

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§295.300 - 295.306.

Sections 295.300 - 295.306 are adopted *with changes* to the proposed text as published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3845).

Background and Summary of the Factual Basis for the Adopted Rules

In 2015, the 84th Texas Legislature passed House Bill (HB) 2031 and HB 4097. HB 2031 relates to the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater. HB 4097 addresses seawater desalination for industrial purposes.

In HB 2031, the legislature declared that: "With this state facing an ongoing drought, continuing population growth, and the need to remain economically competitive, every effort must be made to secure and develop plentiful and cost-effective water supplies to meet the ever-increasing demand for water." The legislature also declared that: "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from the Gulf of Mexico." To that end, 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 desalination."

These rules allow the regulatory process for the diversion of seawater or marine

seawater and conveyance of treated marine seawater in the bed and banks to be expedited. These applications can be expedited because they do not require a determination of water availability and; consequently, do not require the extensive technical review associated with a water availability determination nor do they have to be processed in priority date order. Additionally, the statute requires the Texas Parks and Wildlife Department (TPWD) and the Texas General Land Office (GLO) to conduct a study to develop zones appropriate for the diversion of marine seawater. HB 2031 requires the TPWD and the GLO to submit a report to the commission that "must include recommended diversion zones for designation by the commission and recommendations for the number of points from which, and the rate at which, a facility may divert marine seawater." HB 2031 then requires the commission to adopt rules to designate appropriate diversion zones. The designation of diversion zones will also expedite the review of these applications.

In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects. HB 2031 also amended TWC, §5.509, Temporary or Emergency Order Relating to Discharge of Waste or Pollutants; TWC, §5.551, Permitting Procedures; Applicability; TWC, §7.302, Grounds for Revocation or Suspension of Permit; TWC, §11.0237, Water Rights for Instream Flows Dedicated to Environmental Needs or Bay and Estuary Inflows; TWC, §11.082, Unlawful Use: Civil Penalty; TWC, §11.0842, Administrative Penalty; TWC, §11.121, Permit Required; TWC, §16.053, Regional Water Plans; and TWC, §26.0291, Water Quality Fee. In addition, HB 2031 amended Texas Health and Safety Code (THSC), Chapter 341, Subchapter C, by

adding THSC, §341.0316, Desalination of Marine Seawater for Drinking Water, and repealed TWC, §16.060, Desalination Studies and Research.

TWC, §18.003(a), requires a person to obtain a permit to divert and use state water that consists of marine seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a total dissolved solids (TDS) concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter (mg/L). TWC, §18.003(b), creates an exemption from permitting to divert and use marine seawater if TWC, §18.003(a), does not apply. In addition, TWC, §18.005(c), requires a person to obtain a permit to discharge: 1) treated marine seawater into a natural stream in this state or a lake, reservoir, or other impoundment in this state; or 2) waste resulting from the desalination of treated marine seawater into the Gulf of Mexico.

HB 2031 also directs the commission to issue a bed and banks permit to convey marine seawater in any flowing natural stream or lake, reservoir, or other impoundment. The bill prohibits: 1) the discharge of treated marine seawater into a flowing natural stream and impoundment for conveyance purposes without a discharge permit issued under TWC, Chapter 18; and 2) the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater in a bay and estuary under the expedited permit process as allowed by TWC, Chapter 18. A person has the option to submit an application under TWC, Chapter 11

or 26 to seek a permit to divert or discharge in a bay or estuary.

Further, HB 2031 directs the commission to adopt rules to expedite permitting and related processes for the diversion of marine seawater and the discharge of both treated marine seawater and waste resulting from the desalination process, in accordance with TWC, Chapter 18. In addition, the bill requires the commission to establish reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater.

Finally, HB 2031 requires that the TPWD and the GLO conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and for the discharge of waste resulting from the desalination of marine seawater and for the commission to adopt rules designating diversion zones by September 1, 2020. Under TWC, §18.003(j) and §18.005(g), an applicant for a permit to divert marine seawater must consult with the TPWD and the GLO regarding the point(s) of diversion or discharge until such time as the commission adopts rules designating diversion or discharge zones.

HB 4097 relates to seawater desalination projects. This bill creates TWC, §11.1405, Desalination of Seawater for Use for Industrial Purposes, and TWC, §26.0272, Permits Authorizing Discharges from Certain Seawater Desalination Facilities; and amends TWC, §27.021, Permit for Disposal of Brine from Desalination Operations or Drinking Water Treatment Residuals in Class I Injection Wells, and TWC, §27.025, General

Permit Authorizing Use of Class I Injection Well to Inject Nonhazardous Brine from Desalination Operations or Nonhazardous Drinking Water Treatment Residuals, to address seawater desalination for industrial purposes.

TWC, §11.1405(a), requires a person to obtain a permit to divert and use state water that consists of seawater if: 1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or 2) the seawater contains a TDS concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 mg/L. TWC, §11.1405(b) creates an exemption from permitting to divert and use seawater if TWC, §11.1405(a) does not apply. When a permit application is required, TWC, §11.1405(e) specifies that the application does not require a finding of water availability and TWC, §11.1405(f) requires the permit to be consistent with the commission's adopted environmental flow standards in 30 TAC Chapter 298, Environmental Flow Standards for Surface Water. TWC, §11.1405(h), directs the commission to adopt rules to expedite permitting and related processes for the diversion of seawater.

In October 2015, the commission held a stakeholder meeting to solicit comments regarding the implementation of HB 2031 and HB 4097. The executive director based these rules on consideration of the comments received from the stakeholders, sound science and other public interest and relevant factors.

In corresponding rulemakings published in this issue of the *Texas Register*, the

commission also adopts new sections in 30 TAC Chapter 39, Public Notice; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 318, Marine Seawater Desalination Discharges to implement HB 2031 and HB 4097.

Section by Section Discussion

Subchapter G: Desalination, Procedural

The commission adopts new Subchapter G in Chapter 295 to contain all of the requirements for a water right application to divert marine seawater or seawater and a water right application to convey treated marine seawater in the bed and banks of a watercourse. This new subchapter also contains the requirements for notice of a water right application to divert marine seawater or seawater and for notice of a water right application to convey treated marine seawater in the bed and banks of a watercourse. The commission must adopt rules to implement TWC, §11.1405 and Chapter 18. The commission specifically invited commenters to provide any relevant information that may differ from its proposed rules, which in the commenter's opinion would assist the commission in deciding on adopted rules for water right applications to divert marine seawater or seawater and for water right applications to convey treated marine seawater in the bed and banks of a watercourse. The commission invited comments on all aspects of the rules as they were proposed. The commission made various revisions to the proposed rules and added new subsections in response to comments as noted in this preamble.

