

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§295.73, 295.121, and 295.122; the repeal of §§295.121 - 295.126; and amendments to §§295.151 - 295.153.

New §295.73 and the amendment to §295.153 are adopted *with changes* to the proposed text as published in the February 23, 2018, issue of the *Texas Register* (43 TexReg 1019) and, therefore, will be republished. New §295.121 and §295.122; the repeal of §§295.121 - 295.126; and amendments to §295.151 and §295.152 are adopted *without changes* to the proposed text and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

In 2017, the 85th Texas Legislature passed House Bill (HB) 3735, Senate Bill (SB) 864, and SB 1430, which all became effective on September 1, 2017. SB 1430 amended the Texas Water Code (TWC) to require that the TCEQ provide an expedited procedure for acting on certain applications for an amendment to a water right by applicants that begin to use desalinated seawater. New TWC, §11.122(b-1), provides that an applicant has a right, under specified circumstances, to expedited consideration of an application to change the diversion point for their existing non-saline surface water right when the applicant begins using desalinated seawater. New TWC, §11.122(b-2), further requires the executive director or the commission to prioritize the technical review of such an application over the technical review of other applications that are not subject to TWC, §11.122(b-1).

HB 3735 includes the same provisions described in SB 1430, which were added to HB 3735

in a Senate Committee Substitute. HB 3735 additionally amended TWC, §11.125, to replace specific map requirements in TWC, §11.125(a) with a more general requirement to submit maps in the form prescribed by the commission and removed additional specific map requirements by repealing TWC, §11.125(b) and (c).

SB 864 amended the TWC as it relates to the procedure for obtaining a right to use state water if the applicant proposes an alternative source of water that is not state water. SB 864 amends notice requirements relating to alternate sources of water used in water rights applications. Amended TWC, §11.132(c) and §11.143(e), require that the notice of an application under those sections identify any proposed alternative sources of water. Amended TWC, §11.132(d) and §11.143(f), require that the commission provide mailed notice of an application to any groundwater conservation district (GCD) with jurisdiction over groundwater production in an area from which the applicant proposes to use groundwater as an alternative source. Amended TWC, §11.143(f), requires published notice of a hearing in a newspaper of general circulation in each county in which a GCD is located for applications to use an exempt reservoir to convey groundwater under the jurisdiction of a GCD.

The commission adopts amendments to Chapter 295 to implement the changes to the TCEQ water right amendment process required by HB 3735 and SB 1430, the TCEQ water rights mapping requirements required by HB 3735, and the TCEQ water right notices required by SB 864.

In September 2017, the commission held an informal stakeholder meeting to solicit comments regarding the implementation of HB 1648, HB 3735, SB 864, and SB 1430. While staff intends to strictly implement the legislation as the legislature intended, staff asked for input from stakeholders on the following issues: How to implement SB 1430 and HB 3735, which require the TCEQ to provide an expedited procedure for certain amendments to water rights and also requires the executive director to prioritize the technical review of those applications over applications that are not subject to the expedited process? What should the "expedited process" look like? Is the expedited process for desalination permits in Chapter 295, Subchapter G, an appropriate model? What does "prioritize" mean? How does it harmonize (or not) with the priority system? Does prioritize mean to skip the line of priority? If yes, how should the commission consider/model the impacts that would not occur to water rights applications, but for the expedited applications jumping to the front of the priority line?

The second topic of interest on which staff asked for input relates to the new mailed and published notice requirements to GCDs and their areas required in SB 864. A strict reading of SB 864 appears to only require mailed notice to a GCD and published notice in the GCD area for an application under TWC, §11.143, that uses groundwater under the jurisdiction of a GCD as an alternate source. New TWC, §11.132(d)(2)(B), also appears to require mailed notice to a GCD of a new appropriation which uses groundwater under the jurisdiction of the GCD as an alternate source to support the application. Since SB 864 became effective September 1, 2017, the executive director has put in place procedures to accomplish all of these notice requirements. During the stakeholder meeting, staff requested input on these

new notice requirements in other instances. Specifically, did the legislature intend to expand the published notice requirement in TWC, §11.132(d)(3) to include publishing in a newspaper of general circulation in the area of the GCD (assuming they might be different than the project area in some instances)? Should the new mailed and/or published notice requirements apply to new bed and banks authorizations under TWC, §11.042(c), which use groundwater under the jurisdiction of a GCD? Current TCEQ rule, §295.161, requires downstream mailed notice, but does not require any published notice.

