

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

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

This rulemaking will change the time that notice of an application for a new or amended water right will be 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 sent after the executive director finds the application is administratively complete and files the application with the chief clerk. The proposed amendments would 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 will 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.

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 at the time that these rules become effective.

#### SECTION BY SECTION DISCUSSION

The proposed 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 proposed 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 proposed change to the heading of the list will edit the language to clarify the list's purpose.

The proposed 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 proposed 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 proposed change to §295.151(a).

Proposed §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.

Existing §295.151(b)(9), requiring the notice to specify the time and location where the commission will consider the application, is repealed. 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.

Proposed §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.

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

Proposed §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 the existing §295.151(b)(10).

Existing §295.151(b)(11) is renumbered to §295.151(b)(12) to accommodate the addition of new requirements in the proposed §295.151(b)(10).

Proposed §295.151(b)(12) 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 proposes an administrative change to §295.158(a)(1) to correct a spelling error.

The proposed 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.

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 rules are in effect, no significant 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 rules. The proposed rules affect when notice of application for a new or amended water right is to be mailed and published. Any fiscal impacts regarding the change in date to notify potentially affected parties is expected to be minimal.

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

Currently, notice of an application for a new or amended water right is mailed or published after the executive director finds the application to be administratively complete and files the application with the chief clerk. The proposed amendments to Chapter 295 will change the current deadline of notice mailing or publication to a later date after the executive director has completed the technical review of the application and has filed his memoranda and recommendations with the chief clerk. Changing the time by which notice is to be mailed and published will provide the public with more information concerning agency technical review and recommendations. The timing change will also ensure that the most current membership of the population base in the affected area is informed of the water right application.

The proposed rulemaking is not expected to have a significant fiscal impact on local governments since the rule will only affect the date of notice mailing and publication for water rights permits. The content requirements and substance requirements of notice will not change, and therefore, any cost increases or decreases should be minimal. It is not known if more public hearings will be requested by providing the

public with more information concerning agency technical review and recommendations. Providing notice at a later date in the permit process may include potentially affected parties who were not part of the original population affected by a permit. However, providing more information concerning the permit application could satisfy any concerns that newer potentially affected parties might have.

#### PUBLIC BENEFITS AND COSTS

Nina 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 ensuring the current public potentially affected by the application has notice of water rights and has more information concerning results of technical reviews and agency recommendations.

The proposed rulemaking is not expected to have a significant fiscal impact on businesses since the rulemaking will only affect the date of notice mailing and publication for water rights permits. The content requirements and substance requirements of notice will not change, but potentially affected parties will have more information concerning the results of technical reviews and agency recommendations.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. The proposed rulemaking will only affect the date of notice mailing and publication for water rights permits. The content requirements and substance requirements of notice will not change, but potentially affected parties will have more information concerning the results of technical reviews and agency recommendations. Any cost impacts of the proposed rules are expected to be minimal.

#### SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

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

The commission evaluated these proposed rules and performed an analysis of whether these proposed 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 they do 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. 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 these proposed rules and performed an analysis of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these

proposed 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 proposed 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 proposed rules 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, 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.

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

#### 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](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 C: NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS**

**§295.151, §295.158**

STATUTORY AUTHORITY

The amendments are 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 amendments are also proposed 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 proposed 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 [A] notice must [of application and commission action shall]:

(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 [administratively] 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 [specify the time and location where the commission will consider 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) [(10)] give a general description of the location and area of any land to be irrigated;

and

(12) [(11)] 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 [therefor] 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 [Upon filing such an application], 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.