

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §297.46.

Background and Summary of the Factual Basis for the Proposed 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 proposes to Chapter 297 implements the further defining of the TCEQ's consideration of public welfare required by HB 3735. Specifically, the commission proposes to amend §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 proposed 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 proposes 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 by 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 proposes to amend §297.46 to add a sentence which states "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 proposes this amendment to implement TWC, §11.134(b-1), as amended by HB 3735.

Fiscal Note: Costs to State and Local Government

Maribel Montalvo, analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency and no fiscal implications are expected for units of local government as a result of the administration or enforcement of the proposed rule.

The proposed rulemaking implements HB 3735 by adopting rules to clarify that the commission will only consider factors that are within its jurisdiction and expertise as established in TWC, Chapter 11, for purposes of public welfare findings made for water rights applications. This rulemaking also codifies the commission's existing practices.

Public Benefits and Costs

Ms. Montalvo also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be clearer agency rules and the potential for more efficient contested case hearings.

No fiscal implications are anticipated for businesses or individuals as a result of the implementation or administration of the proposed rule as the rulemaking merely codifies the commission's existing practices. The codification of the commission's practices with respect to public welfare determinations in water rights applications may reduce time spent during contested case hearings discussing public welfare arguments that are outside the commission's jurisdiction and expertise.

Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rule does not adversely affect a rural community in a material way for the first five years that

the proposed rule is in effect. The proposed rule would apply statewide and affect rural communities and urban communities equally.

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 rule for the first five-year period the proposed rule is in effect.

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 rule does not adversely affect small or micro-businesses for the first five-year period the proposed rule is in effect and is intended to implement HB 3735.

Government Growth Impact Statement

The commission reviewed this proposed rulemaking and determined that a Government Growth Impact Statement assessment is not required because the proposed rule does not create or eliminate a government program; does not require the creation of new employee positions or the elimination of existing employee positions; does not require an increase or decrease in future legislative appropriations to the agency; does not require an increase or decrease in fees paid to the agency; does not require the creation of a new regulation; does not expand, limit or repeal an existing regulation; and does not change the number of individuals subject to the rule's applicability.

During the first five years that the proposed rule would be in effect it is not anticipated that there will be an adverse impact on the state's economy.

Draft 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 not being proposed solely under the TCEQ's general rulemaking authority. This rulemaking is being proposed under a specific state statute enacted in HB 3735.

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 rule and performed analysis of whether this proposed rule constitutes a takings under Texas Government Code, Chapter 2007 (*see* Texas Government Code, §2001.0225(g)(3)). The specific purpose of the proposed 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 proposed 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 proposed rule 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 proposed rule is not subject to the Texas Coastal Management Program.

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 March 20, 2018, at 10:00 a.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:

<http://www1.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 2017-034-295-OW. The comment period closes on March 26, 2018. Copies of the proposed rulemaking can be obtained from the commission's website at

http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Ross Henderson, Water Availability Division, at (512) 239-4735.

SUBCHAPTER E: ISSUANCE AND CONDITIONS OF WATER RIGHTS

§297.46

Statutory Authority

The amendment to the rule is proposed 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 to the rule 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.