The executive director based these rules on consideration of the legislation and consideration of comments received from the stakeholders.

In corresponding rulemakings published in this issue of the *Texas Register*, the commission also adopts to implement HB 1648 in amended sections in 30 TAC Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines, and Requirements; HB 3735 in 30 TAC Chapter 297, Water Rights, Substantive; and SB 1430 and HB 3735 in 30 TAC Chapter 80, Contested Case Hearings.

Section by Section Discussion

§295.73, Texas Water Code, §11.122(b-1) Amendment Applications

The commission adopts new §295.73 to implement the requirement in TWC, §11.122(b-1) as added by HB 3735 and SB 1430, which requires that the TCEQ provide expedited technical review of an application to change the diversion point for a water right holder's existing non-saline surface water right when the applicant begins using desalinated seawater and

further requires the executive director or the commission to prioritize the technical review of such an application over the technical review of all other applications that are not subject to the expedited process. Adopted new §295.73(a) requires that prior to being declared administratively complete, applicants requesting expedited technical review of an amendment under §295.73 must demonstrate the amount of desalinated seawater the water right holder has begun using or demonstrate with certainty any amount of desalinated seawater the water right holder will begin using in the future. This information is necessary for the commission to determine whether the application is eligible for the expedited consideration requested.

The expedited technical review and priority mandated by HB 3735 and SB 1430 are implemented by adopted new §295.73(b) which states "Technical review for applications under this section will be completed prior to all other administratively complete applications in the basin that do not meet the requirements of this section." The expedited technical review, which prioritizes applications that meet the requirements of TWC, §11.122(b-1) over other administratively complete applications differs from the commission's current practice of processing applications in the order in which they became administratively complete. Adopted new §295.73(c) addresses the possibility that prioritizing applications under adopted new §295.73(b) over other applications that were declared administratively complete before the §295.73(b) application could result in adverse impacts to the availability of water to the applications that were not prioritized. Adopted new §295.73(c) states that "The commission may include special conditions in the permit, including, but not limited to a re-opener provision, to mitigate adverse impacts on the

availability of water for applications that were administratively complete prior to an application that triggered the expedited technical review under subsection (b) of this section." The reopener provision would be invoked if an application was processed after a §295.73(b) application, despite the fact that it was administratively complete prior to the §295.73(b) application, and technical review of the application revealed that there were adverse impacts on the availability of water that would not have occurred but for the §295.73(b) application being processed first.

Division 12, Maps, Plats, and Drawings Accompanying Application for Water Use Permit

The commission adopts the repeal of §§295.121 - 295.126 because HB 3735 provides for the removal of outdated mapping requirements and the replacement with more general requirements that maps must meet the requirements specified by the commission; therefore, these sections are obsolete.

§295.121, Content Requirements of Maps

The commission adopts new §295.121 to implement the more general requirements of HB 3735 that applications be accompanied by a map or plat in the form and containing the information prescribed by the commission. Adopted new §295.121 states that water right applications must include maps or plats in the form and containing the information specified in the relevant water right form and instructions for the particular authorization sought.

§295.122, Requirements for Dams and Reservoirs

The commission adopts new §295.122 which requires that maps, plats, or drawings submitted with application plans for dam and reservoir projects must include the information described in 30 TAC §299.3. This rule implements the more general requirements of HB 3735 that applications be accompanied by a map or plat in the form and containing the information prescribed by the commission.

§295.151, Notice of Application and Commission Action

The commission adopts §295.151(b)(9) that requires the notice to identify any proposed alternative source of water, other than state water, identified by the application. The subsequent paragraphs are renumbered accordingly.

§295.152, Notice By Publication

The commission adopts amended §295.152(a) to specify that this subsection applies to an application for a permit pursuant to TWC, §11.121, or for an amendment to a TWC, §11.121, permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122, and §295.158(b). The commission also adopts §295.152(b) to require that an application for a permit pursuant to TWC, §11.143, or for an amendment pursuant to TWC, §11.122, to a TWC, §11.143, permit, or a certificate of adjudication which authorizes diversions from a reservoir which is exempted under TWC, §11.142, in which the applicant proposes to use groundwater from a well located within a GCD as an alternative source of water, the applicant shall cause the notice issued by the chief clerk to be published in a newspaper of general circulation within each county in which the GCD is located. The subsequent subsection is re-lettered.

§295.153, Notice By Mail.

