

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts an amendment to §297.46 *without change* to the proposed text as published in the February 23, 2018, issue of the *Texas Register* (43 TexReg 1026) and, therefore, the section will not be republished.

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

In 2017, the 85th Texas Legislature passed House Bill (HB) 3735, which became effective on September 1, 2017. Existing Texas Water Code (TWC), §11.134(b)(3)(C), states that the commission may only grant a water right application if it is not detrimental to the public welfare. HB 3735 amended TWC, §11.134, by adding TWC, §11.134(b-1) which states that the commission may consider only the factors that are within the jurisdiction and expertise of the commission as established by TWC, Chapter 11, in determining whether an appropriation is detrimental to the public welfare. The change the commission adopts to Chapter 297 implements the further defining of the TCEQ's consideration of public welfare required by HB 3735. Specifically, the commission amends §297.46 to implement the changes required by HB 3735.

In September 2017, the commission held an informal stakeholder meeting to solicit comments regarding the implementation of HB 3735. The executive director based this rule 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 new and amended sections to implement HB 3537 and SB 1430 in 30 TAC

Chapter 80, Contested Case Hearings; HB 1648 in 30 TAC Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements; and HB 3735 and SB 1430 in 30 TAC Chapter 295, Water Rights, Procedural.

### **Section Discussion**

#### *§297.46, Consideration of Public Welfare*

Section 297.46 provides that the commission may grant an application for a new or amended water right only if it finds that it would not be detrimental to the public welfare. The commission adopts amended §297.46 to add "For purposes of public welfare findings made under this section, the commission may consider only factors that are within the commission's jurisdiction and expertise as established in Texas Water Code, Chapter 11." The commission adopts this amendment to implement TWC, §11.134(b-1), as amended by HB 3735.

### **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 this rulemaking is not a "Major environmental rule." HB 3735 amended TWC, §11.134, to add that the TCEQ may consider only the factors that are within the jurisdiction and expertise of the TCEQ as established by TWC, Chapter 11, in determining whether an appropriation is detrimental to the public welfare. This rulemaking implements that statute.

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 rule 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 rule is to enumerate what the TCEQ may consider when it is determining whether an application for a water right is detrimental to the public welfare under TWC, §11.134(b)(3)(C). This rule is consistent with existing case law and the TCEQ's current interpretation of TWC, §11.134.

Even if this rulemaking was 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 adopted solely under the TCEQ's general rulemaking authority. This rulemaking is adopted under a specific state statute enacted in HB 3735.

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 rule and performed analysis of whether this adopted rule constitutes a takings under Texas Government Code, Chapter 2007 (*see* Texas Government Code, §2001.0225(g)(3)). The specific purpose of the adopted rule is to incorporate the requirements of HB 3735 into the TCEQ's rules by stating that for the purpose of

determining whether an application for a water right is detrimental to the public welfare under TWC, §11.134(b)(3)(C), the TCEQ may only consider factors that are within the commission's jurisdiction and expertise as established by TWC, Chapter 11. The adopted rule advances this stated purpose by incorporating this statutory directive into the rule requiring the public welfare determination. The rule does not burden private real property in any way.

### **Consistency with the Coastal Management Program**

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

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

### **Public Comment**

The commission offered a public hearing on March 20, 2018. The comment period closed on March 26, 2018. The commission did not receive any comments for Chapter 297.

## SUBCHAPTER E: ISSUANCE AND CONDITIONS OF WATER RIGHTS

### §297.46

#### **Statutory Authority**

The amendment 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; and TWC, §11.134(b-1), which relates to the factors that the commission may consider when determining whether a water right application is detrimental to public welfare.

The amendment implements House Bill 3735, Section 5 (85th Texas Legislature, 2017) and TWC, §11.134(b-1), which relate to the factors that the commission may consider when determining whether a water right application is detrimental to the public welfare.

#### **§297.46. Consideration of Public Welfare.**

The commission may grant an application for a new or amended water right only if it finds that it would not be detrimental to the public welfare. For purposes of public welfare findings made under this section, the commission may consider only factors that are within the commission's jurisdiction and expertise as established in Texas Water Code, Chapter 11.