

The Texas Commission on Environmental Quality (commission) proposes amendments to §§295.2 and 295.171 - 295.174; and proposes new §295.42.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The 79th Legislature, 2005, passed House Bill (HB) 2140. This proposed rulemaking is necessary to implement that bill. This proposed 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 proposed 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 proposed 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.

Proposed 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. Proposed new §295.42 would implement TWC, §11.124, as amended by the 79th Legislature.

The commission proposes to change 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 proposed 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 proposes to delete 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 proposed 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 proposed 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 proposed amendment combines existing paragraphs (1) and (2), renumbers existing paragraph (3) to new paragraph (2), and adds a new paragraph (3). Proposed paragraph (3) provides that the commission may take action on an application requiring notice without holding a contested case hearing, if the commission did not grant a request for a contested case hearing. This amendment is proposed to make the rule consistent with current commission procedures under TWC, §5.115.

The proposed amendment to §295.174, Applications for Temporary Permits, Emergency Permits, and Authorization to Divert Water From Unsponsored 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. Local governments, or other units of

state government, who are water rights holders will see fiscal implications if they decide to construct a storage reservoir, but those implications are anticipated to be minor.

HB 2140 amended TWC, §11.124(b) to require that applications filed to construct a storage reservoir contain evidence that notice of the application has been given to each member of the governing bodies of each county and municipality in which the reservoir, or any part of the reservoir, will be located.

The proposed rulemaking would amend §295.42 to require proof of mailed notice of the application to members of the appropriate governing bodies as now required by state law. In addition, the proposed rulemaking amends §295.2 to state that applicants must submit one original and six copies of the application and supporting materials when requesting any type of water permit. Current agency practice is to require an original and six copies, but the proposed rulemaking will clarify this requirement. The proposed rulemaking also makes administrative changes to Chapter 295 regarding contested case hearings to provide consistency and clarification within current rule provisions.

Local governments or other units of state government may see a cost increase if they apply to construct a storage reservoir. Staff cannot anticipate the number of future applications that will be filed to construct storage reservoirs. The requirement for each application for this type of construction to contain evidence of mailed notice to each member of the appropriate governing bodies will require the mailing of certified letters, which is estimated to cost \$3.00 each. County commissioner courts have five members. Size of city councils varies among municipalities, but it is estimated that the average council size is six members. If a storage reservoir is constructed within one county and within one municipality, mailing costs could total \$33 for each application. Constructing a storage reservoir that

crosses county lines or is contained within more than one municipal boundary will cause application costs to increase by the number of members of each governing body. This increased cost is not anticipated to have significant fiscal implications for local governments or other units of state government.

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 compliance with state law and increased awareness among local government officials regarding planned construction of storage reservoirs that may be constructed within their jurisdictions.

The proposed rules would require applicants who wish to construct storage reservoirs, to send certified letters to each member of the appropriate governing bodies. Assuming an average cost of \$3.00 per certified letter, a county commissioner court size of five, and an average city council size of six members, application costs to construct storage reservoirs could increase by \$33. Application costs will increase incrementally if a storage reservoir is contained within more than one county or municipality. This increased cost is not anticipated to have significant fiscal implications for applicants applying to construct storage reservoirs.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Fiscal implications are anticipated for small or micro-businesses planning to construct storage reservoirs, although they are not anticipated to be significant. Application costs would increase

because of the requirement to send certified letters to each member of the appropriate local government. This cost, estimated to be \$3.00 per letter, could be as much as \$33. A small business is defined as having fewer than 100 employees or less than \$1 million in annual gross receipts. A micro-business is defined as having no more than 20 employees. The cost per employee for a small business is estimated to be \$0.33. For a micro-business, the cost is estimated to be \$1.65 per employee.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

These proposed rules are not a “major environmental rule” as defined by Texas Government Code, §2001.0225(g)(3), because they are not proposed to protect the environment or reduce risks to human health from environmental exposure. The proposed 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 proposed rulemaking is required.

Furthermore, these proposed 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, and are not adopted under the general authority of the agency.

TAKINGS IMPACT ASSESSMENT

These proposed rules do not affect private real property. The proposed 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 proposed rulemaking and found the proposal 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 will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Texas Register Team, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-057-297-PR. Comments must be received by 5:00 p.m. on April 10, 2006. For further information, please contact Kathy Hopkins, Water Rights Permitting and Availability Section, at (512) 239-2567.

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

DIVISION 1: GENERAL REQUIREMENTS

§295.2

STATUTORY AUTHORITY

The amendment is proposed 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 proposed 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 [pursuant to] §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 proposed 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 proposed 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 proposed 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 [PUBLIC HEARING]

§§295.171 - 295.174

STATUTORY AUTHORITY

The amendments are proposed 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 proposed 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 [Public Hearing].

[(a)] A request for contested case hearing [public 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 [public hearing].

[(b) A written request for a hearing from an affected person who objects to the application shall contain the following information:]

[(1) the name, mailing address, and phone number of the person making the request;]

[(2) the application number or other recognizable reference to the application;]

[(3) a brief description of the interest of the requester, or of persons represented by the requester; and]

[(4) a brief description of how the application, if granted, would adversely affect such interest.]

§295.172. Contested Case Hearing [Public Hearing].

The commission may conduct a contested case hearing [public hearing] on any application. If the commission has received a request for a contested case hearing, [public 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) [§295.171 of this title (relating to Request for Public Hearing)], if it determines that a contested case hearing [public hearing] would serve the public interest, or if a commissioner requests a contested case hearing [public hearing], the commission shall conduct a contested case hearing [public hearing] or refer the matter to the State Office of Administrative Hearings for a contested case hearing. [If the commission determines that a public hearing must be held, the matter shall be remanded for hearing.] See §295.157 of this title (relating to Notice of Hearing).

§295.173. Action on Application Without Contested Case Hearing [Public Hearing].

The commission may take action on an application requiring public notice at a regular meeting, without holding a contested case hearing [public 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 no person has requested a contested case hearing within 30 days of the publication of notice;

[(2) within the 30-day period after the publication of the notice, no request for a public hearing has been submitted by the executive director, the applicant, or an affected person who objects to the application; and]

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

(3) the commission did not grant a request for a contested case hearing.

§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.

The sections in this subchapter relating to requests for contested case hearings [public hearings] and the requirements to hold contested case hearings [public hearings] in certain circumstances do not apply to applications for temporary water use permits, emergency water use permits, or authorization to divert water from un-sponsored 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 [pursuant to] §295.181 of this title (relating to Provisional Disposition of Application for Temporary Permit).