For an application for a permit pursuant to TWC, §11.121, or for an amendment to a TWC, §11.121 permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122 and §295.158(b), the commission adopts §295.153(b)(3) to require notice be mailed to each GCD with jurisdiction over the proposed groundwater production, if the applicant proposes to use groundwater from a well located within a GCD as an alternative source of water. The subsequent paragraph is renumbered. At adoption, §295.153(b)(3) was revised to correct a grammatical error.

For an application for a permit pursuant to TWC, §11.143, or for an amendment pursuant to TWC, §11.122, to a TWC, §11.143 permit, or a certificate of adjudication which authorizes diversions from a reservoir which is exempted under TWC, §11.142 and pursuant to §295.158(b), the commission adopts §295.153(c)(2) to require notice be mailed to each GCD with jurisdiction over the proposed groundwater production, if the applicant proposes to use groundwater from a well located within a GCD as an alternative source of water. The subsequent paragraph is renumbered.

The commission also adopts nonsubstantive amendments to §295.153(b) - (d) to comply with Texas Register formatting requirements.

Final Regulatory Impact Analysis Determination

The commission reviewed this rulemaking under Texas Government Code, §2001.0225,

"Regulatory Analysis of Major Environmental Rules," and has determined that none of the rules in this rulemaking are a "Major environmental rule." The legislature in 2017 enacted HB 3735 and SB 1430, both of which amend TWC, §11.122 to add TWC, §11.122(b-1) and (b-2). HB 3735 and SB 1430 require the TCEQ to provide an expedited procedure for changing or adding diversion points in a water right when the water right holder begins to use desalinated seawater. HB 3735 also amends TWC, §11.125 to change the map requirements in an application. This rulemaking also implements SB 864 and TWC, §11.132(c) and (d) and §11.143(e) and (f) regarding use of alternative sources of water.

In 2015, the legislature enacted HB 2031, creating TWC, Chapter 18, which relates to marine seawater desalination, and HB 4097, creating TWC, §11.1405, relating to seawater desalination projects for industrial purposes. HB 2031 stated that the purpose of the law is to remain economically competitive in order to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water. The legislature also stated that in this state, marine seawater is a potential new source of water for drinking and other beneficial uses, and that this state has access to vast quantities of marine seawater from the Gulf of Mexico. The legislature stated the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater."

Therefore, the purpose of the rulemaking is not "to protect the environment or reduce risks to human health from environmental exposure," in a way 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 this rulemaking is not to protect the environment or reduce risks to human health from environmental exposures (*see* Texas Government Code, §2001.0225(g)(3)). The specific intent of the rulemaking is to expedite the permitting process for amendments to change diversion points when the holder of the water right begins using desalinated seawater and to prioritize the technical review of such amendments over other applications. This is intended to encourage the use of desalinated water. As is stated in HB 2031, expediting the use of desalinated seawater supports development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits.

Concerning the amended map rules and notice rules relating to the use of an alternative source of water, these are also not "Major environmental rules." The purpose of these rules is to change requirements for maps in applications, and to add additional information in notices when an applicant wants to use an alternate source of water. The rules also add some additional notice requirements. These rules are procedural in nature and are not to protect the environment or reduce risks to human health from environmental exposure.

Even if any of these rules in this rulemaking were a "Major environmental rule," this rulemaking meets none of the criteria in Texas Government Code, §2001.0225, for the requirement to prepare a full Regulatory Impact Analysis. This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not adopted solely under the TCEQ's general rulemaking authority. This rulemaking is adopted under specific state statutes enacted in

HB 3735, SB 864, and SB 1430.

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 these adopted rules and performed analysis of whether these adopted rules constitute a takings under Texas Government Code, Chapter 2007 (*see* Texas Government Code, §2001.0225(g)(3)).

The specific purpose of these adopted rules is to encourage the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water by expediting the process for amendments to change diversion points when the holder of the water right begins using desalinated seawater. In 2015, the legislature added requirements for expedited permitting for the diversion or transport of marine seawater under TWC, Chapter 18, and the diversion of seawater for industrial purposes under TWC, §11.1405.

The adopted rules would substantially advance this stated purpose by allowing the expedited amendments to permits to change or add diversion points when the holder of the water right begins using desalinated seawater.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property. These

rules only allow an expedited amendment to a water right holder to change or add diversion points when the holder begins to use desalinated seawater. These diversions at new diversion points are limited by the amount of desalinated seawater used by the holder and the amount of water the holder was authorized to divert under the water right before the requested amendment. The water diverted from these diversion points cannot be transferred to another basin. Therefore, this expedited amendment process does not impact private real property rights.