§295.300, Applicability

The commission adopts new §295.300 to describe the purpose of Subchapter G and under what circumstances it applies. Subchapter G is intended to provide an alternate procedure for obtaining an authorization to divert and use state water that consists of marine seawater, to divert and desalinate water for industrial purposes from a bay or arm of the Gulf of Mexico, and to convey treated marine seawater in the bed and banks of a watercourse. In response to comment, the commission added the words and phrases "for desalination," "for desalination solely for industrial purposes," "treated," and "subchapter" to adopted §295.300(a) and deleted the word "section" to clarify the scope and applicability of the subchapter. In response to comment the commission added the words and phrases "water" and "at the proposed diversion point" and deleted the word "seawater" from adopted §295.300(a)(2) to clarify that this adopted subsection applies to diversions of both seawater and marine seawater and to clarify that the determination of TDS concentration would occur at the proposed diversion point. In response to comment, the commission revised adopted §295.300(c) to clarify the requirements for an exemption for the permitting requirements in this subchapter. The commission revised §295.300(c) by adding the word "demonstrating," and separating the location and water quality information into paragraphs for clarity. New §295.300(c)(1) now states "(1) based on the location of each proposed diversion location, that subsection (a)(1) of this section does not apply; and" and new §295.300(c)(2) now states "(2) based on the analysis of samples taken at the water source for each proposed diversion location over a period of at least one year, in accordance with the requirements set out in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration) that subsection (a)(2) of this

section does not apply."

The commission revised §295.300(e) to clarify that marine seawater, as defined in this subchapter, cannot be diverted from bays and estuaries by adding the words and phrases "subchapter," "diversion," "solely," and "the purpose of desalination" and deleting the words and phrases "section," "application," and "for diversion." The commission revised §295.300(f) to clarify how TWC, Chapter 11 applies to applications under this subchapter because diversions of seawater are already covered by TWC, §11.1405. The commission added the words and phrases "subchapter" and "which is not subject to this subchapter of the rules" and deleting the word "section." Finally, the commission adopted §295.300(g) to clarify that a person who seeks an amendment to add a use to a permit issued for diversion of seawater solely for industrial purposes would need to apply for the amendment under other provisions of TWC, Chapter 11. Adopted §295.300(g) states that "If a person seeks to utilize a facility that was constructed or permitted for the diversion of seawater solely for the purpose of desalination for industrial uses under this subchapter to divert seawater for another use, the person must first obtain a water right permit pursuant to provisions of TWC, Chapter 11, other than TWC, §11.1405."

§295.301, Definitions

The commission adopts new §295.301. The adopted section has definitions of terms that only apply to Chapter 295, Subchapter G. 30 TAC Chapter 55 does not apply to applications to divert marine seawater from the Gulf of Mexico or to take seawater

from a bay or arm of the Gulf of Mexico for industrial purposes, except for Chapter 55, Subchapter G. In §295.301(1) the commission adopts the definition of "Affected person." In §295.301(2) the commission adopts the definition of "Marine seawater" consistent with TWC, §18.001(2). In response to comment, the commission added the phrase "for desalination" to the definition of "Marine seawater" to clarify the applicability of this subchapter. In §295.301(3) the commission adopts the definition of "Seawater" as water that is derived from a bay or arm of the Gulf of Mexico. In response to comment, the commission added the phrase "for desalination and use solely for industrial purposes" to clarify that only water diverted solely for industrial purposes can be diverted from a bay or arm of the Gulf of Mexico. In response to comment, the commission adopted §295.301(4) to provide a definition of "Three-mile seaward boundary." Adopted §295.301(4) defines the three-mile boundary as "Three-mile seaward boundary--The three nautical mile boundary developed by the Texas General Land Office for the Dispersant Use Pre-Approval Zone."

§295.302, Requirements for Application for Diversion of Marine Seawater and Diversion of Seawater

The commission adopts new §295.302. The adopted section sets out the application requirements for a water rights application to divert marine seawater or seawater that will apply only to applications under Subchapter G. In response to comment, the commission added the words "Application for" to the title of this section because the section includes the requirements for an application under this subchapter. In §295.302(a) and (b), the commission adopts the requirement that an application for

diversion of marine seawater or seawater conform to the requirements in §295.2 and §295.14 so that an application to divert marine seawater or seawater will be submitted in the form of a water rights application. In response to comment, the commission clarified §295.302(a) by adding the phrase "or for the diversion of marine seawater" and deleting the phrase "diversion of marine seawater." In §295.302(c) and (d) the commission adopts that an application for a water right permit to divert marine seawater or seawater should include the location of the diversion point(s), the total amount of marine seawater or seawater to be diverted and the rate of diversion for the marine seawater or seawater to be consistent with the requirements for a water right application for a new diversion. In response to comment, the commission added the phrase "for each diversion point" to adopted §295.302(d) to clarify that an applicant must provide the maximum diversion rate for each point requested in an application under this subchapter. In §295.302(e) the commission adopts the requirement that the application shall include a purpose of use, and if the diverted marine seawater is to be used for more than one purpose, the specific amount to be used annually for each purpose. The commission adopts this requirement so that it can determine whether the proposed use is a beneficial use, and whether the proposed treatment of the marine seawater is consistent with the proposed use. In response to comment, the commission added the word "each" before "purpose of use" and deleted the words "the," "or purposes," "each," and the sentence "If the marine seawater is to be used for more than one purpose, the specific amount to be used annually for each purpose shall be clearly set forth." for clarity and because the deleted sentence was redundant. The commission further adopts new §295.302(f) requiring the applicant to provide

evidence that the marine seawater or seawater will be treated in accordance with commission rules based on the purpose of use for which the marine seawater or seawater will be used in accordance with TWC, §18.002(d). In §295.302(g) and (h) the commission adopts that an application to divert marine seawater or seawater include a Water Conservation Plan and evidence that the application is consistent with the State and Regional Water Plans because under TWC, §18.002(a)(1), TWC, Chapter 11, including the requirement for a conservation plan and consistency with state and regional water plans, applies to a permit to divert marine seawater. In response to comment, the commission added the word "The" and deleted the word "an" in adopted §295.302(h) to be consistent with the other requirements in the subsection. In §295.302(i), the commission adopts a requirement that an application include a determination of the TDS concentration of the water source in accordance with TWC, §18.003(c). In response to comment, the commission added the phrase "as described in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration)" to provide a cross-reference to the substantive requirements for TDS in adopted 30 TAC §297.205. Adopted §295.302(j) includes a requirement relating to measures to minimize impingement and entrainment associated with the requested diversion as prescribed by TWC, §18.003(h). In response to comment, the commission added the phrase "as described in §297.209 of this title (relating to Impingement and Entrainment)" to provide a cross-reference to the substantive requirements for impingement and entrainment in adopted 30 TAC §297.209. Finally, in §295.302(k) the commission adopts that an application to divert marine seawater shall include evidence of consultation with the TPWD and the GLO in accordance with TWC,

