

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to amend §297.27 and repeal §297.30.

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

In 2009, the 81st Legislature passed Senate Bill (SB) 1711, relating to the exempt use of reservoirs for sediment control or to satisfy certain environmental and safety requirements at surface mining operations.

SB 1711 amends Texas Water Code (TWC), §11.142(d), by providing an exemption from the commission's water rights permitting process for state water used to satisfy environmental and safety regulations for fire or dust suppression as applicable to a surface coal mining operation. The commission's rules related to water rights are in 30 TAC Chapter 297, Water Rights, Substantive.

#### SECTION BY SECTION DISCUSSION

The commission proposes to amend §297.27, Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations, to add exemptions from the water rights permitting process for state water used from sediment control ponds to satisfy environmental and safety regulations for fire and dust suppression as applicable to a surface coal mining operation. Proposed §297.27(b)(1) authorizes the use of water stored in exempt sediment control reservoirs within a surface coal mining operation for sediment control purposes without obtaining a water rights permit. Proposed §297.27(b)(2) authorizes the use of water stored in exempt sediment control reservoirs within a surface coal mining operation for fire or dust suppression without obtaining a water rights permit. These amendments are required by TWC, §11.142(d), as amended by SB 1711, 81st Legislative Session, 2009.

The commission proposes to repeal §297.30, Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations, because it is duplicative of the text contained in §297.27.

#### 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 agency will implement the proposed rules utilizing available resources.

The proposed rules implement the provisions of SB 1711, 81st Legislature, which provides an exemption from the water rights permitting process for state water used from sediment control ponds to satisfy environmental and safety regulations for fire or dust suppression as applicable to a surface coal mining operation. Agency database information shows that there may have been as many as 24 water rights issued since 1986 authorizing water use for dust or fire suppression within surface mining areas. Since the number of water rights permits issued for these purposes has averaged approximately one per year, the exemption from water rights permitting requirements for these types of sediment control ponds is expected to have minimal impact on agency revenue or cost. A permit for this type of water right incurs a one-time filing fee of \$100 and a use fee of \$1.00 per acre foot of water.

Local governments do not typically operate surface coal mining operations, and the proposed rules are not expected to have a significant fiscal impact on them.

#### 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 consistency with state law.

The proposed rules allow water used from sediment control reservoirs for fire or dust suppression in surface mining areas to be exempt from the water rights permitting process. Since 1986, the agency has issued approximately 24 authorizations for this type of use. Businesses that own or operate surface coal mines will no longer have to obtain this authorization, and they will no longer incur a one-time filing fee of \$100 and a use fee of \$1.00 per acre foot of water.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses. Small businesses do not typically own or operate surface coal mines. If a small business owns or operates a surface coal mine, they would also be exempt from the permitting process for water use from sediment control reservoirs for fire or dust suppression, and they would experience the same cost savings as a large business under the proposed rules.

#### 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 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 reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of "major environmental rule" as defined in the statute.

A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may 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 specific intent of the proposed amendment is to amend §297.27(b) of the commission's rules to be consistent with TWC, §11.142(d), as amended during the 81st Legislative Session. The statute was amended to exempt reservoirs used as part of a surface coal mining operation from water use permitting requirements if the water is used for compliance with laws, rules, or regulations relating to fire or dust suppression. The purpose of this statutory amendment was to remove the regulatory impediment to compliance with fire or dust suppression laws, rules, and regulations. The proposed rules are administrative in nature and will 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 commission concludes that the proposed rulemaking does not meet the definition of a major environmental rule.

In addition to the fact that the proposed rulemaking does not meet the definition of a major environmental rule, it is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in §2001.0225(a). Texas Government Code, §2001.0225(a) applies only to a state agency's adoption of a major environmental rule that: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) was adopted solely under the general powers of the agency instead of under a specific state law.

There are no federal standards governing the right to impound and use surface water in the State of Texas. Second, the proposed rulemaking is required by SB 1711 and does not exceed the requirements of SB 1711. Third, the proposed rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. Finally, the proposed rulemaking will be adopted under the express authority of SB 1711, which requires the commission to adopt any rules required to implement the act. Therefore, the rules are not adopted solely under the commission's general powers.

The commission invites public comment regarding this draft regulatory impact analysis determination. 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 amendments to Chapter 297 and performed an assessment of whether the amendments would constitute a taking under Chapter 2007 of the Texas Government Code. The primary purpose of the proposed rulemaking is to implement an amendment to the TWC exempting the use of water from a sediment control reservoir as part of a surface coal mining operation from state water rights permitting requirements if the water is used for compliance with laws, rules, or regulations relating to fire or dust suppression. The proposed rulemaking would substantially advance this purpose by amending §297.27(b) to add this exempt use, and making non-substantive changes to update an obsolete reference to Vernon's Texas Civil Statutes and repeal §297.30, a duplicate rule.