Even if these rules were to impact real property rights, the commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules. These rules and the prior rules relating to the use of desalinated seawater are actions taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). Lack of water for drinking and other essential purposes would be a health and safety crisis. This rulemaking could help to provide more drinking water and water for other essential purposes. There will be no or very minimal burden on private real property rights because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. For marine seawater, there are no permanent water rights, real property rights, that have been granted for use of the water in the Gulf of Mexico. For seawater in a bay or arm of the Gulf of Mexico, very few water rights have been granted for this water. Diversions of seawater in a bay or arm of the Gulf are also limited to industrial water. Water for municipal and domestic needs will not be taken from

this part of the Gulf of Mexico.

Concerning the amended map and notice rules, these rules do not impact private real property. The purpose of these procedural rules is to change requirements for maps in applications, and to add notice of an application for use of an alternate source of water. The intent is to bring mapping and platting requirements in TCEQ's rules up-to-date, and to provide notice to GCDs and other interested parties if an applicant is planning to use groundwater as an alternate source. These rules are procedural in nature and do not impact private real property.

Thus, Texas Government Code, Chapter 2007, does not apply to these adopted rules because these rules do not impact private real property. Furthermore, under the adopted rules, the commission may include special conditions in a permit issued under this rulemaking to mitigate adverse impacts on the availability of water for other water rights and water right applicants.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adopted rules related to amended TWC, §11.122, may be subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the

adopted rulemaking is consistent with the applicable CMP goals and policies.

Although the adopted rules are procedural, the rules are related to prior rules that expedite permitting for diverting desalinated seawater. CMP goals applicable to the adopted rules include: 1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); and 2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone. CMP policies applicable to the adopted rules include those contained in 31 TAC §501.33(a). The adopted rules implement HB 3735 and SB 1430, which encourage diversions of desalinated seawater by allowing expedited processing for amendments to add diversion points to an existing water right when the applicant begins use of desalinated seawater. In 2015, in HB 2031, the legislature found, concerning the existing rules, "...that it is necessary and appropriate to grant authority and provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water right protections ..." Since one of the purposes of the expedited amendment rules is to encourage applicants to begin using desalinated seawater in lieu of their existing surface water, the rules are consistent with the CMP goals and policies.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies, because these rules do not create or have a direct or significant adverse effect on any CNRAs, and because one of the purposes of the adopted

rules is to protect coastal and natural resources.

The commission reviewed the rules related to mapping and notice in the rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rules are administrative in nature and will have no substantive effect on commission actions subject to the CMP and are, therefore, consistent with the 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 held a public hearing on March 20, 2018. The comment period closed on March 26, 2018. The commission received comments on Chapter 295 from Poseidon Water LLC (Poseidon) and Prairielands Groundwater Conservation District (the District).

Poseidon and the District suggested changes to the rules.

Response to Comments

General

Comment

Poseidon commented that HB 3735 and SB 1430 reflect that the state wants desalinated water strategies to play an important role in meeting the water supply needs for protection

of human health and economic prosperity. Poseidon commented that the Legislative Statement of Intent for SB 1430 explained that the 2017 State Water Plan indicates that Texas' population is expected to reach 51 million people by 2070 and faces a potential water shortage of 8.9 million acre-feet of water per year under drought of record conditions and meeting future water needs will require new and innovative technologies such as seawater desalination. Poseidon further commented that SB 1430 seeks to encourage the development and use of desalinated seawater and the legislation does not change the priority date of an existing water right or the nature of the technical analysis that is conducted to establish a new diversion point.

Response

The commission acknowledges these comments. No changes were made in response to these comments.

Comment

The District commented that groundwater is a shared resource that is also privately owned, and any improper, wasteful, or illegal production or use of the resource may have far-reaching impacts on landowners' private property rights associated with the groundwater underlying the GCD.

Response

Jurisdiction over whether groundwater use is improper, wasteful, or illegal resides in the GCD from which the groundwater originates. No changes were made in response to these comments.

Proposed §295.73(a)

Comment

Poseidon commented that the rule requirement that the applicant must demonstrate the amount of desalinated seawater the water right holder has begun using does not account for "the typical ramp up period for increased usage of desalinated water." Poseidon further commented that the ramp up should be accommodated by processing applications for the volume of water that "will be in use within a reasonable time of when the water right amendment is issued." Poseidon commented that a contract supporting the ramp up in usage that will occur within a reasonable time should support the processing of the application at the greater volume. Specifically, Poseidon requested that §295.73(a) be amended to include the following language: "(a) Prior to being declared administratively complete, applications submitted under this section must demonstrate the amount of desalinated seawater the water right holder has (i) begun using and (ii) for which it is applying and can demonstrate commitments for use within a reasonable time."

