

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) adopts the amendment to §281.17 *without changes* as published in the July 24, 2009 issue of the *Texas Register* (34 TexReg 4831) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

This rulemaking amends §281.17(a) and (b) to provide that the executive director will file a water rights application with the chief clerk once the application has been declared administratively complete, but notice of the application will not be sent at that time. This change is necessary because of a corresponding rulemaking in which the commission is changing the time that notice of a water rights application is mailed from the time that the application is declared administratively complete to the time that the technical review is complete and the memoranda and recommendations are filed with the chief clerk. This change to §281.17 is necessary because the issuance of the notice is being moved to later in the process, and also because the application must still be declared administratively complete and filed with the chief clerk. This is particularly important because that date is usually the priority date for a water rights permit, if issued.

Corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 39, Public Notice and Chapter 295, Water Rights, Procedural.

SECTION DISCUSSION

The commission adopts administrative changes throughout the adopted rulemaking to reflect the agency's current practices and to conform to Texas Register and agency guidelines. These changes include updating agency references, updating cross-references, and correcting typographical, spelling, and

grammatical errors.

The adopted amendment to §281.17(a) removes the requirements that the executive director prepare a technical summary of a water use permit application and that the chief clerk issue notice of the application at the time of filing the application. Removing these requirements will make §281.17(a) consistent with adopted changes to §295.151 and §295.158. The adopted amendments to Chapter 295 change the time in the application process at which notice will be issued, and make the results of the executive director's technical review available to the public at the time of notice. The adopted amendments to Chapter 295 also allow notice to be mailed to the most current mailing list of potentially affected persons and aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

The adopted amendment to §281.17(b) removes the requirements that the executive director prepare a technical summary of a temporary water use permit application and that the chief clerk issue notice of the application at the time of filing the application. Removing these requirements will make §281.17(b) consistent with adopted changes to §295.151 and §295.158. The adopted amendments to Chapter 295 change the time in the application process at which notice will be issued, and make the results of the executive director's technical review available to the public at the time of notice. The adopted amendments to Chapter 295 also allow notice to be mailed to the most current mailing list of potentially affected persons and aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the adopted rule and performed an analysis of whether the adopted rule requires a regulatory impact analysis under Texas Government Code, §2001.0225. The adopted amendment is not a "major environmental rule" under Texas Government Code, §2001.0225 because the specific intent of the rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, and it does not 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 purpose of this rulemaking together with a corresponding rulemaking in Chapter 295 is to change the date of notice for a water rights application from the date the application is administratively complete to the date of the completion of technical review. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rule and performed an analysis of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted amendment, along with a corresponding rulemaking in Chapter 295, is to change the date for providing notice for water rights applications to a later time in the application review process so that notice will be provided to those potentially affected persons existing at a time closer to commission action on an application. The adopted amendment, along with a corresponding rulemaking in Chapter 295, would substantially advance this stated purpose by keeping the date of filing an application with the chief clerk at administrative completeness, but changing the date of notice of the application from after

administrative completeness to after technical review of the application is complete. Promulgation and enforcement of the adopted rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, the rule is procedural and does not impact real property. There are no other reasonable or practicable alternatives to this rulemaking.

The commission invited public comment regarding the takings impact assessment during the public comment period. No comments were received.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption 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 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 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.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received.

PUBLIC COMMENT

The commission held a public hearing in Austin on August 19, 2009 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The comment period closed on August 24, 2009. The commission received comments from Lloyd Gosselink, Attorneys at Law on behalf of a coalition of its clients, including cities, regional water districts, and river authorities (Coalition) and from Lowerre, Frederick, Perales, Allmon & Rockwell, Attorneys at Law on behalf of Sierra Club, Environmental Defense Fund, and Lowerre Frederick, Perales, Allmon & Rockwell (Commenters).

The Coalition expressed general approval of the rule. The Commenters oppose the rule unless additional notice requirements are included.

RESPONSE TO COMMENTS

The Coalition expresses general approval of the rule changes to ensure that adequate notice is provided at the appropriate time for potentially affected persons.

The commission appreciates the comment.

The Commenters are concerned about there being no early notice, and object to the changes in Chapter 295 unless the rules require: 1) that the executive director or the applicant prepare a short summary of the application as filed, possibly in a form available to interested persons, which could at least be the internet; and 2) some early notice directly to key potentially affected interests. There could be a limited notice such as to the county judge for the site of the diversion point or use, to groundwater conservation districts with jurisdiction over these locations, to Texas Parks and Wildlife Department, and to anyone who requested

for this water right application or for water rights in the relevant county or counties.

All water right applications are posted to the TCEQ Web site and updated every two weeks. In addition, a mechanism to sign up for notification of updates to the pending applications is in place, and this provides early notice that an application has been received and the ability to request information on the application. Also, when notice is filed with the Office of the Chief Clerk it is posted on the chief clerk's Web site.

