

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §281.2 and §281.17; and the repeal of §281.16 *without changes* to the proposed text as published in the July 13, 2018, issue of the *Texas Register* (43 TexReg 4655) and, therefore, will not be republished.

### **Background and Summary of the Factual Basis for the Adopted Rules**

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 35, Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions; 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 290, Public Drinking Water; Chapter 291, Utility Regulations; and Chapter 293, Water Districts.

### **Section by Section Discussion**

In addition to the adopted revisions associated with this rulemaking, the adopted rulemaking also includes various stylistic, non-substantive changes to update rule language to current Texas Register style and format requirements. Such changes included

appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. Where paragraphs were removed, subsequent paragraphs were renumbered accordingly. These changes are non-substantive and generally not specifically discussed in this preamble.

*§281.2, Applicability*

The commission adopts amended §281.2 to remove paragraph (8), because the paragraph pertains to functions that were transferred from the commission to the PUC in HB 1600 and SB 567.

*§281.16, Applications for Certificates of Convenience and Necessity*

The commission adopts the repeal of §281.16. With the transfer of these functions from the commission to the PUC in HB 1600 and SB 567, this section is no longer required.

*§281.17, Notice of Receipt of Application and Declaration of Administrative Completeness*

The commission adopts amended §281.17(d) to remove the reference to §281.16. With the transfer of this function from the commission to the PUC in HB 1600 and SB 567, this reference 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 amend and repeal obsolete TCEQ rules in Chapter 281 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 amend and repeal the rules 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 rules 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 adopted rules will 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, 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 these adopted rules constitute a taking under Texas Government Code, Chapter 2007.

The commission adopts this rulemaking for the purpose of amending and repealing obsolete TCEQ rules in Chapter 281 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 these adopted rules 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 these adopted rules 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 rules neither relate to, nor have any impact on, the use or enjoyment of private real property, and there will be no reduction in property value as a result of these rules. 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 amend and repeal obsolete TCEQ rules relating to the economic regulation of water and wastewater utilities. Therefore, the adopted rules 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 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 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 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 281.

## **SUBCHAPTER A: APPLICATIONS PROCESSING**

### **§281.2, §281.17**

#### **Statutory Authority**

The amendments are 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 amendments implement House Bill 1600 and Senate Bill 567 passed by the 83rd Texas Legislature, 2013.

#### **§281.2. Applicability.**

This subchapter is applicable to the processing of:

(1) applications for new, amended, or renewed water use permits, certificates of adjudication and certified filings, and extensions of time to commence and/or complete construction of water use facilities;

(2) applications for new, amended, or renewed wastewater discharge permits, including subsurface area drip dispersal systems;



(3) applications for new, amended, or renewed injection well permits;

(4) applications for new, amended, or modified or renewed industrial solid and/or municipal hazardous waste permits filed under §335.2 and §335.43 of this title (relating to Permit Required) or for new or amended compliance plans filed under §305.401 of this title (relating to Compliance Plan);

(5) applications for plan approval of reclamation projects (levees, etc.);

(6) applications for creation of water districts;

(7) water district applications and petitions requiring commission approval;

(8) applications for new, amended, or renewed municipal solid waste permits; and

(9) applications for new, amended, or renewed radioactive material licenses.

**§281.17. Notice of Receipt of Application and Declaration of Administrative Completeness.**

(a) Applications for use of state water. If an application for the use of state water, other than for a permit under §297.13 of this title (relating to Temporary Permit under the Texas Water Code, §11.138) or §297.17 of this title (relating to Emergency Authorization (Texas Water Code, §11.139)), is received containing the information and attachments required by §281.4 of this title (relating to Applications for Use of State Water), the executive director or his designee shall prepare a statement of the receipt of the application and declaration of administrative completeness. The executive director shall forward a copy of the statement to the chief clerk, along with a copy of the application.

(b) Applications for temporary permits to use state water. If an application for a temporary permit, other than a provisional temporary permit under §295.181 of this title (relating to Provisional Disposition of Application for Temporary Permit), for the use of state water is received containing the required information and attachments required by §281.4 of this title, the executive director or his designee shall prepare a statement of the receipt of the application and declaration of administrative completeness, and shall forward a copy of the statement to the chief clerk.

(c) Applications for provisional temporary permits to use state water. When an application for a provisional temporary permit for the use of state water under §295.181 of this title, is received containing the information and attachments required by §281.4 of this title, the chief clerk shall cause notice of the receipt of the application and declaration of administrative completeness to be published in the *Texas Register*. The

chief clerk may include in the notice other information concerning the disposition of the application.

(d) Other applications. Upon receipt of an application described in §281.2(2) or (5) - (9) of this title (relating to Applicability), which contains the information and attachments required by §281.5 and §281.6 of this title (relating to Application for Wastewater Discharge, Underground Injection, Municipal Solid Waste, Radioactive Material, Hazardous Waste, and Industrial Solid Waste Management Permits; and Applications for Plan Approval of Reclamation Projects), the executive director or his designee shall assign the application a number for identification purposes, and prepare a statement of the receipt of the application and declaration of administrative completeness which is suitable for publishing or mailing and shall forward that statement to the chief clerk. Upon receipt of an application for a new, amended, or renewed injection well permit, for a new, amended, or renewed industrial solid waste permit, or for a new or amended compliance plan as described in §281.2(3) and (4) of this title, the executive director or his designee shall assign the application a number for identification purposes and prepare a statement of the receipt of the application which is suitable for publishing or mailing and shall forward that statement to the chief clerk. Upon receipt of an application for a new, amended, or renewed radioactive material license as described in Chapter 336 of this title (relating to Radioactive Substance Rules), the executive director or his designee shall assign the application a number for identification purposes and prepare a statement of the receipt of the application which is suitable for mailing and shall forward that statement to the chief clerk prior to the expiration of the administrative review

periods established in §281.3(d) of this title (relating to Initial Review). The chief clerk shall notify every person entitled to notification of a particular application under the rules of the commission.

(e) Notice requirements. The notice of receipt of the application and declaration of administrative completeness, or for applications for a new, amended, or renewed injection well permit, or for a new or amended compliance plan as described in §281.2(3) and (4) of this title, the notice of receipt of the application, shall contain the following information:

(1) the identifying number given the application by the executive director;

(2) the type of permit or license sought under the application;

(3) the name and address of the applicant and, if different, the location of the proposed facility;

(4) the date on which the application was submitted; and

(5) a brief summary of the information included in the application.

(f) Notice of application and draft permit. Nothing in this section shall be construed so as to waive the requirement of notice of the application and draft permit in

accordance with Chapter 39 of this title (relating to Public Notice) for applications for radioactive material licenses, and for wastewater discharge, underground injection, hazardous waste, municipal solid waste, and industrial solid waste management permits.

**SUBCHAPTER A: APPLICATIONS PROCESSING**

**§281.16**

**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.

**§281.16. Applications for Certificates of Convenience and Necessity.**