Response

The commission agrees that TWC, §11.122(b-1), can be reasonably interpreted to allow permit amendments to include future use of a designated amount of desalinated

seawater as well as an amount of use of desalinated seawater at the time of the amendment application. An amendment granted under this section will be conditioned upon the actual use of the specified amount of desalinated seawater. The commission agrees that this interpretation of the statute is consistent with the statutory intent of encouraging use of desalinated seawater. Language was added to §295.73(a) in response to these comments stating that, "If the water right holder can demonstrate with certainty a specified amount of desalinated seawater the water right holder will begin using in the future, the commission may declare the application administratively complete, but condition any amendment granted under this section upon the actual use of the specified amount of desalination seawater."

Proposed §295.73(b)

Comment

Poseidon commented that while the expedited diversion point amendment applications authorized under SB 1430 are meant to be prioritized, the legislation is not intended to bring any and all draft permits in the basin to a halt regardless of their relationship to the expedited permit. Poseidon further commented that the legislature intended the commission to have the flexibility to determine which other applications may proceed to final draft permit and which need to be put on hold to take into account the expedited diversion point amendment. Poseidon provided several examples of instances in which Poseidon believed the commission may, based on its expertise, conclude that an application would have no impact on an expedited diversion point amendment. Poseidon commented that the executive director should have discretion to determine that particular applications

should proceed to final draft permit without delay. Poseidon proposed the following language to replace proposed §295.73(b): "Technical review for applications under this section shall be completed prior to all other administratively complete applications in the basin that do not meet the requirements of this section, except to the extent that the Executive Director determines the completion of technical review of the application under this section is not reasonably likely to affect technical review of a particular administratively complete application."

Response

TWC, §11.122(b-2), is the basis for the proposed requirement in §295.73(b) that technical review for expedited diversion point amendments will be completed prior to all other administratively complete applications in the basin. TWC, §11.122(b-2) states "The executive director or the commission shall prioritize the technical review of an application that is subject to Subsection (b-1) over the technical review of applications that are not subject to that subsection." The commission does not share Poseidon's interpretation of proposed §295.73(b) that the executive director must cease working on all other applications in a basin until the expedited diversion point amendment is completed. The executive director can continue to use staff resources to work on the technical review of other applications in the basin as long as staff is prioritizing the expedited diversion point amendment as required by TWC, §11.122(b-2), and the expedited diversion point amendment's technical review is completed prior to all other applications in the basin. No changes were made in response to these comments.

Proposed §295.73(c)

Comment

Poseidon commented that proposed §295.73(c) includes a provision that the commission may include special conditions in an expedited diversion point amendment permit, including, but not limited to a re-opener provision, to mitigate adverse impacts on the availability of water for applications that were administratively complete prior to an application that triggered the expedited review under this section. Poseidon commented that the rationale provided for the provision is that the commission's normal procedure is to process applications in the order received. Poseidon further commented that to incentivize seawater desalination projects, the legislature expressly overrode the commission's normal procedure to provide an expedited path to a final amendment that creates a predictable, reliable, and marketable water supply. Poseidon commented that the operative element of the legislation is time saved in technical review and time saved in contested case hearing and that minimizing the time it takes to get to a final amendment is the core incentive of the legislation. Poseidon requested that the commission not adopt §295.73(c).

Response

A fundamental principal in Texas' prior appropriation water law is the doctrine of seniority whereby each water right is assigned a specific priority date. TWC, §11.027, states that "As between appropriators, the first in time is the first in right." The commission and its predecessor water rights agencies have considered the priority date of a permit or an amendment to be the date upon which an administratively complete application has been accepted for filing and filed with the chief clerk. This interpretation

is codified in §297.44(c) of the commission's current rules. The commission does not agree with Poseidon's comment that the plain language in TWC, §11.122(b-1) and (b-2), "expressly overrode" the longstanding priority doctrine. Instead, the legislation requires the commission to expedite processing of certain applications and to prioritize their technical review. The commission proposes §295.73(c) as a means to harmonize TWC, §11.027, with the provisions in TWC, §11.122(b-1) and (b-2). The commission believes that the process outlined in proposed §295.73 will result in expedited final amendments being issued for the diversion point amendments that meet TWC, §11.122(b-1) and (b-2), requirements while also preserving the priority date for earlier filed applications and mitigating any impacts to the earlier filed applications caused by the expedited diversion point amendment being prioritized in technical review. No changes were made in response to these comments.

