

The Texas Commission on Environmental Quality (commission, agency, or TCEQ) adopts the amendments to §295.151 and §295.158.

Section 295.151 is adopted *with changes* to the proposed text as published in the July 24, 2009 issue of the *Texas Register* (34 TexReg 4834). Section 295.158 is adopted *without changes* to the proposed text and will not be republished.

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

This rulemaking changes the time that notice of an application for a new or amended water right is mailed and published. Texas Water Code, Chapter 11 does not provide the timing of the notice of application other than that it must be at least 30 days prior to commission consideration of the application. Currently, the notice of the application is provided after the executive director finds the application is administratively complete and files the application with the chief clerk. The adopted amendments change that time to after the executive director has completed its technical review of the application and filed its memoranda and recommendations with the chief clerk. This change in timing of the notice allows notice to be mailed to the most current mailing list of potentially affected persons and aids public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

Corresponding rulemaking is published in this issue of the *Texas Register* and includes changes to 30 TAC Chapter 39, Public Notice, and Chapter 281, Applications Processing.

This rulemaking will not apply to any application for a water right permit if notice has been issued for

that application prior to the time that these rules become effective.

#### SECTION BY SECTION DISCUSSION

The amendment to §295.151 is adopted with changes to the proposed text. Since proposal, the commission added §295.151(b)(12), which provides that the notice include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information. The subsequent paragraph in subsection (b) is renumbered accordingly to accommodate this addition.

The adopted amendment to §295.151(a) requires notice of an application for a permit to use state water after the technical review is complete and the technical memoranda are filed with the chief clerk, rather than after the executive director has declared the application administratively complete and filed it with the chief clerk. The adopted amendment will change the time in the application process at which notice will be issued. It will make the results of the executive director's technical review available to the public at the time of notice. It will also allow notice to be mailed to the most current mailing list of potentially affected persons and will aid public participation by providing notice to persons potentially affected closer to the time that the application could be acted upon.

Section 295.151(b) is a list of items required to be included in the notice. The adopted change to the heading of the list will edit the language to clarify the list's purpose.

The adopted amendment to §295.151(b)(3) adds reference to the rule, being §281.17(a) or (b), under which the application is filed with the chief clerk.

The adopted amendment to §295.151(b)(4) requires the notice to state that the technical review of the application is complete rather than stating that the application is administratively complete. This change makes the requirement consistent with the adopted change to §295.151(a).

Adopted §295.151(b)(9) requires the executive director's recommendation on the application to be added to the notice. This requirement will give potentially affected persons more information about the application.

Language previously existing in §295.151(b)(9), requiring the notice to specify the time and location where the commission will consider the application, is deleted. The time of commission action is unknown at the time of notice, and is made known to potentially affected parties through a separate notice required by other rules.

Adopted §295.151(b)(10) requires the notice to state that an affected person may request a hearing as set out in 30 TAC Chapter 55, Subchapter G. This change is helpful to public participation as it clarifies the options for affected persons.

Section 295.151(b)(10) is renumbered to §295.151(b)(11) to accommodate the addition of new requirements in adopted §295.151(b)(10).

Adopted §295.151(b)(11) requires that the notice give a general description of the location and any land to be irrigated. This requirement is being moved from §295.151(b)(10).

Section 295.151(b)(11) is renumbered to §295.151(b)(13) to accommodate the addition of new requirements in adopted §295.151(b)(10) and adopted §295.151(12).

Adopted §295.151(b)(12) provides that the notice include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information.

This is an addition to the rulemaking since proposal.

Adopted §295.151(b)(13) requires that the notice give any additional information that the commission considers necessary. This requirement is being moved from the existing §295.151(b)(11).

The commission adopts an administrative change to §295.158(a)(1) to correct a spelling error.

The adopted amendment to §295.158(c)(1) requires that the commission consider whether notice of an application to amend an existing permit, certified filing, or certificate of adjudication is required upon completion of the technical review of the application and filing of the technical memoranda rather than upon filing of the application. This rule amendment will change the time in the amendment application process at which notice, if required, will be issued. It will also allow notice to be mailed to the most current mailing list of potentially affected persons and will 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 these adopted rules and performed an analysis of whether these adopted rules require a regulatory impact analysis under Texas Government Code, §2001.0225. These amendments are

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 the rulemaking 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. These rules are procedural in nature. 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 these adopted rules and performed an analysis of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these adopted rules is to change the timing of notice of an application for a new or amended water right from after the application is administratively complete to after the completion of technical review of the application. This change is to ensure greater public notice of these applications by having the most current list of potentially affected persons when notice is issued. The adopted rules would substantially advance this stated purpose by amending the notice rules for water rights to specify that notice is after technical review. Promulgation and enforcement of these adopted rules 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, these rules are procedural only

and do not impact property rights in any way. 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 district, 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 generally supports the rulemaking, and 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 request that the commission implement additional safeguards by rule or policy requiring the executive director to post notice of an application for a new water right or amendment on the internet.

