 100-year flood-fringe area, as defined in clauses (i) - (iv) of this subparagraph, as determined by a registered professional engineer using the United States Army Corps of Engineers Hydrologic Engineering Center I and II procedures or other standard procedure acceptable to the executive director;

(i) **100-year flood** - The peak flood discharge of a stream, based upon statistical data, which would have a 1.0% chance of occurring in any given year;

(ii) **100-year flood fringe** - That area of the 100-year floodplain outside the 100-year floodway;

(iii) **100-year floodplain** - That area along a stream during the time the stream is subject to the statistical 100-year flood, as determined by a registered professional engineer using the United States Army Corps of Engineers Hydrologic Engineering Center I and II procedures or other standard procedure acceptable to the executive director;

(iv) **100-year floodway** - The channel of a stream and adjacent land areas that must be reserved in order to discharge the 100-year flood without cumulatively increasing the water surface elevation more than one foot above the 100-year flood elevation prior to encroachment.

(4) **Levee improvement district or district** - Any levee improvement district organized under the provisions of Texas Water Code, Chapter 57.

(5) **Preliminary plans** - The preliminary engineering plans for levees or other improvements submitted for approval by the commission under Texas Water Code, Chapter 16, as required by §301.33 of this title (relating to Preliminary Plans: Data To Be Submitted).

### **§301.3. Authority To Go on Land.**

The executive director may enter any land or go on any water with appropriate equipment for the purpose of surveillance and inspection with reference to the proposed location of levees or other improvements.

### **§301.4. Approvals Required.**

(a) The approval of the commission is required for preliminary plans for construction of levees and other improvements other than those which are exempt under Texas Water Code, §16.236. The procedure for submission and approval of preliminary plans for levees and other improvements other

than those which are exempt is set forth in Subchapter C of this chapter (relating to Approval of Levees and Other Improvements.)

(b) The review and/or approval of the executive director is required for final plans for levees and other improvements. The procedure for submission, review, and approval, if required, is set forth in §301.38 of this title (relating to Procedures Subsequent to Approval of Preliminary Plans).

**§301.6. Injunction and Monetary Penalties.**

In accordance with Texas Water Code (TWC), §16.236(b) and (c), the executive director may request the attorney general to file suit in a district court of Travis County to enjoin any such violation or threatened violation of TWC, §16.236, to seek monetary penalties, or both.

**SUBCHAPTER A: GENERAL PROVISIONS**

**§301.5**

**STATUTORY AUTHORITY**

The repeal is adopted under the authority of TWC, §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of the state.

The adopted repeal implements TWC, §5.103, relating to Rules.

**§301.5. Proposed Plan of Reclamation: Consolidated Proceeding.**

**SUBCHAPTER B: LEVEE IMPROVEMENT DISTRICTS AND FORMATION OF DISTRICT**

**§301.21**

**STATUTORY AUTHORITY**

The amendment is adopted under the authority of TWC, §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of the state.

The adopted amendment implements TWC, §5.103, relating to Rules.

**§301.21. Procedures Concerning Formation of District.**

(a) Levee improvement districts to which this subchapter applies are formed in accordance with the procedures set forth in Texas Water Code (TWC), Chapter 57.

(b) Upon petitioning the county commissioner's court for the creation of the district under TWC, Chapter 57, and giving the notice required by TWC, §57.015, the person or persons petitioning the county commissioner's court shall file with the executive director notice of the hearing before the county commissioner's court on the creation of the district. The notice must state that the petition has been filed with the appropriate county commissioner's court and must include a statement of the petition's general purpose and the time and place of the hearing.

(c) In accordance with TWC, §57.016, the executive director shall attend the hearing before the county commissioner's court on the petition to create the district and shall file a written report with the county commissioner's court concerning the necessity, feasibility, probable costs of reclaiming the land of the district from overflow and of draining it properly, and costs of organizing the district and maintaining it for two years. The executive director shall furnish the county commissioner's court with any additional information that is required.

**SUBCHAPTER B: LEVEE IMPROVEMENT DISTRICTS AND APPROVAL OF DISTRICT  
PLANS OF RECLAMATION**

**§301.22, §301.23**

**STATUTORY AUTHORITY**

The repeals are adopted under the authority of TWC, §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of the state.

The adopted repeals implement TWC, §5.103, relating to Rules.