Promulgation and enforcement of the proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed rulemaking does 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. The proposed amendment removes a requirement to obtain a permit for a use of water from certain exempt reservoirs. Removal of this regulatory requirement by adding the exempt use does not burden, restrict, or limit the owner's right to property, or reduce its value.

In addition, because the subject proposed regulations are less stringent than existing rules, they do not burden, restrict, or limit an 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. Therefore, these rules will not constitute takings under the Texas Government Code, Chapter 2007.

#### 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 Rule, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (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 consistent with CMP goals and policies because the rulemaking is unlikely to be of environmental significance to the coastal natural resource areas.

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.

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on September 22, 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 Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

#### SUBMITTAL OF COMMENTS

Written comments may be submitted to Devon Ryan, 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 2009-031-297-PR. The comment period closes September 28, 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 Ronald L. Ellis, Water Rights Permitting and Availability Section, Water Supply Division, at (512) 239-1282.

**SUBCHAPTER C: USE EXEMPT FROM PERMITTING**

**§297.27**

**STATUTORY AUTHORITY**

The amendment is proposed under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Senate Bill 1711, 81st Legislature, 2009.

The proposed amendment implements TWC, §11.142.

**§297.27. Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations.**

(a) Permit Exemption for Use of State Water for Irrigation of Certain Historic Cemeteries.

(1) Without obtaining a water use permit from the commission, a tax-exempt non-profit corporation that owns a cemetery may divert from a stream not more than 200 acre-feet of water each year to irrigate the grounds of the cemetery if the cemetery:

(A) borders the stream; and

(B) is more than 100 years old.

(2) If the executive director, or a watermaster who has jurisdiction over the stream from which a cemetery diverts water under this section, determines that the diversion will harm a person downstream of the cemetery who acquired a water right before May 23, 1995, the executive director or the watermaster may order the cemetery to restrict the diversion to the extent and duration of the harm. The executive director may also request appropriate commission action.

(3) Any person dissatisfied with the action taken by the executive director or the watermaster pursuant to paragraph (2) of this subsection may appeal to the commission for relief.

(b) Permit Exemption to Use State Water for Sediment [Sedimentation] Control, Fire Suppression, or Dust Suppression Purposes within a Surface Coal Mining Operation. Without obtaining a permit from the commission, a person may construct or maintain a reservoir [for the sole purpose of sedimentation control] as part of a surface coal mining operation under Natural Resources Code, Chapter 134, if the water in the reservoir is used solely for: [the Texas Surface Coal Mining and Reclamation Act (Art. 5920-11, Texas Civil Statutes).]

(1) sediment control; or,

(2) compliance with applicable laws, rules, or regulations relating to fire or dust suppression.

**SUBCHAPTER C: USE EXEMPT FROM PERMITTING**

**[\$297.30]**

**STATUTORY AUTHORITY**

The repeal is proposed under TWC, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and Senate Bill 1711, 81st Legislature, 2009.

The proposed repeal implements TWC, §11.142.

**[\$297.30. Permit Exemptions for Use of State Water for Irrigation of Certain Historic Cemeteries and for Sedimentation Control Structures within Surface Coal Mining Operations.]**

[(a) Permit Exemption for Use of State Water for Irrigation of Certain Historic Cemeteries.]

[(1) Without obtaining a water use permit from the commission, a tax-exempt non-profit corporation that owns a cemetery may divert from a stream not more than 200 acre-feet of water each year to irrigate the grounds of the cemetery if the cemetery:]

[(A) borders the stream; and]

[(B) is more than 100 years old.]

[(2) If the executive director, or a watermaster who has jurisdiction over the stream from which a cemetery diverts water under this section, determines that the diversion will harm a person downstream of the cemetery who acquired a water right before May 23, 1995, the executive director or the watermaster may order the cemetery to restrict the diversion to the extent and duration of the harm. The executive director may also request appropriate commission action.]

[(3) Any person dissatisfied with the action taken by the executive director or the watermaster pursuant to paragraph (2) of this subsection may appeal to the commission for relief.]

[(b) Permit Exemption to Use State Water for Sedimentation Control Purposes within a Surface Coal Mining Operation. Without obtaining a permit from the commission, a person may construct or maintain a reservoir for the sole purpose of sedimentation control as part of a surface coal mining operation under the Texas Surface Coal Mining and Reclamation Act (Article 5920-11, Texas Civil Statutes).]