§18.005(i). The commission adopts that an applicant for diversion of seawater should also provide evidence of consultation because diversion zones have not been identified at the time of this rulemaking. In response to comment the commission added the word and phrase "and" and "documentation of the results of the" and deleted the "&" in the name of the Texas Parks and Wildlife Department and deleted the phrases "evidence of" and "before submitting an application for a permit for the facility if §295.300(a)(1) of this title (relating to Applicability) applies or before beginning construction of the facility if §295.300(a)(2) of this title applies." The commission made these changes to clarify that an applicant must provide the results of its consultation with its application.

§295.303, Review Timeframes

The commission adopts new §295.303 regarding review timeframes for a water right application to divert marine seawater and to divert seawater for industrial use from a bay or arm of the Gulf of Mexico to provide for an expedited review of applications submitted under Subchapter G in accordance with TWC, §18.003(e). In §295.303(a) the commission adopts that an application must be administratively complete when submitted in order for expedited review to apply. In §295.303(b) applications will be reviewed within 10 working days to determine whether the application is administratively complete and contains the information required under §295.302. In §295.303(c) the commission adopts the requirement that technical review of a water right application to divert marine seawater be completed within 60 working days in order to provide for expedited review of these applications. In response to comment,

the commission added the phrase "except as extended pursuant to subsection (d) of this section" to clarify that the time for the executive director to review an application is extended by the amount of time an applicant is given to submit additional documentation. In §295.303(d) the commission adopts requirements and timeframes that apply to a water right application to divert marine seawater or seawater if the information required under §295.302 is not sufficient for a complete review. The commission adopts that an applicant be provided no less than 30 days to submit the necessary information and provides that if the necessary information is not received, the application may be returned. The commission adopts this requirement to expedite processing of water right applications to divert marine seawater and seawater. In response to comment the commission added the words and phrases "technical review," "taken by the applicant to provide," "original," and "the application" and the sentence "And, in no event shall the executive director have less than 60 working days, exclusive of any time spent waiting for submission of additional information, to complete the technical review." The commission also deleted the words and phrases "of time," "required for," and "material." The commission made these changes to adopted §295.302(d) to clarify that the executive director shall always have 60 working days to complete his technical review.

§295.304, Notice of Application to Divert Marine Seawater or Seawater

The commission adopts new §295.304 to provide the notice requirements for an application to divert marine seawater or to divert and desalinate seawater for industrial use. In §295.304(a) the commission adopts the requirement that emailed

notice of an application be provided to the TPWD and the GLO because water right applications to divert marine seawater and to divert and desalinate seawater for industrial use would not be located in a river basin as set out in TWC, §11.002(11). The notice requirements in this section do not apply to points of diversion which are located in a river basin as set out in TWC, §11.002(11). In response to comment the commission added additional notice to county judges for the county in which the facility is to be located and to other persons who request to receive notice by adding "the county judge for each county in which the proposed facility is proposed to be located" and "any person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notice of applications filed under this subchapter. The notice shall also be posted on the commission's website." In §295.304(b)(1) - (8) the commission adopts the requirement that the notice include the applicable information required for mailed notice of a water right application, as set out in §295.151. In §295.304(b)(9) the commission adopts the requirement that the notice state that a person may submit written comments and request a contested case hearing in accordance with TWC, §18.003(e). In response to comment the commission added the phrase "and indicate the deadline for doing so" to adopted §295.304(b)(9) to clarify that the notice of an application under this subchapter would include a time period for persons receiving notice to respond to the notice. In addition, the commission removed the word "affected" from §295.304(b)(9) to clarify that a person may submit written comments on an application. Also in §295.304(b)(9), the commission adds to "an affected person" that the commission, executive director, and applicant can request a contested case hearing. In

§295.304(b)(11) the commission adopts the requirement that the notice can also include any additional information the commission considers necessary which provides the commission flexibility to ensure that the notice includes all relevant information on the application. In §295.304(c) the commission adopts the requirement that requests for a contested case hearing submitted on applications to divert marine seawater or seawater will be processed in accordance with Chapter 55, Subchapter G.

§295.305, Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks

The commission adopts new §295.305. The adopted section sets out the application requirements for a water rights application to convey treated marine seawater in the bed and banks of a watercourse that will apply only to applications under Subchapter G. In §295.305(a), the commission adopts the requirement that an applicant for a water right to convey treated marine seawater in the bed and banks of a watercourse provide evidence that the marine seawater will be treated so as to meet standards that are at least as stringent as the commission's adopted water quality standards for the watercourse in which the treated marine seawater will be conveyed in accordance with TWC, §18.004(a). In response to comment the commission added the sentence "More stringent treatment may be required if the commission determines it is necessary to protect water quality" to clarify that the commission retains the authority to require appropriate treatment of treated marine seawater conveyed in the bed and banks of a watercourse to protect water quality in this state. In §295.305(b) the commission adopts that treated marine seawater conveyed under an authorization granted under

this section may only be used by the person to whom the authorization is granted in accordance with TWC, §18.004(d). The commission adopts §295.305(c) to implement TWC, §18.004(f), which states that §295.305 does not prohibit a person from conveying marine seawater in any other manner authorized by law. The commission adopts §295.305(d) to provide the application requirements for a water right permit to convey treated marine seawater in the bed and banks of a watercourse. The requirements in §295.305(d) are substantially the same requirements for an application under §295.113; however, §295.305(d) does not include requirements for information on interbasin transfers because the conveyed treated marine seawater does not originate from a river basin. The commission's application requirement in §295.305(d)(4) implements TWC, §18.004(c), which relates to discharge of the treated marine seawater, and the commission's adopted application requirement in §295.305(d)(5), relating to consistency with environmental flow standards, implements TWC, §11.1405(f) and (g). The commission's application requirement in §295.305(d)(6) ensures that sufficient information is provided in the application to allow the commission to determine whether other water rights could be affected by the application. The commission's application requirement in §295.305(d)(7) facilitates expedited processing of an application because the accounting plan will be required to be submitted with the application.