**§301.22. Procedures Subsequent to Formation of District; Applications for Approval of District Plans of Reclamation.**

**§301.23. Data Required for Applications for Proposed Plans of Reclamation and Criteria Applicable to Proposed Plans of Reclamation.**

**SUBCHAPTER C: APPROVAL OF LEVEES AND OTHER IMPROVEMENTS**

**§§301.31, 301.38, 301.43, 301.45**

**STATUTORY AUTHORITY**

The amendments are adopted under the authority of TWC, §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of the state.

The adopted amendments implement TWC, §5.103, relating to Rules.

**§301.31. Application for Approval of Preliminary Plans for Levees and Other Improvements.**

Any person who seeks approval of the commission under Texas Water Code, §16.236, for construction of any levee or other improvement shall file an application with the executive director, together with a set of preliminary plans for the levee or other improvement, in duplicate. The preliminary data so submitted must be in sufficient detail to permit the executive director to evaluate the project. Ordinarily, existing maps and information are adequate for the development of acceptable preliminary plans without the necessity of extensive site clearing or detailed surveys. The application and preliminary plans must comply with Subchapter D of this chapter (relating to Notice and Hearing).

**§301.38. Procedures Subsequent to Approval of Preliminary Plans.**

(a) Final approval of engineering plans and specifications for levees and other improvements for which commission approval is required; submission of final plans for exempt levees and other improvements.

(1) Following approval by the commission of a proposed levee or other improvement under Texas Water Code (TWC), §16.236, the applicant shall submit final engineering plans and specifications to the executive director for approval prior to beginning construction.

(2) For levees and other improvements which are exempt under TWC, §16.236, final engineering plans and specifications shall be submitted to the executive director prior to beginning construction for review to ensure compliance with preliminary plans submitted thereunder and to carry out the executive director's inspection duties under TWC, §57.117, but approval of these final plans by the executive director is not required.

(3) In addition to the submission of final plans, the applicant shall also provide the executive director with proof of ownership or right to construct on the project site prior to beginning construction. Upon review and approval of the final plans of the applicant, the executive director shall notify the applicant in writing that construction may proceed.

(b) Criteria for review and/or approval of final plans. Final plans of the proposed works must adequately illustrate pertinent features of the project such as planned elevations, profiles, dimensional typical cross-sections, and other features such as outlet works, drains, overflow relief structures,

landfills, and roads so that an understandable project concept can be discerned. The requirements are to be considered guidelines and may be varied according to the requirements of any particular project at the discretion of the executive director. Final plans for such features as excavated channels or constructed embankments will be reviewed as to their structural integrity in accordance with the degree of hazard inherent with the project.

(1) Normal requirements for final channel excavation plans are as follows.

(A) Information is to be provided to indicate the type and/or classification of the soil to be excavated in the channel according to the unified soil classification system. Depth of exploratory borings shall be at least five feet below planned channel bottom grade.

(B) Plans shall provide elevations and dimensions for the channel and all structures and appurtenances integral to the project such as protective linings, wingwalls, outlet works, drop inlets, aprons and riprap.

(C) Unlined channels must be constructed to a nonerosive grade. All channels should be accessible for maintenance or repair.

(D) All concrete placement shall be reviewed for intended use.

(E) Use or disposal of excavated material shall be clearly shown on final plans.

(F) All specifications to be followed by the contractor shall be included with plans submitted.

(G) The applicant must have an acceptable operation and maintenance program and budget.

(2) Normal requirements for final levee or dike construction plans are as follows.

(A) For purposes of review, final plans of dikes and levees will be classified into one or a combination of the following:

(i) the dike that holds back water at all times:

(I) with landfill;

(II) without landfill:

(-a-) high-risk protection (dwelling or high value land);

(-b-) low-risk protection (agricultural);

(ii) the levee that holds back water only during floods:

(I) with landfill;

(II) without landfill:

(-a-) high-risk protection (dwelling or high value land);

(-b-) low-risk protection (agricultural).

(B) Normal requirements are as follows.

(i) Foundation and borrow source information obtained from exploration will indicate the type and/or classification of the soil according to the unified soil classification system. The borings should be at least to a depth equal to the height of the embankment. In some cases, additional depth of borings may be required. The natural groundwater table elevation shall be given if water is encountered in the borings. The soils to be used shall be relatively impervious and consist of clay and clayey material. At least 15% of the material must pass the #200 sieve and the plasticity index of the material must be above 15. Fill material shall have no stones over six inches in diameter and no organic material (roots, etc.).

(ii) Elevations and dimensions of all proposed structures (levees, dikes, conduits, etc.) including those to be used for drainage shall be noted.

(iii) Lengths and distances between the various components of the system, i.e., lengths of conduits and pipes; distances between dike or levee and natural stream, and borrow area or ditches, shall be noted.

