

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §35.202 *without change* to the proposal as published in the July 13, 2018, issue of the *Texas Register* (43 TexReg 4634).

Background and Summary of the Factual Basis for the Adopted Repeal

The Public Utility Commission of Texas (PUC) Sunset Legislation, House Bill (HB) 1600 and Senate Bill (SB) 567 passed by the 83rd Texas Legislature, 2013, transferred from the TCEQ to the PUC the functions relating to the economic regulation of water and wastewater utilities effective September 1, 2014.

Concurrent with this adoption, and published in this issue of the *Texas Register*, the commission is adopting revisions to 30 TAC Chapter 37, Financial Assurance; Chapter 50, Action on Applications and Other Authorizations; Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment; Chapter 80, Contested Case Hearings; Chapter 281, Applications Processing; Chapter 290, Public Drinking Water; Chapter 291, Utility Regulations; and Chapter 293, Water Districts.

Section Discussion

§35.202, Emergency Order for Rate Increase in Certain Situations

The commission adopts the repeal of §35.202. With the transfer of these functions from the commission to the PUC in HB 1600 and SB 567, this section is no longer required.

Final Regulatory Impact Analysis 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. Texas Government Code, §2001.0225 applies to a "Major environmental rule" which is defined in Texas Government Code, §2001.0225(g)(3) as a rule with a specific intent "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 PUC Sunset Legislation, HB 1600 and SB 567, transferred from the TCEQ to the PUC the functions relating to the economic regulation of water and wastewater utilities. The specific intent of the adopted rulemaking is to repeal an obsolete TCEQ rule in Chapter 35 relating to the economic regulation of water and wastewater utilities. Therefore, the intent is not to protect the environment or reduce risks to human health from environmental exposure, but instead to repeal the rule relating to economic regulation of water and wastewater utilities as those functions were transferred to the PUC.

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

Finally, the adopted rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) 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; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This adopted rulemaking does not meet any of the four preceding applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law for the economic regulation of water or wastewater utilities; 2) does

not exceed any express requirements of Texas Water Code, Chapter 11, 12, or 13, which relate to the economic regulation of water and wastewater utilities; 3) 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; and 4) is not adopted solely under the general powers of the agency.

Since this adopted rulemaking does not meet the statutory definition of a "Major environmental rule" nor does it meet any of the four applicability requirements for a "Major environmental rule" this rulemaking is not subject to Texas Government Code, §2001.0225.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received regarding the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed a preliminary assessment of whether the adopted repeal constitutes a taking under Texas Government Code, Chapter 2007.

The commission adopts this rulemaking for the purpose of repealing an obsolete rule in Chapter 35 relating to the economic regulation of water and wastewater utilities as

those functions have transferred from the TCEQ to the PUC.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to the adopted rulemaking based upon an exception to applicability in Texas Government Code, §2007.003(b)(5). The adopted rulemaking is a discontinuance of the economic regulation of water and wastewater utilities within the TCEQ, which provides a unilateral expectation that does not rise to the level of a recognized interest in private real property. Because the adopted rulemaking falls within an exception under Texas Government Code, §2007.003(b)(5), Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

Further, the commission determined that promulgation of the adopted rulemaking will be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rulemaking because the adopted repeal neither relates to, nor has any impact on, the use or enjoyment of private real property, and there will be no reduction in property value as a result of the adoption. This rulemaking is required due to the transfer of functions relating to the economic regulation of water and wastewater utilities from the TCEQ to the PUC pursuant to HB 1600 and SB 567. The specific intent of the adopted rulemaking is to repeal an obsolete TCEQ rule relating to the economic regulation of water and wastewater utilities. Therefore, the adopted rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that it is neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rulemaking is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding consistency with the CMP.

Public Comment

The commission offered a public hearing on August 7, 2018. The comment period closed on August 13, 2018. The commission did not receive any comments regarding Chapter 35.

SUBCHAPTER E: EMERGENCY ORDERS FOR UTILITIES

§35.202

Statutory Authority

The repeal is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; and TWC, §5.103, concerning Rules, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC and other laws of this state.

The adopted repeal implements House Bill 1600 and Senate Bill 567 passed by the 83rd Texas Legislature, 2013

§35.202. Emergency Order for Rate Increase in Certain Situations.