§295.306, Notice of Application to Convey Treated Marine Seawater in Bed and Banks

The commission adopts new §295.306 to provide the notice requirements for a water right application to convey treated marine seawater in the bed and banks of a

watercourse. In §295.306(a) - (c) the commission adopts that mailed notice of an application be provided to every water right holder of record downstream of the discharge point, that the application not require published notice, and that the applicant shall be responsible for the costs of providing notice. The commission's adopted notice is consistent with the notice requirements in §295.161, which states the notice requirements for an application under TWC, §11.402(c) consistent with TWC, §18.004(e). In response to comment, the commission added the sentences "Notice shall also be provided to any person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notice of applications filed under this subchapter. The notice shall be posted on the commission's website" to clarify that a person can request to receive notice of an application under this subchapter. In §295.306(d)(1) - (7) and (10), the commission adopts that the notice include general information on the application and contact information for the agency. Section 295.306(d)(8) and (9) specifically implements TWC, §18.004(b), relating to notice. Section 295.306(d)(8) has been changed to remove the word "affected" in order to clarify that a person may submit written comments on an application. Also in §295.306(d)(10), the commission adds to "an affected person" that the commission, executive director, and applicant can request a contested case hearing. In §295.306(d)(11) the commission adopts that the notice can also include any additional information the commission considers necessary which provides the commission flexibility to ensure that the notice includes all relevant information on the application. Finally, in §295.306(e) the commission adopts the requirement that requests for a contested case hearing submitted on applications to divert marine

seawater or seawater will be processed in accordance with Chapter 55, Subchapter G.

Final Regulatory Impact Analysis Determination

The commission has 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." 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 states that the purpose of the new 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 that the purpose of HB 2031 was to "... streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination."

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" (Texas Government Code, §2001.0225(g)(3)). The purpose of this rulemaking is to add procedures for the development of plentiful and cost-effective

water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The rules adopted in Chapter 295 streamline the processes for obtaining a permit to divert or transport marine seawater under TWC, Chapter 18, and to divert seawater for industrial purposes under TWC, §11.1405.

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 adopted under the TCEQ's general rulemaking authority. This rulemaking is adopted under specific state statutes enacted in HB 2031 and HB 4097.

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. The specific purpose of these adopted rules is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever-increasing demand for water and to streamline the process for these permits. The adopted rules substantially

advance this stated purpose by adding provisions to Chapter 295 to streamline the processes for obtaining a permit to divert or transport marine seawater under TWC, Chapter 18, and to divert seawater for industrial purposes under TWC, §11.1405.

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. In HB 2031, the legislature expressed that "In this state, marine seawater is a potential new source of water for drinking and other beneficial uses. This state has access to vast quantities of marine seawater from 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. There is no potential for harm to other water rights by this rulemaking. The burden on private real property rights will be nonexistent or minimal because of the amount of water in the Gulf of Mexico, or a bay or arm of the Gulf of Mexico. Diversions of seawater in a bay or arm of the Gulf of Mexico are also limited to industrial water and water for municipal and domestic needs will not be taken from this part of the Gulf of Mexico.

Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that the adoption is 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.

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 2031 and HB 4097, which direct the commission to regulate the diversion, treatment, and use of marine seawater and the discharge of treated marine seawater and waste resulting from the desalination of marine seawater through expedited permitting and related processes. In HB 2031, the legislature finds "...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 adopted rules is to protect coastal natural resources, 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 invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP.

Public Comment

The commission held a public hearing on June 21, 2016, in Austin. The comment period closed on July 5, 2016. The commission received comments from AEM the Woodlands (AEM); Asociacion Amiga; Clean Water Action (CWA); Coastal Conservation Association Texas (CCA-Texas); EV Houston Newspaper (EVHN); Glenrose Engineering, Inc. (GEI); the Honorable A. R. Senac, Chambers County Commissioner, Precinct 4 (Commissioner Senac); San Marcos River Foundation (SMRF); Save Our Springs Alliance (SOS); Texas Conservation Alliance (TCA); Texas Desalination Association's Marine Subcommittee (TDA Marine Subcommittee); TPWD; Viva! The Woodlands Magazine (Viva!); joint comments submitted by the Galveston Bay Foundation (GBF), National Wildlife Federation (NWF), and the Sierra Club Lone Star Chapter (Sierra Club); 41 individuals who submitted personalized comments through NWF; 940 individuals who submitted identical comments through NWF; 32 individuals who submitted personalized comments through the Sierra Club; and 1,299 individuals who submitted identical comments through the Sierra Club. The comments submitted by Commissioner Senac do not in any manner necessarily reflect the opinion of Chambers County Commissioners Court or Chambers County.

TDA Marine Subcommittee and one individual supported the rules. Generally, AEM, Asociacion Amiga, CWA, CCA-Texas, EVHN, GEI, Commissioner Senac, SMRF, SOS, TCA, TPWD, Viva!, GBF, NWF, Sierra Club, and 2,310 individuals supported the rules but were concerned that the rules were not sufficiently protective. One individual was against the rule. TPWD, GBF, NWF, and Sierra Club suggested specific changes to the rulemaking as noted in the Response to Comments section of this preamble.

Response to Comments

General

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and Viva! commented that it is critically important that the streamlined process does not unduly compromise environmental protections and that the worst thing for the Texas coast would be to create an authorization process that results in desalination diversions or discharges being located in sensitive environments without adequate protections. These commenters further stated that this would harm our natural heritage and risk creating a backlash against future desalination proposals.

Response

The commission acknowledges these comments. The commission believes that implementation of the legislation and these rules will not result in harm to the environment. No changes were made in response to these comments.

Comment

TCA commented that the rules should not allow desalination diversions to be located in sensitive environments without adequate protections because this would be devastating for the Gulf Coast's stunning natural resources but also for the billions of dollars in economic activity based on these resources. SOS commented that more stringent requirements should apply for facilities located in sensitive environments like bays and estuaries to protect these areas and encourage facilities to locate elsewhere.

Response

The commission acknowledges these comments. The commission notes that the TPWD and the GLO will make decisions on what areas are appropriate for the diversion of marine seawater under this legislation and the rules. No changes were made in response to these comments.