Proposed §295.152

Comment

The District recommended that the commission use its discretion to expand the proposed requirement in §295.152(b) beyond the current proposed requirement to publish notice in the area of a GCD for a permit pursuant to TWC, §11.143, or for an amendment under TWC, §11.122, to a TWC, §11.143, permit, or a certificate of adjudication which authorizes diversions from a reservoir which is exempted under TWC, §11.142, in which the applicant proposes to use groundwater from a well located within a GCD as an alternative source of water. Specifically, the District requested that the commission revise the proposed amendment to §295.152 to state that "for an application for a permit pursuant to TWC,

§11.121, or for an amendment to a permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122, and 30 TAC §295.158(b), in which the applicant proposes to use groundwater from a well located in a GCD as an alternative source of water, the applicant shall cause notice issued by the chief clerk to be published in a newspaper of general circulation within each county in which the GCD is located." The District commented that the intent of SB 864 was to apprise not just GCDs, but also landowners in the GCD of the proposed use of groundwater as an alternative source of water in an application before the commission. The District commented that SB 864 clearly requires mailed notice to a GCD, but SB 864 is less clear on the requirements for published notice. The District commented that it is illogical to think that the legislature intended to expand published notice to the area of a GCD for applications under TWC, §11.143, that use groundwater as an alternate source, but did not intend to expand notice for other applications under TWC, §11.121 and §11.122, that use much more groundwater as an alternate source. The District commented that the controlling default language in TWC, §11.132(a), requires the commission to give notice to "persons who in the judgement of the commission may be affected by an application . . ." The District further commented that landowners in an area where groundwater is proposed to be used as an alternative source of water may be affected by an application. Finally, the District commented that the requirement to publish notice in the area of the source of the surface water may not be sufficient to provide landowners who may be affected by an application when the area of the source of surface water does not coincide with the area where the groundwater is located.

Response

In SB 864, the legislature expressly expanded notice for applications under TWC, §11.143 (formerly exempt reservoirs), to include mailed notice to a GCD and published notice to include the area of a GCD. SB 864 also expressly expanded mailed notice for other new applications under TWC, §11.121 and §11.122, by amending TWC, §11.132(d)(2)(B), to include GCDs if an application proposes to use groundwater as an alternative source. SB 864 did not similarly expand published notice under TWC, §11.132(d)(1). No changes were made in response to these comments.

Existing §295.161 (Notice for Bed and Banks Authorizations)

Comment

The District commented that existing §295.161 should also be amended to include mailed notice to GCDs and published notice in the area of a GCD for a TWC, §11.042(c), application to convey groundwater under the jurisdiction of a GCD. The District commented that the legislative intent of SB 864 applies to these conveyances. The District commented that TWC, §11.042, is silent on notice requirements applicable to bed and banks permit applications and that notice for those permit applications is provided through TWC, §11.132(a), and §295.161 which requires mailed notice to certain water right holders downstream of the discharge point as well as Texas Parks and Wildlife Department and the Public Interest Counsel. The District commented that a GCD and the landowners in the GCD have a special interest in the use of groundwater in a bed and banks application that is similar to Texas Parks and Wildlife Department and the Public Interest Counsel. The District commented that a GCD is statutorily required to manage and conserve groundwater resources and does so primarily through issuance of permits. The District commented that notice of a bed and

banks application gives the GCD or an affected landowner the opportunity to ensure the applicant's use of groundwater is permitted and in compliance with the GCDs rules by participating in a hearing prior to the issuance of the bed and banks permit when groundwater may not be available.

Response

For TWC, §11.042, bed and banks applications involving groundwater from wells in a GCD, commission practice has been to require the applicant to provide a groundwater permit or proof that no permit is required. Statute and commission rules do not require notice to GCDs for these applications. However, any person, including a GCD, may request to be placed on an interested persons list and receive notices for applications within a county or basin. In SB 864, the legislature expressly expanded notice for applications under TWC, §11.143 (formerly exempt reservoirs), to include mailed notice to a GCD and published notice to include the area of a GCD. SB 864 also expressly expanded mailed notice for other new applications under TWC, §11.121 and §11.122, by amending TWC, §11.132(d)(2)(B), to include GCDs if an application proposes to use groundwater as an alternative source. SB 864 did not similarly expand notice for applications under TWC, §11.042. No changes were made in response to these comments.

