

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes new Subchapter A, §§261.1 - 261.6, concerning Environmental, Social, and Economic Impacts Statements; and Subchapter B, §§261.21 - 261.23, concerning Guidelines for Preparation of Environmental, Social, and Economic Impacts Statements; and proposes the repeal of §§261.21 - 261.26 and §§261.41 - 261.43, General Provisions. The purpose of the repeal and the new sections is to rename the chapter and one subchapter, reformat both subchapters, and amend two sections.

The commission also proposes the review of the rules in Chapter 261 as required by the Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999. The proposed notice of review can be found in the Review of Agency Rules section of this issue of the *Texas Register*.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Chapter 261 is a recodification of a rule first adopted by the former Texas Water Rights Commission (TWRC). The TWRC rule (formerly §129.03.25.008) allowed environmental impact evidence created for proposed projects to be introduced into evidence in commission proceedings where statutory criteria for the review of an application included public welfare. The rule later was readopted with four subchapters under Chapter 261, General Provisions, by the Texas Department of Water Resources. In 1996, Subchapters A and C were removed from Chapter 261 and incorporated into Chapters 1 and 10. Subchapter B, concerning Environmental, Social, and Economic Impacts Statements; and Subchapter D, concerning Guidelines for Preparation of Environmental Impact Studies, were left intact and now comprise all that remains of Chapter 261.

SECTION BY SECTION ANALYSIS

These rules are needed when an impact statement is required on a proposed project or permit to determine whether the project or permit is detrimental to the public interest or welfare. An example would be the public welfare criteria for a water rights application contained in the Texas Water Code (TWC), §11.134, concerning Action on Application. Applications for water rights are routinely reviewed for environmental impacts. Those which involve reservoir construction have the potential for far-reaching impacts on public welfare, both within the project area and downstream. In addition, TWC, §11.085, concerning Interbasin Transfers, requires applicants to assess the projected economic impact expected to occur in each basin as a result of an interbasin transfer. Multiple TWC sections require the commission to assess impacts of proposed projects as they relate to surface water and groundwater quality. Chapter 261 provides the commission the discretion to require an impact statement if an impact statement is not otherwise required to be submitted with a related federal permit application, such as a permit under the Federal Clean Water Act (CWA), §404. In the latter case, this impact statement also must be submitted to the commission with the water rights application.

The commission has conducted a preliminary review of the rules under Chapter 261 and has determined that the justification for their adoption continues to exist. The commission is required by various sections of the TWC to review and assess the potential impacts of proposed projects as they relate to surface water and groundwater. Examples of those sections include §§11.085; 11.134; 11.147, concerning Effects of Permit on Bays and Estuaries and Instream Uses; §11.150, concerning Effects of Permits on Water Quality; §11.151, concerning Effects of Permits on Groundwater; and

§11.152, concerning Effects of Permits on Fish and Wildlife Habitats. Assessments under §11.085 include, for each basin, projected economic impacts; impacts on water rights, instream uses, water quality, and aquatic habitats; and effects on bays and estuaries that must be assessed under §§11.147, 11.150, and 11.152 of the TWC. Assessments under §11.134 include effects on the public welfare. Assessments under §11.147 include effects of inflow quality, quantity, and frequency on bays and estuaries. Assessments under §11.150 include effects on water quality. Assessments under §11.151 include effects on groundwater and groundwater recharge. Assessments under §11.152 include effects on fish and wildlife habitats.

The rules under the current Chapter 261, Subchapter B, establish requirements for environmental impact evidence and statements which will allow the commission to consider environmental, social, and economic impacts of a proposed project. The rules under the current Subchapter D address the impacts assessment process and the content of an impacts statement. While many proposed projects have a federal requirement for an impacts statement, a few do not. The rules under Chapter 261 give the commission the option to require an impacts statement in either case and the rules will continue to assist the commission in conducting environmental impacts assessments required under the TWC. Some changes in format and titles are needed to improve the structure of the chapter and three minor wording changes will improve readability. Accordingly, the repeal of the current Chapter 261 and adoption of a new Chapter 261 are proposed.

The proposed Chapter 261 contains the following changes from the existing chapter. The new chapter title will be “Impact Statements” to better reflect the subject of the rules. The existing Subchapter B

will become Subchapter A, titled “Environmental, Social, and Economic Impacts Statements,” with renumbering of its sections as §§261.1 - 261.6. Proposed word changes in §261.3, concerning Executive Director’s Recommendation, include replacing “In his” with “After” and replacing “he” with “executive director” in the first sentence. The only other proposed content change appears in §261.5, concerning Impacts Statement Guidelines, in which a reference to Subchapter C will be changed to Subchapter B, concerning Guidelines for Preparation of Environmental, Social, and Economic Impacts Studies.