#### **The commission appreciates the comment but respectfully declines to make this change because it is beyond the scope of this rulemaking. The commission may consider this comment for future rulemakings.**

The Commenters also note that in the air and waste areas the commission posts signs at the site of the facility providing information. Such practices are effective and efficient ways to provide notice to affected landowners who can provide the TCEQ with information.

#### **The commission appreciates the comment but respectfully declines to make this change because it is**

**beyond the scope of this rulemaking. The commission may consider this comment for future rulemakings.**

The Coalition comments that moving notice to after technical review will allow potentially affected persons to know more definitely whether they may be affected based on the executive director's technical review and recommendation on the permit. This may lead to a reduction in unnecessary hearing requests and a more current list of potentially affected persons.

**The commission appreciates the comment.**

The Coalition comments that moving the notice until after technical review will allow the executive director to review and respond to public comments after technical review, resulting in a more informed and meaningful response to comments.

**The commission appreciates the comment.**

The Coalition requests that proposed §295.151 be revised to require that the notice provide the name and address of the agency, and the telephone number of an agency contact from who interested persons may obtain future information.

**The commission agrees and has made this change.**

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 C: NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS**

### **§295.151, §295.158**

#### **STATUTORY AUTHORITY**

The amendments are 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 amendments are also adopted under Texas Water Code, §11.129, which provides for commission review of a water rights application, and Texas Water Code, §11.132, which provides for notice of water rights applications.

The adopted amendments implement Texas Water Code, §§5.102, 5.103, 5.105, 11.129, and 11.132.

#### **§295.151. Notice of Application and Commission Action.**

(a) At the time that the technical review of an application for a permit to use state water has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the commission shall give notice by mail to those persons specified in §295.153 of this title (relating to Notice By Mail). At such time, the chief clerk shall furnish a copy of the notice to the applicant, and the applicant shall cause such notice to be published, pursuant to §295.152 of this title (relating to Notice by Publication).

(b) The notice must:

- (1) state the name and address of the applicant;

(2) state the date on which the application was received by the commission;

(3) state the date the application was filed by the executive director with the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness);

(4) state that the executive director has determined that the technical review of the application is complete;

(5) state the application number;

(6) state the type of permit the applicant is seeking;

(7) state the purpose and extent of the proposed appropriation of water;

(8) identify the source of supply and the place where the water is to be stored or taken or diverted from the source of supply;

(9) state the executive director's recommendation regarding the application;

(10) state that an affected person may request a hearing as set out in Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications);

(11) give a general description of the location and area of any land to be irrigated;

(12) include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information; and

(13) give any additional information the commission considers necessary.

**§295.158. Notice of Amendments to Water Rights.**

(a) On motion of executive director.

(1) If the executive director determines to file a petition to amend a water right, notice of the determination stating the grounds therefore and a copy of a proposed amendment draft shall be personally served on or mailed by certified mail to the water right holder at the last address of record with the commission.

(2) This notice shall be given at least 15 days before a petition is filed with the commission.

(b) Requiring mailed and published notice. Unless authorized by subsection (c) of this section, applications for amendments to permits, certified filings, or certificates of adjudication, including, but not limited to, those of the following nature, must comply with requirements for a water use permit, including the notice requirements in the Texas Water Code, §11.132, and this subchapter:

(1) to change the place of use when other water users of state water may be affected;

(2) to increase an appropriation and/or rate or period of diversion;

(3) to change the purpose of when the change would authorize a greater consumption of state water or would materially alter the period of time when state water could be diverted;

(4) to add points of diversion which would result in a greater rate of diversion or impair other water rights;

(5) to remove or modify the requirements or conditions of a water right which were included for the protection of other water rights;

(6) to change a point of diversion which may impair other water rights;

(7) to relocate or enlarge a reservoir; or

(8) to extend the period of duration of any term permit.

(c) Not requiring mailed and published notice.

(1) Only an application to amend an existing permit, certified filing, or certificate of adjudication which does not contemplate an additional consumptive use of state water or an increased rate or period of diversion and which, in the judgment of the commission, has no potential for harming any other existing water right, is subject to amendment by the commission without notice other than that provided to the record holder. Once the technical review of an application is complete and the technical memoranda have been filed with the chief clerk of the commission, the commission shall consider whether additional notice is required based on the particular facts of the application.

(2) Applications of the following descriptions may not require additional notice:

(A) to cure ambiguities or ineffective provisions in a water right;

(B) to reduce an appropriation or rate of diversion;

(C) to change the place of use when there will be no increased use of state water and the change will not operate to the injury of any other lawful user of state water. If a water right is owned by more than one party, all other parties will be notified of the proposed changes by certified mail and given two weeks to protest. If no protest is received, further notice will not be required;

(D) to change the point of diversion when the existing rate of diversion will not be increased and there are no interjacent water users of record between the originally authorized point of diversion and the new one, or when interjacent water users agree in writing to the amendment. If written agreements are not obtained, interjacent water users will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;

(E) to add additional points of diversion where the existing rate of diversion will not be increased and there are no water users of record between any originally authorized point of diversion and the new one to be added, or when interjacent water users agree in writing to the amendment. If written agreements are not obtained, interjacent water users will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;

(F) to increase the rate or period for diversion from a storage reservoir.