

The Texas Commission on Environmental Quality (commission) adopts amendments to §§295.2 and 295.171 - 295.174; and adopts new §295.42. Section 295.173 is adopted *with change* to the proposed text as published in the March 10, 2006, issue of the *Texas Register* (31 TexReg 1605). Sections 295.2, 295.42, 295.171, 295.172, and 295.174 are adopted *without changes* to the proposed text and will not be republished.

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

The 79th Legislature, 2005, passed House Bill (HB) 2140. This adopted rulemaking is necessary to implement that bill. This rulemaking is also necessary to update the rules to reflect the agency's current practices, to adhere to the style and formatting requirements in the *Texas Legislative Council Drafting Manual*, November 2004, and to conform with Texas Register and agency guidelines.

When an application is filed to construct a storage reservoir, Texas Water Code (TWC), §11.124, as amended by HB 2140, requires that the application contain evidence that notice of the application has been given to members of the governing bodies of each county and municipality in which the reservoir will be located. The rule and statute ensure that local elected officials are provided timely information on reservoirs that are proposed for their area.

A corresponding rulemaking that includes changes to 30 TAC Chapter 297, Water Rights, Substantive, is published in this issue of the *Texas Register*.

#### SECTION BY SECTION DISCUSSION

The adopted amendment to §295.2, Preparation of Application, adds a provision that the applicant must submit one original and six copies of the application and supporting materials, with a provision that electronic versions can be submitted for copies with the approval of the executive director. Some applicants have suggested to staff that the applicants may not provide the customary copies. In order to ensure timely processing of applications it is especially important for the staff to have copies of maps and other exhibits that cannot be readily copied by staff.

Adopted new §295.42, Additional Notice Requirements, requires proof of mailed notice of the application for a proposed storage reservoir to each member of the governing body of each county and municipality in which the reservoir, or any part of the reservoir, will be located. Adopted new §295.42 would implement TWC, §11.124, as amended by the 79th Legislature.

The commission is changing the title of Subchapter D from “Public Hearing” to “Contested Case Hearing” because this subchapter relates to contested case or trial-type hearings and the term “public hearing” is a broad term which includes all types of hearings.

The adopted amendment to §295.171, Request for Public Hearing, changes the title of the section from “Request for Public Hearing” to “Request for Contested Case Hearing,” incorporates the requirements of 30 TAC Chapter 55, Subchapter G, concerning Requests for Reconsideration and Contested Case Hearings; Public Comments, and adds a reference to the time period specified in §55.251, to make the time for requesting a contested case hearing consistent with other commission rules. Additionally, the

commission is deleting subsection (b) because those requirements are contained in Chapter 55, Subchapter G, and therefore, do not need to be repeated in §295.171(b).

The adopted amendment to §295.172, Public Hearing, changes all references from “public hearings” to “contested case hearings” to clarify that this rule only applies to contested case hearings. The reference to §295.171 will also be changed to refer to §55.251 and §55.255.

The adopted amendment to §295.173, Action on Application Without Public Hearing, changes the name of the section title from “Action on Application Without Public Hearing” to “Action on Application Without Contested Case Hearing” to more accurately reflect the contents of the section. Additionally, the adopted amendment combines existing paragraphs (1) and (2), adds paragraph (1)(A) and (B), and renumbers existing paragraph (3) to new paragraph (2). Adopted paragraph (1)(A) acknowledges the potential for the commission to extend the period for the filing of hearing requests, and paragraph (1)(B) provides that the commission may take action on an application requiring notice without holding a contested case hearing, if the commission denied all requests for a contested case hearing. This amendment is adopted to make the rule consistent with current commission procedures under TWC, §5.115.

The adopted amendment to §295.174, Applications for Temporary Permits, Emergency Permits, and Authorization to Divert Water From Un-sponsored and Storage-Limited Projects for Domestic and Livestock Purposes, changes all references from “public hearings” to “contested case hearings” to clarify that this rule only applies to contested case hearings.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

These adopted rules are not a “major environmental rule” as defined by Texas Government Code, §2001.0225(g)(3), because they are not adopted to protect the environment or reduce risks to human health from environmental exposure. The adopted rules are procedural and require six copies of an application and supporting materials, require proof of mailed notice of an application for a proposed storage reservoir to each member of a governing body of each county or municipality in which the reservoir will be located, change “public hearing” to “contested case hearing” in three existing rules, and add a current statutory procedure to the request for contested case hearing process. Therefore, no regulatory analysis on the costs of the adopted rulemaking is required.