The existing Subchapter D will become Subchapter B, titled “Guidelines for Preparation of Environmental, Social, and Economic Impacts Statements,” with renumbering of its sections as §§261.21 - 261.23.

FISCAL NOTE

Bob Orozco, Strategic Planning and Appropriations Division, has determined that for the first five-year period the proposed s are in effect there will be no significant fiscal implications for the commission or other units of state and local government as a result of administration or enforcement of the proposed sections to Chapter 261, General Provisions. The proposed sections recodify Chapter 261 and rename the chapter “Impact Statements” to better reflect the subject of the rule. The proposed sections reformat the chapter, correct or update references, and make the rules easier to read and understand. The proposed sections do not add any requirements to currently existing rules.

Chapter 261 applies to certain permits and projects and requires applicants to offer environmental, social, and economic impacts evidence where such evidence is required by law or where the proposed project or permit is detrimental to the public interest or welfare. Examples of significant adverse impacts which may require such evidence include impacts which disrupt historical, or archaeological sites; affect natural, cultural, or scenic resources; disrupt established communities or their development plans; result in deterioration of air or water quality, or flood protection; result in unallowable reduction of identifiable in-stream uses; endanger species of plant and animal life, or their habitat; significantly reduce productivity of the bay and estuary systems; or contribute to a series of related projects that involve individually minor but collectively significant adverse impacts.

Applications for water rights are routinely reviewed for impacts on public welfare. In addition, water interbasin transfers require applicants to assess the projected impact expected in each basin as a result of transfers. The two subchapters of the proposed sections continue to address environmental, social, and economic impact statements and guidelines for preparation of environmental impact studies. The proposed sections also retain commission discretion to require an impact statement if an impact statement is not otherwise required to be submitted with a related federal permit application.

PUBLIC BENEFIT

Mr. Orozco has also determined that for each year of the first five-years the proposed sections to Chapter 261 are in effect, the public benefit anticipated from enforcement of and compliance with the proposed sections will be enhanced clarity in general commission processes, enhanced understanding by making the rules easier to read, and consistency with state and federal

requirements. These benefits are anticipated to assist the public and the regulated community in their understanding of and compliance with the regulations.

The proposed sections to Chapter 261 are administrative in nature and do not impose any additional requirements beyond those which currently exist. Therefore, there are no additional economic costs anticipated to any person required to comply with the proposed sections.

SMALL BUSINESS AND MICRO-BUSINESS ANALYSIS

The proposed sections to Chapter 261 are administrative in nature and do not impose any additional requirements beyond those which currently exist. No adverse economic effects are anticipated to any small business or micro-business as a result of implementing the proposed sections. The proposed sections remain consistent with state and federal requirements and make current requirements easier to read and understand.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. “Major environmental rule” means a rule the specific intent of which is 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. The proposed sections

to Chapter 261 are not anticipated to 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 because the proposed sections are administrative in nature and are intended to reformat the chapter, correct or update references, and make the rules easier to read and understand. The proposed sections do not add any additional regulatory requirements. In addition, the proposed sections do not meet the applicability requirements of a "major environmental rule." The proposed sections do not exceed a standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of a delegation agreement. In addition, the proposed sections are consistent with the TWC.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposal under the Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to repeal Chapter 261 and adopt it in a new format. This action will not affect private real property which is the subject of the rules because this rulemaking action does not restrict or limit the owner's right to the property that otherwise would exist in the absence of the rulemaking. Further, this rulemaking is not the producing cause of the reduction in the market value of private real property. Therefore, this action, which involves no change in requirements, does not create a burden on private real property and will not constitute a takings under the Texas Government Code, §2007.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program.

The commission has reviewed this proposal for consistency with the CMP goals and policies listed in the rules of the Coastal Coordination Council, §§501.12 - 501.15, and has determined that the rulemaking is consistent with the applicable CMP goals and policies. The rulemaking involves only renaming, reformatting, and three minor revisions. No changes are proposed in the requirements of this chapter.

