

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §295.13 and §295.155 and adopts a new §295.177 *without change* to the proposed text as published in the March 14, 2014, issue of the *Texas Register* (39 TexReg 1860) and, therefore, the text will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2013, the 83rd Legislature passed House Bill (HB) 3233, relating to interbasin transfers of state water. HB 3233 amended Texas Water Code (TWC), §11.085, to remove TWC, §11.085(b)(4), which requires an application for an interbasin transfer to include the projected effect on user rates and fees for each class of ratepayers. HB 3233 also added language to TWC, §11.085(e), which limits consideration of issues in an evidentiary hearing to those requirements included in TWC, §11.085. HB 3233 further amended TWC, §11.085(g), to clarify the length of notice publication. Additionally, HB 3233 amended TWC, §11.085(v)(4), which describes geographic areas exempt from the provisions of TWC, §11.085. The commission's procedural rules related to water rights are in 30 TAC Chapter 295.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also adopts the amendments to 30 TAC Chapter 297, Water Rights, Substantive.

Section by Section Discussion

Section 295.13, Interbasin Transfers, describes the general application requirements and exemptions for transferring state water from one river basin to another basin.

The commission deleted §295.13(b)(4) which requires an application for a non-exempt interbasin transfer of state water to include the projected effect on user rates and fees for each class of ratepayers. The commission adopts this amendment to update its rules to reflect the deletion of TWC, §11.085(b)(4), by HB 3233. Paragraphs (5) - (9) of §295.13(b) are renumbered to accommodate the deleted provision. HB 3233 amended TWC, §11.085(v)(4), to clarify the geographic areas exempt from the provisions of TWC, §11.085(b) - (u). The commission adopts amendments to §295.13(c)(4) to incorporate these changes.

Section 295.155, Notice for Interbasin Transfers, describes the requirements and exemptions for public notice for an application to transfer state water from one river basin to another basin. The commission adopts the amendment to change the published notice requirement in §295.155(b)(2) from once a week for two consecutive weeks to two different weeks within a 30-day period. The commission adopts this amendment to incorporate the changes made to TWC, §11.085(g), by HB 3233. The commission also adopts the amendment to §295.155(d)(4) to incorporate the revisions to the description of exempt geographic areas as described in TWC, §11.085(v)(4).

New §295.177, Evidentiary Hearing on Interbasin Transfer Amendments, is adopted to limit the issues to be considered during a hearing to those requirements under TWC, §11.085. This new section implements TWC, §11.085(e), as amended by HB 3233.

Final Regulatory Impact Determination

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225. "Major environmental rule" means 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.

First, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is implementing legislation to clarify and streamline requirements for the issuance of interbasin transfer authorizations upon application by a current or prospective water right owner.

Second, the adopted rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted rulemaking would 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. It is not anticipated that the cost of complying with the adopted rulemaking would be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

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

Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed an assessment of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The commission adopted the rules for the specific purpose of implementing legislation to clarify and streamline requirements for the issuance of interbasin transfer authorizations. The commission would not act under the adopted rule unless an application from a current or prospective water right owner is received requesting an authorization for an interbasin transfer. Further, the rulemaking clarifying exemptions

to the requirement that an interbasin transfer be authorized by the commission expands the ability of a retail public utility to transfer water owned under surface water rights within the utility's service area.

A "taking" under Texas Government Code, Chapter 2007 means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%.

Because no taking of private real property will occur by amending the definitions as adopted, the commission has determined that promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the adopted rules neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rules. Therefore, the adopted rules would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 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 Advisory Committee and determined that the rulemaking is administrative and 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 section during the public comment period. The commission received no comments regarding the Consistency with the Coastal Management Program section.

Public Comment

The commission held a public hearing on April 10, 2014. The comment period closed on April 14, 2013. The commission received one comment from an individual.

The commenter asked a question outside the scope of this rulemaking as discussed in the Response to Comments section of this preamble.