Furthermore, these adopted rules do not exceed an express requirement of state law or exceed a requirement of a delegation agreement or contract between the state and federal government.

#### TAKINGS IMPACT ASSESSMENT

These adopted rules do not affect private real property. The adopted rules require six copies of an application and supporting materials, require proof of mailed notice of an application for a proposed storage reservoir to each member of a governing body of each county or municipality in which the reservoir will be located, change “public hearing” to “contested case hearing” in three existing rules, and add a current statutory procedure to the request for contested case hearing process. All of these changes are procedural changes which will aid the executive director’s staff in processing applications, provide more notice of certain applications, clean up language concerning contested case hearings, and add a process for contested case hearing requests under TWC, §5.115.

None of these changes have any impact on any private real property interest. There are no alternatives to these procedural changes because they are either required for clarity or efficiency or reflect state law.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that this is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), concerning rules subject to the Texas Coastal Management Program (CMP), and therefore, requires that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is editorial and procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

#### PUBLIC COMMENT

The public comment period closed at 5:00 p.m. on April 10, 2006. The commission received comments from the National Wildlife Federation (NWF).

NWF suggested modifications to the proposed rules as stated in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

*§295.173, Action on Application Without Contested Case Hearing*

NWF expressed concern that proposed §295.173(3) may have the unintended result of providing that, unless the commission affirmatively grants a request for a contested case hearing, the commission may grant an application without a hearing even if the executive director or members of the public have submitted requests and/or even if one of the commissioners has submitted a request for a hearing.

NWF commented that this leads to the unintended result that this section is inconsistent with TWC, §11.132(d)(3). NWF proposed the deletion of proposed §295.173(3).

**The commission agrees that the rules could be read as NWF states and has deleted proposed §295.173(3).**

NWF commented that §295.173 should acknowledge the potential for the commission to extend the period for the filing of hearing requests. NWF proposes the addition of language that will explicitly acknowledge the potential for the commission to extend the period for the filing of hearing requests, as well as making clear that the commission must take the affirmative action of denying all timely filed hearing requests before action without a contested case hearing can proceed.

**The commission agrees that the rules could be read as NWF states and that it would be clearer to add language allowing an extension of time and to add language specifying that the commission must take affirmative action denying requests before a case is referred to the State Office of Administrative Hearings. The commission has made the recommended changes to §295.173.**

**SUBCHAPTER A: REQUIREMENTS OF WATER RIGHTS APPLICATION GENERAL  
PROVISIONS**

**DIVISION 1: GENERAL REQUIREMENTS**

**§295.2**

**STATUTORY AUTHORITY**

The amendment is adopted under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights, and under §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state. TWC, §§11.124 - 11.128, contain certain requirements for water rights applications.

The amendment implements TWC, §§11.124 - 11.128, relating to application requirements for water rights, and TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

**§295.2. Preparation of Application.**

(a) All applications shall be typewritten or printed legibly in ink. Illegible applications will be returned to the applicant. Applicants will be notified if additional information is needed to process an application, under §281.4 of this title (relating to Applications for Use of State Water). The applicant should confer with the staff of the executive director on any questions concerning preparation of the application, especially if the application is unusual or unique. Upon express written or verbal approval

of the applicant or the applicant's agent, any employee of the commission may make nonsubstantive changes in any documents submitted by the applicant. 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 of the commission by the executive director.

(b) All applicants shall submit one original and six copies of the application and supporting materials. In addition to the original notarized application form, if approved by the executive director, an applicant may submit electronic versions of required application documents.