The applicable CMP goals under §501.12, concerning Goals, are Nos. 1, 2, 3, 5, and 8. The applicable CMP policy under §501.13(a), concerning Administrative Policies, is number (1), and the applicable CMP policies under §501.14, concerning Policies for Specific Activities and Coastal Natural Resource Areas, are (b), (c), (d), (f), (h), (i), (j), and (r). Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

SUBMITTAL OF COMMENTS

Comments may be submitted to Bettie Bell, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 98054-261-AD. Comments must be received by 5:00 p.m.,

December 13, 1999. For further information or questions concerning this proposal, please contact Barry Irwin, Policy and Regulations Division, at (512) 239-1461.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

STATUTORY AUTHORITY

The new sections are proposed under the Texas Water Code, §§5.103, 5.105, 11.147, 11.150, 11.151, 11.152, 26.003, 26.011, 27.003, and 27.019, which authorize the commission to adopt rules necessary to carry out its responsibilities and duties under the Texas Water Code and other laws of Texas; to establish and approve all general policy of the commission; to consider impacts on public welfare; and to promote the state policies of maintaining the propagation and protection of terrestrial and aquatic life, preventing contamination which is dangerous to animal life, and protecting the state's natural resources.

The proposed sections implement Texas Water Code, §§5.103, 5.105, 11.147, 11.150, 11.151, 11.152, 26.003, 26.011, 27.003, and 27.019, which require the commission to permit and otherwise regulate activities which affect ecology, habitat, productivity, and public welfare as they relate to groundwater, surface water, and instream water quality.

**SUBCHAPTER A : ENVIRONMENTAL, SOCIAL, AND ECONOMIC
IMPACTS STATEMENTS**

§§261.1 - 261.6

§261.1. Relevance of Impacts Evidence.

The commission may require and will consider environmental, social, and economic impacts evidence as relevant in any hearing in which the commission is directed by law to consider such evidence or to determine whether any proposed project or permit is detrimental to the public interest or welfare.

§261.2. Filing of Federal Statement Required.

If an agency of the federal government prepares or requires an environmental, social, and economic impacts statement for authorization or funding of a proposed project, then the applicant shall file the statement prepared or required by the federal government, or the most current draft statement, in each proceeding before the commission in which such statement is pertinent.

§261.3. Executive Director's Recommendation.

After initial review of an application, and prior to submission to the commission, the executive director shall notify the applicant if the executive director intends to recommend to the commission that

the applicant be required to offer environmental, social, and economic impacts evidence either in a written statement, oral testimony, or both. This section shall not preclude the executive director or any other party in any proceeding before the commission from offering, nor preclude the commission from considering, any environmental, social, and economic impacts evidence.

§261.4. Statement Filed with Executive Director.

If an environmental, social, and economic impacts statement is required, the applicant shall file it with the executive director for review in accordance with §§281.1 - 281.24 of this title (relating to Applications Processing) or as otherwise directed by the executive director.

§261.5. Impacts Statement Guidelines.

If the federal government does not prepare or require an environmental, social, and economic impacts statement, then any written evidence which may be required of the applicant by the commission shall be prepared in accordance with the guidelines set forth in Subchapter B of this chapter (relating to Guidelines for Preparation of Environmental, Social, and Economic Impacts Statements).

§261.6. Impact Statement Supplemented by Testimony.

Nothing in this subchapter shall be construed to prohibit supplementing environmental, social, and economic impacts statement with additional evidence developed through testimony during a public hearing.

**SUBCHAPTER B : GUIDELINES FOR PREPARATION OF
ENVIRONMENTAL, SOCIAL, AND ECONOMIC IMPACTS STATEMENTS**

§§261.21 - 261.23

The new sections are proposed under the Texas Water Code, §§5.103, 5.105, 11.147, 11.150, 11.151, 11.152, 26.003, 26.011, 27.003, and 27.019, which authorize the commission to adopt rules necessary to carry out its responsibilities and duties under the Texas Water Code and other laws of Texas, to establish and approve all general policy of the commission, and to promote the state policies of maintaining the propagation and protection of terrestrial and aquatic life, preventing contamination which is dangerous to animal life, and protecting the state's natural resources.

The proposed sections implement Texas Water Code, §§5.103, 5.105, 11.147, 11.150, 11.151, 11.152, 26.003, 26.011, 27.003, and 27.019, which require the commission to permit and otherwise regulate activities which affect ecology, habitat, productivity, and public welfare as they relate to groundwater, surface water, and instream water quality.

§261.21. Introduction.

An impacts statement predicts anticipated changes which are the result of a proposed action, and determines the magnitude and extent of the particular changes through analyses and professional judgment. The statement should demonstrate that a systematic interdisciplinary approach was used in

assessing environmental, social, and economic impacts, that all reasonable alternatives were considered, and that the assessment was relied upon to support decisions made in planning the project.

§261.22. Impact Assessment Process.

(a) Assessment of the environmental, social, and economic impacts of proposed projects should be undertaken concurrently with initial engineering and other technical studies. The impacts assessment process consists of two basic steps. The first step requires description of potential environmental, social, and economic changes. The second step requires evaluation of these changes, focusing on significant beneficial and adverse impacts.

