

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §281.2 and §281.17; and the repeal of §281.16.

### **Background and Summary of the Factual Basis for the Proposed 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 proposal, and published in this issue of the *Texas Register*, the commission is proposing 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 proposed revisions associated with this rulemaking, the proposed 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 are proposed for removal, subsequent paragraphs

are renumbered accordingly. These changes are non-substantive and generally not specifically discussed in this preamble.

*§281.2, Applicability*

The commission proposes to amend §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 proposes 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 proposes to amend §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.

**Fiscal Note: Costs to State and Local Government**

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The rulemaking is proposed in order to repeal or modify obsolete rules for a program transferred to the PUC through the passage of HB 1600 and SB 567. Effective September 1, 2014, HB 1600 and SB 567 transferred the responsibility for regulating water and wastewater rates, services, and certificates of convenience and necessity from the commission to the PUC. The commission therefore proposes this rulemaking to remove any language which pertains to functions that were transferred from the commission to PUC through HB 1600 and SB 567.

Staff, fees, and functions relating to the economic regulation of water and wastewater utilities were transferred from the TCEQ to the PUC in Fiscal Year 2015. The agency transferred \$1,429,818 out of Water Resource Management Account Number 153 funds and 20.0 full-time employees (FTEs) to the PUC. In addition, there was also a transfer of \$184,000 to the PUC to cover the cost of the contract with the State Office of Administrative Hearings for water and wastewater utility contested case hearings. The Office of Public Utility Counsel was appropriated \$499,680 in Water Resource Management Account Number 153 funds and 5.0 FTEs in Fiscal Year 2015 to represent water and wastewater utility customers as provided by the provisions of HB 1600 and SB 567.

For Fiscal Year 2016, the legislature increased the appropriation to the PUC and the Office of Public Utility Counsel; the total cost to the Water Resource Management Account Number 153 for Fiscal Year 2016 and 2017 was \$3,567,824 and \$3,567,824, respectively.

The total cost to the Water Resource Management Account Number 153 for Fiscal Year 2018 was \$3,470,453.

Since the transfer of the administration and regulation of water and wastewater rates, services, and certificates of convenience and necessity has already taken place, there are no fiscal implications anticipated for the agency, PUC, or for other units of state or local government as a result of the implementation or administration of the proposed rules.

#### **Public Benefits and Costs**

Ms. Bears 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 compliance with state law and clear rules for the administration and regulation of water and wastewater rates, services, and certificates of convenience and necessity.

The proposed rulemaking is not expected to result in fiscal implications for businesses or individuals. The proposed rulemaking amends and repeals obsolete TCEQ's rules to reflect the transfer of the regulation of water and wastewater rates, services, and certificates of convenience and necessity to the PUC.

#### **Local Employment Impact Statement**

The commission 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.

### **Rural Community Impact Statement**

The commission reviewed this proposed rulemaking and determined that the proposed rules do not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The rulemaking would apply statewide and have the same effect in rural communities as in urban communities.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect. The proposed rulemaking amends and repeals obsolete TCEQ's rules to reflect the transfer of the regulation of water and wastewater rates, services, and certificates of convenience and necessity to the PUC.

### **Small Business Regulatory Flexibility Analysis**

The commission 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 the proposed rules are in effect.

### **Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this

proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; will not require an increase or decrease in future legislative appropriations to the agency; require the creation of new employee positions nor eliminate current employee positions; nor will it require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, or limit an existing regulation, but it does amend and repeal TCEQ's rules for a program transferred to the PUC. The proposed rulemaking does not increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules are in effect, the proposed rules should not impact positively or negatively the state's economy.

#### **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 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 proposed 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 proposed 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 proposed rulemaking does not meet the statutory definition of a "Major environmental rule" because the proposed rules 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 proposed rules will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Finally, the proposed 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 proposed 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 proposed solely under the general powers of the agency.

Since this proposed 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.

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 this proposed rulemaking and performed a preliminary assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007.

The commission proposes 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 proposed rules based upon an exception to applicability in Texas Government Code, §2007.003(b)(5). The proposed 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 proposed rulemaking falls within an exception under Texas Government Code, §2007.003(b)(5), Texas Government Code, Chapter 2007 does not apply to this proposed rulemaking.

Further, the commission determined that promulgation of these proposed 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 rulemaking because the proposed rules neither relate to, nor have any impact on, the use or enjoyment of private real property, and there would 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 proposed rulemaking is to amend and repeal obsolete TCEQ rules relating to the economic regulation of water and wastewater utilities. Therefore, the proposed rules would not constitute a taking under 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 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.

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 August 7, 2018, at 2:00 p.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 Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Ms. Kris Hogan, 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:

<https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2013-057-291-OW. The comment period closes on August 13, 2018. Copies of the proposed rulemaking can be obtained from the commission's website at [https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please

contact Brian Dickey, Water Supply Division, Plan and Technical Review Section at (512) 239-0963.

**SUBCHAPTER A: APPLICATIONS PROCESSING**

**§281.2, §281.17**

**Statutory Authority**

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

**§281.2. Applicability.**

This subchapter is [These sections are] 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) [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 or amended certificates of convenience and necessity;]

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

(9) [(10)] 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 [Under] the Texas Water Code, [§]§11.138 [and 11.153 - 11.155]) 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 [as set forth therein], 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) [(11)] of this title (relating to Applicability), which contains the information and attachments required by [§]§281.5[,] and §281.6[, and 281.16] 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[; and Applications for Certificates of Convenience and Necessity]), 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 proposed 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 proposed 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.]**

[Applications for certificates of convenience and necessity must include:]

[ (1) three copies of the appropriate application form prescribed by the executive director, completed as instructed, and properly executed;]

[ (2) territorial maps filed in support of such application for initial or amended certificates that fulfill the following requirements:]

[(A) for water and sewer utilities, the area to be served shall be shown on a state highway county map, scale one inch equals two miles. It shall clearly define the proposed location of the applicant and each neighboring water or sewer utility within five miles of applicant's present location, and service boundaries shall conform to verifiable landmarks such as roads, creeks, railroads, etc. Facilities shall be shown on United States Geological Survey 7 1/2-minute series maps, subdivision plats, engineering planning maps, or other large scale maps;]

[(B) three copies of each map shall be filed;]

[(C) separate maps shall be filed for each county in which the reporting utility operates;]

[(D) if applicable, the map shall separately indicate the production facilities, transmission facilities, and distribution facilities as located within the territory claimed. A color code may be used to distinguish the types of facilities indicated. The location of any such facility shall be described with such exactness that the facility can be located on the ground from the map or in supplementary data with reference to physical landmarks where necessary to show its actual location;]

[(3) three copies of any evidence as required by the commission to show that the applicant has received the required consent or permit of any other public authority having jurisdiction, for example, municipalities;]

[(4) any other information as the executive director or the commission may reasonably require.]