**SUBCHAPTER A: REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL  
PROVISIONS**

**DIVISION 4: ADDITIONAL REQUIREMENTS FOR DAMS AND RESERVOIRS**

**§295.42**

**STATUTORY AUTHORITY**

The new section is adopted under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights; §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state; §11.132, which requires notice for certain applications; and §11.124(f), which requires that an applicant provide evidence that it has provided notice of an application to construct a proposed reservoir to the governing bodies of each county and municipality in which the reservoir will be located. The commission must enact procedural rules for notice, and amend them when required by commission decision or statutory law.

The new section implements TWC, §11.132 and §11.124(f), concerning notice requirements for water rights applications. The new section specifically implements §11.124(f), requiring notice of a storage reservoir to each member of the governing body of each county and municipality in which the reservoir will be located. The new section also implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

**§295.42. Additional Notice Requirement.**

(a) The applicant for a permit to construct a storage reservoir shall give notice by certified mail of the application to each member of the governing body of each county and municipality in which the reservoir, or any part of the reservoir, will be located.

(b) For purposes of this section, a reservoir is located within a municipality when any part of the reservoir, when full, will be within the city limits of the municipality.

(c) An application for a permit to construct a storage reservoir must contain a copy of the notice that was mailed to each member of the governing bodies, as well as copies of the certified mailing cards.

## **SUBCHAPTER D: CONTESTED CASE HEARING**

### **§§295.171 - 295.174**

#### **STATUTORY AUTHORITY**

The amendments are adopted under TWC, Chapter 11, which sets out the powers and duties of the commission relating to water rights; §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state; and §5.115, which also contains requirements for a contested case hearing for water rights permits. The commission must enact procedural rules for contested case hearings, and amend them when required by commission decision or statutory law.

The amendments implement TWC, §11.176 and §5.115, which contain the requirements for contested case hearings for water rights applications, and TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

#### **§295.171. Request for Contested Case Hearing.**

A request for contested case hearing on an application for a water use permit or amendment made by the applicant, the executive director, or an affected person who objects to the application must be made in writing, must comply with the requirements of Chapter 55, Subchapter G, of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), and

specifically §55.251 of this title (relating to Requests for Contested Case Hearing, Public Comment), and must be submitted to the commission within 30 days after the publication of the notice of application. The commission may extend the time allowed for submitting a request for contested case hearing.

**§295.172. Contested Case Hearing.**

The commission may conduct a contested case hearing on any application. If the commission has received a request for a contested case hearing, which it determines is in compliance with §55.251 and §55.255 of this title (relating to Requests for Contested Case Hearing, Public Comment; and Commission Action on Hearing Request), if it determines that a contested case hearing would serve the public interest, or if a commissioner requests a contested case hearing, the commission shall conduct a contested case hearing or refer the matter to the State Office of Administrative Hearings for a contested case hearing. See §295.157 of this title (relating to Notice of Hearing).

**§295.173. Action on Application Without Contested Case Hearing.**

The commission may take action on an application requiring public notice at a regular meeting, without holding a contested case hearing, provided:

(1) at least 30 days prior to the regular meeting at which action is taken, notice of the application has been given by publication and by mail and:

(A) no person has requested a contested case hearing within 30 days of the publication of notice or within any extension of that period authorized by the commission; or

(B) the commission has denied all timely filed hearing requests for failing to meet applicable requirements; and

(2) no commissioner has submitted a request for a contested case hearing within the 30-day period after publication of the notice or requests a contested case hearing at the regular meeting of the commission at which action on the application could be taken according to such notice.

**§295.174. Applications for Temporary Permits, Emergency Permits, and Authorization to Divert Water From Unsponsored and Storage-Limited Projects for Domestic and Livestock Purposes.**

The sections in this subchapter relating to requests for contested case hearings and the requirements to hold contested case hearings in certain circumstances do not apply to applications for temporary water use permits, emergency water use permits, or authorization to divert water from unsponsored and storage-limited projects for domestic and livestock purposes. In these specified instances, the commission may conduct such hearings as it deems appropriate. However, the commission shall conduct a hearing on a temporary permit if it has been provisionally issued and if the permit has been cancelled upon request of the executive director under §295.181 of this title (relating to Provisional Disposition of Application for Temporary Permit).