(b) Examples of "significant adverse impacts" are those which:

- (1) disrupt historical or archeological sites;
- (2) affect natural, cultural, or scenic resources;
- (3) disrupt established communities or their development plans;
- (4) result in deterioration of air or water quality, or flood protection;
- (5) result in unallowable reduction of identifiable in-stream uses;

(6) endanger species of plant and animal life, or their habitat;

(7) significantly reduce productivity of the bay and estuary systems; or,

(8) contribute to a series of related projects that involve individually minor but collectively significant adverse impacts.

§261.23. Specific Guidelines for the Impacts Statement.

(a) The impacts statement should include:

(1) a brief, complete, and accurate description of the proposed project, including its scope, purpose, and cost (referencing the engineering report plus supplemental data, if any);

(2) a description of the environmental setting of the area affected as it exists prior to the proposed action;

(3) a description of the relationship of the proposed action to land use plans, policies, and controls for the affected area and probable future conditions which would exist in the area with and without the proposed action;

(4) an evaluation of the probable environmental, social, and economic impacts including positive and negative, primary and direct, secondary and indirect impacts, of the proposed action, and a discussion of the efforts made to eliminate, reduce, or mitigate the adverse impacts; and

(5) alternatives to the proposed action (referencing the engineering report plus supplemental data, if any).

(b) An environmental studies assessment prepared using the guidelines cited in subsection (a) of this section should provide sufficient information to answer the following basic questions:

(1) What is the scope of the proposed action?

(2) What adverse and/or beneficial environmental, social, and economic impacts will occur to the affected area should the proposed action be implemented?

(3) What area would be served by the action and what effect would it have on the regional population movement and density?

(4) Have all reasonable alternatives to the proposed action been addressed?

(5) Will the proposed action affect groundwater, streams, reservoirs, other water resources and in-stream uses of the study area and will it impact the bay and estuarine systems?

(6) Have plans been included to eliminate, reduce, or mitigate expected adverse impacts on the resources in the area of the proposed action?

(7) What effect does the project have on energy and natural resource conservation and development, or on the use of agricultural land?

(8) What are the relationships between short-term uses provided by the proposed action and the long-term productivity of the environment under the no-action alternative?

(9) How would the project fit into long-term regional development plans?

GENERAL PROVISIONS

SUBCHAPTER B : ENVIRONMENTAL SOCIAL, AND ECONOMIC IMPACTS STATEMENTS

§§261.21 - 261.26

The repealed sections are proposed under the Texas Water Code, §§5.103, 5.105, 11.147, 11.150, 11.151, 11.152, 26.003, 26.011, 27.003, and 27.019, which authorize the commission to adopt rules necessary to carry out its responsibilities and duties under the Texas Water Code and other laws of Texas, to establish and approve all general policy of the commission, and to promote the state policies of maintaining the propagation and protection of terrestrial and aquatic life, preventing contamination which is dangerous to animal life, and protecting the state's natural resources.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 11.147, 11.150, 11.151, 11.152, 26.003, 26.011, 27.003, and 27.019, which require the commission to permit and otherwise regulate activities which affect ecology, habitat, productivity, and public welfare as they relate to groundwater, surface water, and instream water quality.

§261.21. Relevance of Impacts Evidence.

§261.22. Filing of Federal Statement Required.

§261.23. Executive Director's Recommendation.

§261.24. Statement Filed with Executive Director.

§261.25. Impacts Statement Guidelines.

§261.26. Impact Statement Supplemented by Testimony.

GENERAL PROVISIONS

SUBCHAPTER D : GUIDELINES FOR PREPARATION OF ENVIRONMENTAL IMPACT STUDIES

§§261.41 - 261.43

The repealed sections are proposed under the Texas Water Code, §§5.103, 5.105, 11.147, 11.150, 11.151, 11.152, 26.003, 26.011, 27.003, and 27.019, which authorize the commission to adopt rules necessary to carry out its responsibilities and duties under the Texas Water Code and other laws of Texas, to establish and approve all general policy of the commission, and to promote the state policies of maintaining the propagation and protection of terrestrial and aquatic life, preventing contamination which is dangerous to animal life, and protecting the state's natural resources.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 11.147, 11.150, 11.151, 11.152, 26.003, 26.011, 27.003, and 27.019, which require the commission to permit and otherwise regulate activities which affect ecology, habitat, productivity, and public welfare as they relate to groundwater, surface water, and instream water quality.

§261.41. Introduction.

§261.42. Impact Assessment Process.

§261.43. Specific Guidelines for the Impacts Statement.