Comment

TPWD commented that desalination of seawater is critically important due to its potential, if carefully implemented, to provide a viable water supply option that could delay or replace the need for water supply strategies with more severe environmental impacts. SOS commented that it is important for the success of seawater desalination in Texas that a new process does not result in desalination diversions harming sensitive environments, and that the public be provided a meaningful way to

participate. GBF, NWF, Sierra Club, and Viva! commented that it is critically important that, even as the rules establish a streamlined process, environmental protections are not unduly compromised. The worst thing for the Texas coast and for the future of seawater desalination in Texas would be to create an authorization process that results in desalination diversions or discharges being located in sensitive environments and without adequate protections. That would harm our natural heritage and risk creating a backlash against all future desalination proposals. One individual commented that caution and planning now will assure a safe process that will do no further damage to our already threatened ecosystem. One individual commented that the facilities should be built right from the beginning. One individual commented that they support desalination while protecting the environment.

Response

The commission acknowledges these comments.

Comment

GBF, NWF, and Sierra Club commented that they very much appreciate the work of the executive director and staff in developing this complex set of rules. Finding the right path forward for implementing the two statutory approaches is quite challenging and these commenters appreciated the obvious effort that has gone into developing the proposed rules.

Response

The commission acknowledges these comments.

Comment

TCA commented that it is pleased with the TCEQ's and the Texas Legislature's interest in desalination of seawater as a future source of water supply that takes pressure off of strained freshwater resources. TCA supports desalination projects within an economically reasonable distance of the saltwater source, provided adequate environmental protections are in place. Along with promoting increased desalination comes the need to promulgate rules that ensure that the environmental impacts of desalination will be minimized.

Response

The commission acknowledges these comments.

Comment

TDA Marine Subcommittee commented that the rules are well written and in good alignment with HB 2031 and HB 4097 and that the combined experience of TDA Marine Subcommittee's members shows that marine intakes and outfalls can be and will be installed so as to do no harm to either public health or the environment.

Response

The commission acknowledges the comment.

Comment

Two thousand, three hundred and seven individuals commented that the proposed rules to streamline the process to authorize diversions for desalination facilities along the coast are not adequately protective and must be strengthened to protect our bays and estuaries.

Response

The commission disagrees with these comments. Without knowing more specific concerns the commission cannot address this further in this response. No changes were made in response to these comments.

Comment

One thousand, three hundred and twenty-nine individuals commented that TCEQ's desalination rules should ensure that desalination diversions that seek to rely on salinity levels of greater than 20 parts per thousand to support an exemption from permitting must document compliance with clearly prescribed sampling procedures.

Response

The commission acknowledges these comments. The rules were not changed in response to these comments, although the commission notes that §295.302(i) and §297.205 were modified to include sampling procedures to show the facility has met the salinity requirement in response to other comments.

Comment

Two thousand, three hundred and eight individuals commented that TCEQ has full authority to deny applications for poorly located facilities and to place any needed environmental conditions in any permit issued.

Response

The commission acknowledges these comments and notes that the procedural requirements in Chapter 295, Subchapter G and the substantive requirements in Chapter 297, Subchapter K offer suitable safeguards for considering the appropriateness of the proposed locations of facilities in keeping with the commission's jurisdiction and statutory requirements.

Comment

Twenty-one individuals were concerned about fish and wildlife; two individuals were concerned about wetlands; one individual commented that bays and estuaries must be protected because they provide services to the state for water, sea life, recreational and commercial fisheries, and as a buffer that reduces storm damage to the coast; five individuals were concerned about impacts to future generations; and one individual commented that desalination must respect the environment.

Response

The commission acknowledges these comments. Without knowing more specific concerns the commission cannot address this further in this response.

Comment

Two individuals were concerned about pollution and litter in the bays and one individual commented that Texas was rated the United States of America's largest worst government for poorly cleaned and protected public properties.

Response

The commission responds that this specific rulemaking does not address pollution and litter. No changes were made in response to these comment.

Comment

One individual commented that the bays need to be protected from economic development in coastal areas, three individuals commented that the seafood industry should be protected, and one individual commented that bays and estuaries must be protected because ecotourism is important to local economies.

Response

The commission acknowledges these concerns and responds that the fiscal note in the rule proposal preamble addressed economic impacts and found no impacts from this rulemaking.

Comment

One individual commented that Watershed Steward programs should be supported.

Response

The commission acknowledges this comment.

Comment

One individual commented about the corrupting influence of money in the political system and wants to amend the United State Constitution to state that corporations are not people and money is not speech.

Response

The commission responds that this comment is beyond the scope of this rulemaking. No change has been made in response to this comment.

Comment

One individual commented that TCEQ should not streamline the process.

Response

The commission responds that, in Section 1(e) of HB 2031, the Texas Legislature found that it is necessary and appropriate to provide for expedited and streamlined authorization for marine seawater desalination facilities, consistent with appropriate environmental and water rights protections, in order to avoid unnecessary costs, delays, and uncertainty and thereby help justify the investment of significant resources in the development of such facilities. The rules track the

procedural language of HB 2031 and HB 4097 as much as is practicable. No changes were made in response to this comment.

Comment

One individual commented that the rules should encourage only natural sediment to be deposited in bays and estuaries and one individual commented that climate change and changing water levels should be considered.

Response

The commission responds that this specific rulemaking addresses the requirements for water rights applications for desalination. No changes were made in response to these comments.

Comment

One individual commented that if the rules are not made more protective TCEQ should explain why stronger protections should not be required and explain the impact on humans.

Response

The commission acknowledges this comment. The rules track the procedural language of HB 2031 and HB 4097 as much as is practicable. The explanation of changes to the rule can be found in the Section by Section Discussion for each rule section in this preamble. Without knowing more specific concerns the commission

cannot address this further. No changes were made in response to this comment.

Comment

One individual commented that they support desalination.

Response

The commission acknowledges the comment.

Comment

One individual commented that there should be a membership sign-up to receive notice of rule changes.

Response

The commission acknowledges the comment and notes that proposed rule changes and information on the rulemaking process are available on TCEQ's website.

§295.300, Applicability

Comment

AEM, Asociacion Amiga, CCA-Texas, Commissioner Senac, CWA, EVHN, GEI, SMRF, and Viva! commented that the rules must establish a clear limitation ensuring that no desalination diversion will be exempt from obtaining a water diversion permit unless it is located at least three miles off-shore of any point on the Texas coast. AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, and Viva! commented that

the rules should expressly acknowledge that to qualify for an exemption such diversions facilities must be located at least three miles seaward from any point on a barrier island and from any cut or pass between barrier islands. Two thousand, three hundred and eight individuals commented that TCEQ's rules for saltwater diversions should explicitly ensure that no diversion will be exempt from permit or hearing requirements unless the proposed site is proven to be located at least three miles seaward from the coast, including all barrier islands and any cuts or passes between islands.