SB 864

Comment

The District commented that SB 864 was created as a stakeholder consensus bill through the joint efforts of the Texas Water Conservation Association's Legislative Groundwater and Surface Water Committees and that the General Manager for the District participated in the drafting and discussions on the intent of the bill. The District commented that SB 864 was unchanged throughout the legislative process.

Response

The commission acknowledges these comments. No changes were made in response to these comments.

Comment

The District commented that commission staff requested input to specific questions relating to the implementation of SB 864.

Response

The commission clarifies that staff requested input on the questions during the informal stakeholder meeting in September 2017 and based these rules on the legislation and consideration of comments received from the stakeholders during the informal stakeholder process. No changes were made in response to these comments.

**SUBCHAPTER A: REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL
PROVISIONS**

**DIVISION 7: REQUIREMENTS FOR APPLICATIONS FOR AMENDMENTS TO WATER USE
PERMITS AND EXTENSIONS OF TIME**

§295.73

Statutory Authority

The new rule is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the TCEQ's authority over water and water rights; TWC, Chapter 18, concerning Marine Seawater Desalination Projects; TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes; and TWC, §11.122, relating to water rights amendments.

The new rule implements House Bill 3735 and Senate Bill 1430 (85th Texas Legislature, 2017) and TWC, §11.122(b-1) and (b-2).

§295.73. Texas Water Code, §11.122(b-1) Amendment Applications.

(a) Prior to being declared administratively complete, applications submitted under this section must demonstrate the amount of desalinated seawater the water right holder has begun using. If the water right holder can demonstrate with certainty a specified

amount of desalinated seawater the water right holder will begin using in the future, the commission may declare the application administratively complete, but condition any amendment granted under this section upon the actual use of the specified amount of desalination seawater.

(b) Technical review for applications under this section will be completed prior to all other administratively complete applications in the basin that do not meet the requirements of this section.

(c) The commission may include special conditions in the permit, including, but not limited to a re-opener provision, to mitigate adverse impacts on the availability of water for applications that were administratively complete prior to an application that triggered the expedited technical review under subsection (b) of this section.

**SUBCHAPTER A: REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL
PROVISIONS**

**DIVISION 12: MAPS, PLATS, AND DRAWINGS ACCOMPANYING APPLICATION FOR
WATER USE PERMIT**

[§§295.121 - 295.126]

Statutory Authority

The repeal of the rules is adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the commission's authority over water and water rights; and TWC, §11.125, relating to maps and plats.

The repeal of the rules implements House Bill 3735 (85th Texas Legislature, 2017) and TWC, §11.125(a).

§295.121. Requirements.

§295.122. Drawings Not To Be Folded.

§295.123. Content Requirements of Maps.

§295.124. Additional Requirements for Dams and Reservoirs.

§295.125. Requirements for Temporary Permits.

§295.126. Requirements for Texas Water Code, §11.143, Permits.

**SUBCHAPTER A: REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL
PROVISIONS**

**DIVISION 12: MAPS, PLATS, AND DRAWINGS ACCOMPANYING APPLICATION FOR
WATER USE PERMIT**

§295.121, §295.122

Statutory Authority

The new rules are adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the commission's authority over water and water rights; and TWC, §11.125, relating to maps and plats.

The new rules implement House Bill 3735 (85th Texas Legislature, 2017) and TWC, §11.125(a).

§295.121. Content Requirements of Maps.

Applications must include maps or plats in the form and containing the information specified in the relevant water right form and instructions for the particular authorization sought.

§295.122. Requirements for Dams and Reservoirs.

Maps, plats, or drawings submitted with application plans for dam and reservoir projects must include the information described in §299.3 of this title (relating to General).

SUBCHAPTER C: NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS

§§295.151 - 295.153

Statutory Authority

The amendments are adopted under the authority of Texas Water Code (TWC), §5.102, concerning General Powers, TWC, §5.103, concerning Rules, and §5.105 concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC; TWC, §5.013(a)(1), concerning the commission's authority over water and water rights; TWC, §11.132, relating to notice; and TWC, §11.143, relating to use of water from an exempt reservoir for nonexempt purposes.

The amendments implement House Bill 864 (85th Texas Legislature, 2017); TWC, §11.132(c) and (d); and TWC, §11.143(e) and (f).