Response to Comments

One individual requested information regarding the limit of water that can be drilled or produced per well per year in Atascosa and McMullen counties.

The purpose of this rulemaking is to implement HB 3233, relating to interbasin transfers of state water. The commenter's question is outside the scope of this rulemaking. The rules were not changed in response to this comment.

SUBCHAPTER A: REQUIREMENTS OF WATER RIGHTS
APPLICATIONS GENERAL PROVISIONS
DIVISION 1: GENERAL REQUIREMENTS
§295.13

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; and TWC, §5.105, which establishes the commission's authority to set policy by rule.

The adopted amendment implements TWC, §§5.102, 5.103, 5.105 and 11.085(v)(4).

§295.13. Interbasin Transfers.

(a) An applicant seeking to transfer state water from one basin to another basin shall so state in the application. For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code (TWC), §16.051. The application content requirements contained in this chapter for a new or amended water right, as applicable, shall apply to all applications for an interbasin transfer unless otherwise provided.

(b) In addition to the application requirements for a new or amended water right contained in this chapter, the application must also include the following unless exempted by subsection (c) of this section:

(1) the contract price of the water to be transferred;

(2) a statement of each general category of proposed use of the water to be transferred and a detailed description of the proposed uses and users under each category;

(3) the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users;

(4) an analysis of whether and to what extent there is the need for the water in the basin of origin and in the proposed receiving basin based upon the period for which the transfer is requested, but not to exceed 50 years;

(5) factors identified in the applicable approved regional water plans which address the following (Regional water management plans must be submitted to the Texas Water Development Board for review and approval not later than September 1, 2000. If applicable approved regional water management plans do not exist at the

time the application is submitted, the following information under this paragraph is not required to be submitted.):

(A) an analysis of the availability of feasible and practicable alternative supplies in the receiving basin for which the water is needed;

(B) the amount and purposes of use in the receiving basin for which the water is needed;

(C) the proposed methods and efforts by the receiving basin to avoid waste and implement water conservation and drought contingency measures;

(D) the proposed methods and efforts by the receiving basin to put the water proposed for transfer to beneficial use;

(E) the projected economic impact that is reasonably expected to occur in each basin as a result of the transfer; and

(F) the projected impacts of the proposed transfer that are reasonably expected to occur on existing water rights, instream uses, water quality, aquatic and riparian habitat, and bays and estuaries that must be assessed under TWC,

§§11.147, 11.150, and 11.152 and related commission rules contained in §§297.49 - 297.52 of this title (relating to Return and Surplus Waters; Consideration of Water Conservation Plans; Time Limitations for Commencement or Completion of Construction; and Suppliers of Water for Agriculture) in each basin. If the water sought to be transferred is currently authorized to be used under an existing water right, such impacts shall only be considered in relation to that portion of the water right proposed for transfer and shall be based on historical uses of the water right for which amendment is sought;

(6) proposed mitigation or compensation, if any, to the basin of origin by the applicant;

(7) the continued need to use the water for the purposes authorized under the existing water right if an amendment to an existing water right is being sought; and

(8) any other related information the executive director or commission may require to review the application to make recommendation or determine, as applicable, whether it meets all applicable requirements of the TWC or other applicable law.

(c) Subsection (b) of this section shall not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same water right;

(2) a request for an emergency transfer of water under §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139));

(3) a proposed transfer from a basin to its adjoining coastal basin;

(4) a proposed transfer from the part of the geographic area of a county or municipality, or the part of the retail service area of a retail public utility as defined by TWC, §13.002, that is within the basin of origin for use in that part of the geographic area of the county or municipality or that contiguous part of the retail service area of the utility, not within the basin of origin; or

(5) a proposed transfer of water that is:

(A) imported from a source located wholly outside the boundaries of this state, except water that is imported from a source located in the United Mexican States;

(B) for use in this state; and

(C) transported by using the bed and banks of any flowing natural stream in this state.