Response

The commission agrees that a diversion of water for desalination under this rulemaking would not be exempt unless it is more than three miles off-shore. It also must meet the salinity requirement. Both TWC, §11.1405 and §18.003 include these requirements. The rules track the procedural language of HB 2031 and HB 4097 as much as is practicable. No changes were made in response to these comments.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, and Viva! commented that the rules should specifically state that both the three-mile limit and the salinity exemption must be satisfied before a diversion can be considered to be exempt. TCA commented that the adopted rules should clearly establish that no exemption will be given for obtaining a water diversion permit unless it is located at least three miles off-shore and no exemption will be given for a location that is less than 20 parts per

thousand.

Response

The commission agrees both the salinity requirement and the three-mile requirement must be satisfied before a diversion for desalination under these rules would be exempt from permitting. Both TWC, §11.1405 and §18.003 include this requirement. The rules track the procedural language of HB 2031 and HB 4097 as much as is practicable. No changes were made in response to these comments.

Comment

TPWD commented that §295.300(a) should be revised for clarity and consistency with TWC, §11.405 and §18.003 as follows:

"(a) This subchapter only applies to diversion and use of marine seawater for desalination, diversion of seawater from a bay or arm of the Gulf of Mexico for desalination solely for industrial purposes, and conveyance of treated marine seawater through the bed and banks of a flowing stream. The commission may issue a permit under this section to authorize a diversion of state water from the Gulf of Mexico or a bay or arm of the Gulf of Mexico for desalination and use if:

"(1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or

"(2) the seawater at the proposed diversion point contains a total dissolved solids concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter."

Response

The commission agrees that the rule could be clarified and §295.300(a) has been modified to reflect these changes.

Comment

GBF, NWF, and Sierra Club commented that the limitation on the scope of this subchapter as applying only to diversions for desalination should be expressly noted in subsection (a) in order to accurately define the applicability of this subchapter. Consistent with the approach in proposed §295.301, the distinction between "marine seawater" and "seawater" should be clarified by expressly noting that "seawater" refers solely to desalination for industrial purposes, which is the universe of projects to which HB 4097 applies. If an application requests authorization for desalination for another type of use, the application would either need to follow the traditional TWC, Chapter 11 water rights application procedures or comply with HB 2031 requirements. As currently drafted, the distinction between those two definitions as well as the references in the rules are unduly ambiguous. The reference in the second sentence of proposed subsection (a) to "this section" appears to be inadvertent and should, instead, refer to "this subchapter," because the subsection is referring to the scope of the entire subchapter and issuance of permits under the subchapter. The determination of the

three-mile line that governs exemptions from permitting is a critical issue and the rules should minimize ambiguity and uncertainty about that determination. The inclusion of, or reference to, a map delineating the line would be very helpful. At minimum, further refinement of the rule language is needed to better define the starting point for the three-mile determination, including when dealing with a cut or pass between barrier islands. These commenters recommended §295.300(a) be revised as follows:

"(a) This subchapter only applies to diversion and use of marine seawater for desalination, diversion of seawater from a bay or arm of the Gulf of Mexico for desalination solely for industrial purposes, and conveyance of treated marine seawater through the bed and banks of a flowing stream. The commission may issue a permit under this subchapter to authorize a diversion of state water from the Gulf of Mexico or a bay or arm of the Gulf of Mexico for desalination and use if:

"(1) the point of diversion is located less than three miles seaward of any point located on the coast of this state, which includes any point located on a barrier island and any point located on an imaginary line drawn between the most seaward points of land on either end of a pass or cut between barrier islands; or

"(2) the source water at the proposed diversion site contains a total dissolved solids concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter."

Response

The commission responds that it has modified §295.300(a) to clarify that the adopted rules only apply to diversions for desalination, to clarify the distinction between "marine seawater" and "seawater," and to correct the reference to the subchapter. The commission also responds that it has addressed how the three-mile boundary will be determined by adding a new definition describing the three-mile boundary to §295.301.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, and Viva! commented that nothing in HB 2031 indicates that facilities that are exempt from permit requirements are exempt from the statutory requirements to minimize impingement and entrainment. AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and Viva! commented that TWC, §18.003(h) avoids any language limiting its applicability only to facilities requiring a permit. That provision applies to all diversions of marine seawater. The proposed rules are unacceptably narrow in proposing to require measures to avoid impingement and entrainment only as part of permit applications. Proposed §295.300(b) should make clear that exempt facilities must comply with requirements to minimize impingement and entrainment and include a cross-reference to minimum requirements set out in §297.209.

Response

The commission acknowledges the comment. The commission agrees that exempt facilities also must address impingement and entrainment measures because HB 2031, in TWC, §18.003(h), provides that the commission shall adopt rules prescribing reasonable measures to minimize impingement and entrainment. This requirement is not limited to permitted facilities. Additionally, exempt facilities are required to meet certain other requirements in the legislation, such as consultation with the TPWD and the GLO, and diverting water from diversion zones.

Comment

TPWD commented that §295.300(b) should be revised for clarity and consistency with TWC, §11.405 and §18.003 as follows:

"(b) A person may divert and use state water that consists of marine seawater or seawater without obtaining a permit if the person demonstrates that subsection (a)(1) and subsection (a)(2) of this section does not apply. To divert state water under this subsection, a person must comply with requirements under Section 295.302 (j) of this title relating to minimizing impingement and entrainment."

Response

The commission agrees that a facility is exempt only if both §295.300(a)(1) and (2) do not apply. The commission notes that adopted §295.300(b) exactly follows the language in TWC, §18.003(b). The rule was not changed in response to this comment. The commission does not agree that a reference to requirements for

impingement and entrainment should be included in §295.300(b) and did not revise the rule in response to this comment. However, for the reasons discussed in the previous comment, the commission agrees that exempt facilities must employ reasonable measures to minimize impingement and entrainment.