§295.151. Notice of Application and Commission Action.

(a) At the time that the technical review of an application for a permit to use state water has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the commission shall give notice by mail to those persons specified in §295.153 of this title (relating to Notice By Mail). At such time, the chief clerk shall furnish a copy of the notice to the applicant, and the applicant shall cause such notice to be published, pursuant to §295.152 of this title (relating to Notice By Publication).

(b) The notice must:

(1) state the name and address of the applicant;

(2) state the date on which the application was received by the commission;

(3) state the date the application was filed by the executive director with the chief clerk as required by §281.17(a) or (b) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness);

(4) state that the executive director has determined that the technical review of the application is complete;

(5) state the application number;

(6) state the type of permit the applicant is seeking;

(7) state the purpose and extent of the proposed appropriation of water;

(8) identify the source of supply and the place where the water is to be stored or taken or diverted from the source of supply;

(9) identify any proposed alternative source of water, other than state water, identified by the application;

(10) state the executive director's recommendation regarding the application;

(11) state that an affected person may request a hearing as set out in Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications);

(12) give a general description of the location and area of any land to be irrigated;

(13) include the name and address of the agency, and the telephone number of an agency contact from whom interested persons may obtain future information; and

(14) give any additional information the commission considers necessary.

§295.152. Notice By Publication.

(a) For an application for a permit pursuant to Texas Water Code (TWC), §11.121, or for an amendment to a TWC, §11.121, permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122, and §295.158(b) of this title (relating to Notice of Amendments to Water Rights), the applicant shall cause the notice issued by the chief clerk

to be published in a newspaper of general circulation within the section of the state where the source of water is located.

(b) For an application for a permit pursuant to TWC, §11.143, or for an amendment pursuant to TWC, §11.122, to a TWC, §11.143, permit, or a certificate of adjudication which authorizes diversions from a reservoir which is exempted under TWC, §11.142, in which the applicant proposes to use groundwater from a well located within a groundwater conservation district as an alternative source of water, the applicant shall cause the notice issued by the chief clerk to be published in a newspaper of general circulation within each county in which the groundwater conservation district is located.

(c) The date of publication shall be on or before the date of publication directed by the chief clerk of the commission. In any event, the date of publication shall be not less than 30 days before the date set for commission consideration of the application.

§295.153. Notice By Mail.

(a) If notice by mail is required, the commission shall mail the notice by first-class mail, postage prepaid, to persons listed in this section for each type of application. The commission shall mail required notice not less than 30 days before the date set for commission consideration of the application.

(b) For an application for a permit pursuant to Texas Water Code (TWC), §11.121, or for an amendment to a TWC, §11.121, permit, a certified filing, or a certificate of adjudication pursuant to TWC, §11.122, and §295.158(b) of this title (relating to Notice of Amendments to Water Rights), notice shall be mailed to the following:

(1) each claimant or appropriator of water from the source of water supply, the record of whose claim or appropriation has been filed with the commission or its predecessor agencies;

(2) all navigation districts within the river basin concerned;

(3) each groundwater conservation district with jurisdiction over the proposed groundwater production, if the applicant proposes to use groundwater from a well located within a groundwater conservation district as an alternative source of water; and

(4) other persons who, in the judgment of the commission, might be affected.

(c) For an application for a permit pursuant to TWC, §11.143, or for an amendment pursuant to TWC, §11.122, to a TWC, §11.143, permit, or a certificate of adjudication which authorizes diversions from a reservoir which is exempted under TWC, §11.142, and pursuant to §295.158(b) of this title, notice shall be mailed to the following:

(1) each person whose claim or appropriation has been filed with the commission or its predecessor agencies and whose diversion point is downstream from the location of the dam or reservoir as described in the application;

(2) each groundwater conservation district with jurisdiction over the proposed groundwater production, if the applicant proposes to use groundwater from a well located within a groundwater conservation district as an alternative source of water; and

(3) other persons who, in the judgment of the commission, might be affected.

(d) For an application to amend a certified filing authorizing diversions from a reservoir which is exempted under TWC, §11.142, which, if granted, will cause a change in the reservoir so that it would no longer be exempt under TWC, §11.142, notice shall be mailed to the persons listed in subsection (b) of this section.

(e) For an application to authorize the use of state water for domestic and livestock use from a reservoir constructed by the federal government for which no local sponsor has been designated nor permit issued, the commission shall issue such notice as it deems appropriate.