

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) proposes an amendment to §281.17.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

This rulemaking amends §281.17(a) 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 proposes administrative changes throughout the proposed 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 proposed 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 proposed changes to §295.151 and §295.158. The proposed 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 proposed 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 proposed 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 proposed changes to §295.151 and §295.158. The proposed 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 proposed 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

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

The proposed amendment to Chapter 281 is part of corresponding rule proposals regarding when public notice is mailed or published that also includes amendments to Chapters 39 and 295. The fiscal impacts of the proposed amendments to those chapters are detailed in separate fiscal notes.

The amendment to Chapter 281 is proposed to ensure consistency with the rule changes proposed for Chapter 295 concerning the time that notice of a water rights application is mailed or published.

Administrative changes to Chapter 281, including updating agency references, updating cross-references, and correcting typographical, spelling, and grammatical errors, are also proposed.

The proposed rule will amend §281.17(a) and (b) concerning technical summaries for water use permit applications and temporary water use permit applications to make this section compatible with proposed changes to Chapter 295 concerning the timing of public notice. This rulemaking does not change the content and substance requirements of public notice, and there are no fiscal impacts to local governments associated with this rulemaking.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be consistency with the proposed changes for Chapter 295.

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SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. The proposed rule will amend §281.17(a) and (b) concerning technical summaries for water use permit applications and temporary water use permit applications to make this section compatible with proposed changes to Chapter 295 concerning the timing of public notice. This rulemaking does not change the content and substance requirements of public notice, and there are no fiscal impacts to small or micro-businesses associated with this rulemaking.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

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 rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the proposed rule and performed an analysis of whether the proposed rule requires a regulatory impact analysis under Texas Government Code, §2001.0225. The proposed 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.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule and performed an analysis of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed amendment together 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 proposed amendment together 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 proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed 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.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal 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.

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

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on August 18, 2009 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Jessica Rawlings, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Jessica Rawlings, 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. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-028-295-LS. The comment period closes August 24, 2009. Copies of the proposed rulemaking 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 Robin Smith, Environmental Law Division, (512) 239-0463; Sherry Smith, Water Quality Division, 512-239-0571; or Ronald Ellis, Water Supply Division, 512-239-1282.

SUBCHAPTER A: APPLICATIONS PROCESSING

§281.17

STATUTORY AUTHORITY

The amendment is proposed 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 proposed 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 proposed 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) [Emergency Permit]), 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

[suitable for mailing or publishing, and a brief technical summary of the application to assist the chief clerk]. The executive director shall forward a copy of the statement [and brief technical summary] to the chief clerk, along with a copy of the application. [The chief clerk shall notify every person entitled to notification of the filing of an application under §295.153 of this title (relating to Notice by Mail) by mail in the manner provided therein.]

(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 [Applications for Temporary Permits; Provisional Issuance in Certain Cases]), for the use of state water is received containing the required information and attachments required by §281.4 of this title [(relating to Applications for Use of State Water)] 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 [suitable for mailing or publishing], and shall forward a copy of the statement to the chief clerk. [The chief clerk shall mail a copy of the statement of the receipt of the application and declaration of administrative completeness to every water rights holder of record with the commission who would be entitled to notice of hearing under §295.154 of this title (relating to Notice for Temporary Water Use Permit).]

(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 [(relating to Application for Temporary Permits; Provisional Issuance in Certain Cases)], is received containing the information and attachments required by §281.4 of this title [(relating to Applications for Use of State Water)], 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, [- 281.7] 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; [Applications for Weather Modification Permits;] 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 [(relating to Applicability)], 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.