(iv) Compactive effort proposed to be used in project specifications shall be noted. The compactive effort required may vary with the type of dike or levee. The compaction of the material may be obtained by any means that is suitable. The soil shall be compacted to a minimum density of 95% using the standard proctor compaction test at approximately 3.0% optimum moisture content. Fill shall be placed in lifts of not more than 12 inches thick and properly processed, if needed, prior to compaction. Methods to be employed to obtain compaction shall be contained in specifications for the project.

(v) Sides of levees that are to remain exposed shall be adequately protected. Plans shall provide for establishing a protective grass cover or for an alternate treatment where climate will not support a vegetative cover.

(vi) All pipes and conduits passing through the dike shall have anti-seep collars to increase the percolation path by a minimum of 15%. The immediate area below drainage outfalls shall be protected by riprap or concrete.

(vii) All concrete placements shall be reviewed for intended use.

(viii) The foundation area shall be stripped. Stripping shall include removal of all grass, trees, and surface root systems for the full width of the levee.

(ix) Provision shall be made for an embankment key. Methods employed to control subsurface seepage shall be reviewed in accordance with soil conditions present and with the degree of hazard inherent in the project.

(x) Materials removed by stripping or from the key way shall be used only on the dry side of the finished levee.

(xi) All specifications to be followed by the contractor shall be included with the plans submitted.

(xii) The applicant shall formulate and carry out an acceptable operation and maintenance program and budget.

**§301.43. Certification by Executive Director.**

After approval for the construction of a project has been obtained by a levee improvement district from the commission, the executive director shall inspect the construction of the project at least once every 60 days after the construction work has commenced, and if the executive director finds that the work has been done in compliance with the construction contract, the executive director shall certify

this fact. The certificate shall give a full description of the work done up to the date of inspection. If the executive director finds that the work has not been done in compliance with the construction contract, the executive director shall officially certify this fact to the district and to the commission. The certificate shall specify how the contractor has failed to comply with the construction contract.

**§301.45. Failure To Comply with Approved Plans and Specifications.**

If at any time during construction, enlargement, repair, or alteration of any levee or channel modification, the executive director finds that the work is not being done in accordance with approved plans and specifications, the executive director shall give written notice and direct compliance by certified mail to the owner. If the owner fails to comply with the directive, the executive director may take appropriate action to assure compliance. Failure to comply with approved plans and specifications is ground for revocation of the order approving the plan and/or civil penalty as provided by law. The commission may order that the structure be removed to eliminate any safety hazard to life and property.

**SUBCHAPTER D: NOTICE AND HEARING**

**§301.51**

**STATUTORY AUTHORITY**

The amendment is adopted under the authority of TWC, §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of the state.

The adopted amendment implements TWC, §5.103, relating to Rules.

**§301.51. Notice Required.**

The notice procedures set forth in this subchapter are required for applications for approval of levees and other improvements for which commission approval is required under Texas Water Code, §16.236.

**SUBCHAPTER F: FEES**

**§§301.71, 301.73, 301.74**

**STATUTORY AUTHORITY**

The amendments are adopted under the authority of TWC, §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of the state.

The adopted amendments implement TWC, §5.103, relating to Rules.

**§301.71. Executive Director To Charge and Collect Fees.**

In accordance with Texas Water Code, §5.701, the executive director shall charge and collect for the benefit of the state the fees provided in §301.73 of this title (relating to Fees To Be Paid).

**§301.73. Fees To Be Paid.**

The following fees shall be submitted with any application required to be filed under this chapter:

- (1) filing fee - the filing fee shall be \$100;
- (2) recording fee - the recording fee shall be \$1.25 per page;

(3) fees for mail notice - the cost of mailing notice of the application to persons in the affected or protected area shall be paid by the applicant. The executive director shall advise the applicant of the number of persons and the mailing cost;

(4) fees for publication of notice of application - the cost of publication of the notice of application in a newspaper of paid circulation that is regularly published and generally circulated in the county or counties within the proposed affected or protected area, shall be paid by the applicant; and

(5) fees for publication of notice of hearing - fees for publication of notice of hearing in a newspaper that is regularly published and generally circulated in the county or counties within the affected or protected area, shall be paid by the applicant.

**§301.74. Examples of Applications Subject to Filing, Recording, and Notice Fees.**

The following are examples of applications subject to filing, recording, and notice fees:

(1) application for approval of engineering plans and specifications (preliminary and final plans);

(2) application to amend a plan approval order;

(3) application to alter, enlarge, extend, or otherwise change any levee or other improvement; and

(4) application for extension of time.