The suggestion to require early notice as well as notice after the technical review is complete was made by members of the Water Rights Amendment Notice Advisory Group, which met in 2007, but no consensus of the group was achieved. Additionally, the commission declined to adopt the dual notice requirement when it considered the Water Rights Amendment Notice Advisory Group's recommendations at the January 18, 2008 work session. Water rights notices can be very costly and can require a substantial amount of resources to write and mail. Therefore, it would often be an inefficient use of state resources to require dual mailed notice in light of the additional opportunities for notice discussed above. The commission will continue to consider the issue. The commission has made no changes in response to this comment.

SUBCHAPTER A: APPLICATIONS PROCESSING

§281.17

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the Texas Water Code. The amendment is also adopted under Texas Water Code, §11.121, which provides that a person cannot store or divert state water without obtaining a permit from the commission; Texas Water Code, §11.129, which provides for commission review of a water rights application; and Texas Water Code, §11.132, which provides requirements for notice for water rights permits.

The adopted amendment implements Texas Water Code, §§5.102, 5.103, 5.105, 11.121, 11.129, and 11.132.

§281.17. Notice of Receipt of Application and Declaration of Administrative Completeness.

(a) Applications for use of state water. If an application for the use of state water, other than for a permit under §297.13 of this title (relating to Temporary Permit Under the Texas Water Code, §§11.138 and 11.153 - 11.155) or §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139)), is received containing the information and attachments required by §281.4 of this title (relating to Applications for Use of State Water), the executive director or his designee shall prepare a statement of the receipt of the application and declaration of administrative completeness. The executive director shall

forward a copy of the statement to the chief clerk, along with a copy of the application.

(b) Applications for temporary permits to use state water. If an application for a temporary permit, other than a provisional temporary permit under §295.181 of this title (relating to Provisional Disposition of Application for Temporary Permit), for the use of state water is received containing the required information and attachments required by §281.4 of this title as set forth therein, the executive director or his designee shall prepare a statement of the receipt of the application and declaration of administrative completeness, and shall forward a copy of the statement to the chief clerk.

(c) Applications for provisional temporary permits to use state water. When an application for a provisional temporary permit for the use of state water under §295.181 of this title, is received containing the information and attachments required by §281.4 of this title, the chief clerk shall cause notice of the receipt of the application and declaration of administrative completeness to be published in the *Texas Register*. The chief clerk may include in the notice other information concerning the disposition of the application.

(d) Other applications. Upon receipt of an application described in §281.2(2) or (5) - (11) of this title (relating to Applicability), which contains the information and attachments required by §§281.5, 281.6, and 281.16 of this title (relating to Application for Wastewater Discharge, Underground Injection, Municipal Solid Waste, Radioactive Material, Hazardous Waste, and Industrial Solid Waste Management Permits; Applications for Plan Approval of Reclamation Projects; and Applications for Certificates of Convenience and Necessity), the executive director or his designee shall assign the application a number for identification purposes, and prepare a statement of the receipt of the application and declaration of

administrative completeness which is suitable for publishing or mailing and shall forward that statement to the chief clerk. Upon receipt of an application for a new, amended, or renewed injection well permit, for a new, amended, or renewed industrial solid waste permit, or for a new or amended compliance plan as described in §281.2(3) and (4) of this title, the executive director or his designee shall assign the application a number for identification purposes and prepare a statement of the receipt of the application which is suitable for publishing or mailing and shall forward that statement to the chief clerk. Upon receipt of an application for a new, amended, or renewed radioactive material license as described in Chapter 336 of this title (relating to Radioactive Substance Rules), the executive director or his designee shall assign the application a number for identification purposes and prepare a statement of the receipt of the application which is suitable for mailing and shall forward that statement to the chief clerk prior to the expiration of the administrative review periods established in §281.3(d) of this title (relating to Initial Review). The chief clerk shall notify every person entitled to notification of a particular application under the rules of the commission.

(e) Notice requirements. The notice of receipt of the application and declaration of administrative completeness, or for applications for a new, amended, or renewed injection well permit, or for a new or amended compliance plan as described in §281.2(3) and (4) of this title, the notice of receipt of the application, shall contain the following information:

(1) the identifying number given the application by the executive director;

(2) the type of permit or license sought under the application;

(3) the name and address of the applicant and, if different, the location of the proposed facility;

(4) the date on which the application was submitted; and

(5) a brief summary of the information included in the application.

(f) Notice of application and draft permit. Nothing in this section shall be construed so as to waive the requirement of notice of the application and draft permit in accordance with Chapter 39 of this title (relating to Public Notice) for applications for radioactive material licenses, and for wastewater discharge, underground injection, hazardous waste, municipal solid waste, and industrial solid waste management permits.