**SUBCHAPTER C: NOTICE REQUIREMENTS FOR
WATER RIGHT APPLICATIONS
§295.155**

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; and TWC, §5.105, which establishes the commission's authority to set policy by rule.

The adopted amendment implements TWC, §§5.102, 5.103, 5.105, and 11.085(g) and (v)(4).

§295.155. Notice for Interbasin Transfers.

(a) The notice requirements of this subchapter for an application for a new or amended water right, as applicable, shall apply to an application for an interbasin transfer except as otherwise provided by this section. In addition, notice shall be given to users of record in the receiving basin who are located below the point of introduction except for interbasin transfers described under subsection (d)(2) - (5) of this section. For purposes of this section, a river basin is defined and designated by the Texas Water Development Board by rule pursuant to Texas Water Code, §16.051. An increase in the

amount of water being transferred to the receiving basin under an existing water right constitutes a new interbasin basin transfer for purposes of this section.

(b) In addition to the notice requirements provided by subsection (a) of this section, notice of an application for an interbasin transfer shall also include the following unless exempted by subsection (d) of this section:

(1) notice of the application shall be mailed to:

(A) all holders of water rights located in whole or in part in the basin of origin if not already provided under subsection (a) of this section;

(B) each county judge of a county located in whole or in part in the basin of origin;

(C) each mayor of a city with a population of 1,000 or more based upon the most recent estimate of the U.S. Census Bureau located in whole or in part in the basin of origin;

(D) all groundwater conservation districts located in whole or in part in the basin of origin;

(E) each state legislator in both basins; and

(F) the presiding officer of each affected regional water planning group in both basins;

(2) the applicant shall cause notice of the application to be published in two different weeks within a 30-day period in one or more newspapers having general circulation in each county located in whole or in part in the basin of origin and the receiving basin. The published notice may not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. The notice of application and public meetings shall be combined in the mailed and published notices; and

(3) the notice of the application must state how a person may obtain from the applicant, without cost, information relating to the contract price of the water to be transferred; a statement of each general category of proposed use of the water to be transferred, and a detailed description of the proposed uses and users under each category; the cost of diverting, conveying, distributing, and supplying the water to, and treating the water for, the proposed users; and the projected effect on user rates and fees for each class of ratepayers.

(c) The applicant shall pay the cost of notice required to be provided under this section.

(d) Subsection (b) of this section shall not apply to:

(1) a proposed transfer which in combination with any existing transfers totals less than 3,000 acre-feet of water per annum from the same water right;

(2) a request for an emergency transfer of water under §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139));

(3) a proposed transfer from a basin to its adjoining coastal basin; or

(4) a proposed transfer from the part of the geographic area of a county or municipality, or the part of the retail service area of a retail public utility as defined by Texas Water Code, §13.002, that is within the basin of origin for use in that part of the geographic area of the county or municipality, or that contiguous part of the retail service area of the utility, not within the basin of origin. The further transfer and use of this water outside of such county, municipality, or the part of the retail service area of a retail public utility as defined by Texas Water Code, §13.002 as existing at the time of

the transfer or as may exist in the future other than back to the basin of origin shall not be exempt under this paragraph;

(5) a proposed transfer of water that is:

(A) imported from a source located wholly outside the boundaries of this state, except water that is imported from a source located in the United Mexican States;

(B) for use in this state; and

(C) transported by using the bed and banks of any flowing natural stream in this state.

SUBCHAPTER D: CONTESTED CASE HEARING

§295.177

Statutory Authority

The new section is adopted under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; and TWC, §5.105, which establishes the commission's authority to set policy by rule.

The adopted new section implements TWC, §§5.102, 5.103, 5.105 and 11.085(e).

§295.177. Evidentiary Hearing on Interbasin Transfer Amendments.

An evidentiary hearing on an application to transfer water authorized under an existing water right is limited to considering issues related to the requirements of Texas Water Code, §11.085.