Comment

GBF, NWF, and Sierra Club commented that proposed §295.300(b) should be clarified to explicitly state that an exemption applies only if neither subsection (a)(1) nor (2) is satisfied. A general reference to the inapplicability of subsection (a) is unnecessarily ambiguous. Because of the significance of granting an exemption from permitting, potential ambiguity should be minimized. In addition, HB 2031 directs the commission to prescribe by rule reasonable measures to minimize impingement and entrainment. That directive is not limited to diversions pursuant to permits. Accordingly, the rules must prescribe such measures for all desalination diversions under this subchapter, regardless of whether they are exempt from permit requirements. Because nothing in HB 4097 suggests an intent that the requirement for measures to minimize impingement and entrainment should not apply for the limited subset of desalination applications subject to HB 4097, the requirement in the more broadly applicable HB 2031 must be respected when a diversion is not otherwise authorized pursuant to TWC, Chapter 11. These commenters recommended that §295.302(b) be revised as follows:

"(b) A person may divert and use state water that consists of marine seawater or seawater without obtaining a permit if the project owner or operator demonstrates that neither subsection (a)(1) nor subsection (a)(2) of this section applies. In order to operate pursuant to this subsection, a diversion facility also must comply with requirements for minimizing impingement and entrainment as set out in Section 295.302 (j) of this title."

Response

The commission agrees that a facility is exempt only if both §295.300(a)(1) and (2) do not apply. The commission notes that adopted §295.300(b) exactly follows the language in TWC, §18.003(b). The rule was not changed in response to this comment. The commission does not concur that in order to receive an exemption a facility has to demonstrate to the commission that it has talked to TPWD about diversion points and minimization of entrainment and impingement. The commission agrees that exempt facilities also must address impingement and entrainment measures because HB 2031, in TWC, §18.003(h), provides that the commission shall adopt rules prescribing reasonable measures to minimize impingement and entrainment. This requirement is not limited to permitted facilities. Additionally, exempt facilities are required to meet certain other requirements in the legislation, such as consultation with TPWD and GLO, and diverting water from diversion zones.

Comment

TCA commented that the provisions for consultation should be strengthened.

Response

The commission acknowledges the comment. The rule was not changed in response to this comment. The rules are clear that consultation with the TPWD and the GLO is required for an application to divert water under this subchapter.

Comment

TPWD commented that §295.300(c) should be revised for clarity and consistency with TWC, §11.405 and §18.003 as follows:

"(c) A person may not begin construction of a facility for the diversion of marine seawater or seawater without obtaining a permit until the person has provided:

"(1) data to the commission demonstrating for each proposed diversion point, that subsection (a)(1) of this section does not apply and, based on the analysis of samples taken at the water source for each proposed diversion point over a period of at least one year, that subsection (a)(2) of this section does not apply; and

"(2) a report documenting the results of the persons completed consultation with the Texas Parks and Wildlife Department and the Texas General Land Office regarding the point or points from which a facility the person proposes to construct may divert marine seawater or seawater."

Response

The commission does not agree that the commission should require that a facility demonstrate that it has corresponded with the TPWD and the GLO in order to demonstrate that it is exempt from permitting under this subchapter. Consultation is a requirement for the application to divert, not the applicability of the rules. No changes were made in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that proposed §295.300(c) only requires the submission of data regarding salinity levels at the source as a prerequisite for beginning construction of a diversion facility relying on an exemption from permitting. Although that is a good start, in order to provide certainty for all involved, the rules should also require the submission of documentation that all proposed diversion facilities are beyond the three-mile line set out in §295.300(a)(1). In addition, TWC, §18.003(j), as added by HB 2031, requires consultation with the TPWD and the GLO before beginning construction of an exempt diversion facility. Nothing in HB 4097 is inconsistent with that requirement. The rules should require the filing of a report on the consultation process in order to establish a mechanism for documentation of compliance and in order to ensure that the commission has information that may be relevant to a determination about specific requirements for minimizing impingement and entrainment. Because compliance with measures to minimize impingement and entrainment is required for exempt diversion facilities, the proposed rule should also

require the filing of design and specification information for those measures. These commenters recommended that §295.300(c) be revised as follows:

"(c) A person may not begin construction of a facility for the diversion of marine seawater or seawater without obtaining a permit until the person has provided:

"(1) data to the commission demonstrating, based on the location of each proposed diversion location, that subsection (a)(1) of this section does not apply and, based on the analysis of samples taken at the water source for each proposed diversion location over a period of at least one year, that subsection (a)(2) of this section does not apply;

"(2) a report to the commission on the consultation with the Texas Parks & Wildlife Department and the Texas General Land Office regarding the point or points from which a facility the person proposes to construct may divert marine seawater or seawater; and

"(3) technical design and specification information to the commission for measures to be used to minimize impingement and entrainment in compliance with the requirements set out in Section 295.302(j)."

Response

The commission does not agree that it should require facilities that are seeking to demonstrate that they are exempt from permitting to submit information on their

required consultation. The commission agrees that an entity should provide evidence to the commission that the facility is exempt; however, a demonstration of consultation with the TPWD is not required for this exemption showing. The commission does not want to unduly prescribe how consultation with other agencies should occur. The commission agrees that exempt facilities also must address impingement and entrainment measures because HB 2031, in TWC, §18.003(h), provides that the commission shall adopt rules prescribing reasonable measures to minimize impingement and entrainment. This requirement is not limited to permitted facilities. Additionally, exempt facilities are required to meet certain other requirements in the legislation, such as consultation with the TPWD and the GLO, and diverting water from diversion zones.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, SOS, and Viva! commented that consultation with the TPWD and the GLO is required for diversion facilities that are exempt from permitting requirements. Section 295.300(c) should be revised to require documentation of the results of the consultation process before a person is allowed to begin construction of an exempt diversion facility.

Response

The commission disagrees for the reasons stated in the previous response. Consultation with the TPWD is required for an application for a permit, but it is not part of a facility's demonstration that it is exempt from permitting. As a result,

consultation is not required for an exempt facility. No changes were made in response to this comment.

Comment

TPWD commented that §295.300(e) should be revised for clarity and consistency with TWC, §11.405 and §18.003 as follows:

"(e) This section does not apply to a diversion of marine seawater from a point of diversion located in a bay or estuary unless the diversion is solely for desalination and used for industrial purposes under Texas Water Code (TWC), §11.1405."

Response

The commission agrees that §295.300(e) could be revised for clarity. The commission revised this subsection in response to other comments.

Comment

GBF, NWF, and Sierra Club commented that proposed §295.300(e) refers to the inapplicability of §295.300 for most diversions located in a bay or estuary but the reference should be to the entire subchapter. In addition, the proposed exception for when a diversion proposed to be located in a bay or estuary may rely on the subchapter is overbroad. HB 2031, which applies to all types of desalination diversions from the Gulf of Mexico under the alternative permitting procedures, makes facilities located in a bay or estuary ineligible for those procedures. However, HB 4097, which

applies only to desalination diversions for industrial uses, does not include a comparable provision. As a result, only diversions solely for industrial uses located in a bay or estuary may rely on the subchapter. These commenters recommended that §295.300(e) be revised as follows:

"(e) This subchapter does not apply to a diversion of marine seawater from a point of diversion located in a bay or estuary unless the diversion is solely for the purpose of desalination of seawater for industrial use under Texas Water Code (TWC), §11.1405."

Response

The commission agrees and §295.300(e) was revised to reflect this comment.

Comment

GBF, NWF, and Sierra Club commented that proposed §295.300(f) should reference a permit or authorization under the new subchapter rather than just referring to the section. In addition, the proposed language is unnecessarily confusing because some applications under the new subchapter of the rules are applications under TWC, Chapter 11, specifically under TWC, §11.1405. These commenters recommended that the subsection be clarified as follows:

"(f) TWC, Chapter 11, applies to a permit or authorization under this subchapter in the same manner as that chapter applies to a permit or authorization under that chapter which is not subject to this subchapter of the rules."

Response

The commission agrees that §295.300(f) should reference the subchapter. The commission also agrees that §295.300(f) could be clarified and has revised the adopted rule to reflect this comment.

Comment

GBF, NWF, and Sierra Club commented that a new subsection (g) should be added to deal with the situation where a person who has obtained a permit under TWC, §11.1405 for a diversion facility located in a bay or estuary solely for industrial use seeks to change the use or add another use. TWC, §11.1405 could not be relied upon to authorize the diversion because it is limited to a diversion for industrial use. Because this subchapter could not authorize an additional use in that location without violating TWC, §18.003(f), the rules should make clear that a person must seek a permit pursuant to TWC, Chapter 11, other than TWC, §11.1405, before adding such a use or changing the use. TWC, §11.122(b) would not apply to authorize the diversion because none of the exceptions to the permit requirement under TWC, §11.121 would apply and, in the absence of a TWC, §11.121 permit, the other applicable requirements of TWC, Chapter 11 would not be met. These commenters recommended that a new subsection (g) be added as follows:

"(g) If a person seeks to utilize a facility that was constructed or permitted for the diversion of seawater solely for the purpose of desalination for industrial use under

this subchapter to divert water for another use, the person must, if the diversion is located in a bay or estuary, first obtain a water right permit pursuant to provisions of TWC, Chapter 11 other than Section 11.1405, because neither Section 11.1405 nor this subchapter authorize the diversion."

Response

The commission agrees and has added §295.300(g) in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that a new subsection (h) should be added to incorporate requirements for documentation in support of an exemption in order to demonstrate that salinity levels in the source water at the location of the proposed diversion facility are not less than 20,000 mg/L. There must be some specification of standard practices for collection of salinity data in order to ensure that conditions at the diversion location are properly characterized. For example, depending on the location, collecting data at different depths could produce widely varying results. Similarly, if the collection of data is not evenly distributed within months across the sampling period, the data is not likely to provide an accurate characterization. The most-straightforward way of incorporating such data collection practices likely is to add a cross-reference to the documentation requirements in proposed §295.302 and add specificity to that provision. Alternatively, the documentation requirements recommended for inclusion in §295.302(i) could be incorporated directly into a new §295.300(h). These commenters recommended that a new subsection (h) be added as

follows:

"(h) To demonstrate that subsection (a)(2) does not apply, a person must comply with the documentation requirements of subsection (i) of Section 295.302 in the same manner as if the person were filing an application."

Response

The commission agrees that information regarding the collection of data relating to salinity levels for facilities claiming exempt status could be clarified. However, a reference to requirements for water quality data for exempt facilities is better addressed in the subsection relating to facilities claiming to be exempt. The commission has revised §295.300(c) to include more specific requirements for the demonstration of salinity levels for an exempt facility claim.

§295.301, Definitions

Comment

GBF, NWF, Sierra Club, and TPWD commented that the definition of "Marine seawater" should be revised for clarity as follows:

"(2) Marine Seawater - Water that is derived from the Gulf of Mexico for desalination."

Response

The commission agrees and the rule has been changed to reflect this comment.

Comment

GBF, NWF, Sierra Club, and TPWD commented that the definition of "Seawater" should be revised for clarity as follows:

"(3) Seawater - Water that is derived from a bay or arm of the Gulf of Mexico for desalination and use solely for industrial purposes."

Response

The commission agrees and the rule has been changed to reflect this comment.

Comment

GBF, NWF, Sierra Club, and TPWD commented that a definition of "Bay or arm of the Gulf of Mexico" should be included in the rule and proposes that the definition follow the definition in Appendix C of TCEQ's Chapter 307 rules. These commenters recommended that the rule should be revised as follows:

"(4) Bay or arm of the Gulf of Mexico--The landward boundary of an arm of the Gulf of Mexico is defined by the downstream boundary of the most downstream segment of a river or stream as set out in Appendix C of Chapter 307 of Title 30 of the Texas Administrative Code. A bay of the Gulf of Mexico is considered any portion of the Gulf of Mexico that is not seaward of any point of land along the Texas coast, which includes any point on a barrier island and any point on an imaginary line drawn

between the most seaward points of land on either end of a pass or cut between barrier islands."

Response

The commission declines to adopt this definition because, under 30 TAC Chapter 307, boundaries of bay and estuary segments have not been precisely defined, some smaller bays and arms do not have a classified segment as described in Appendix C, and the proposed definition would include portions of tidal streams that are located in river or coastal basins. The commission further notes that this determination would best be addressed during the studies to identify zones that are appropriate for diversion of marine seawater as set out in TWC, §18.003(i).

Comment

TPWD commented that it supports the use of the three-mile nautical line demarcation developed by the GLO to identify the boundary of the oil spill dispersant pre-approval zone as a common reference for applicants in determining the location of their point and comments that the rule should be revised as follows:

"(5) Three-mile seaward boundary - The three nautical mile demarcation developed by the Texas General Land Office and is the seaward boundary of pre-approved area for use of dispersant in relation to spill response. The boundary is published in downloadable electronic format on the General Land Office website and also on the Texas Natural Resource Information System website: www.tnris.org/data-

catalog/entry/glo-dispersant-use-pre-approval-zone/."

Response

The commission notes that adding the website to the rule may cause confusion because website addresses can change over time. Otherwise, the commission agrees that a common reference for determining the location of the three-mile boundary would be helpful and agrees with TPWD's proposed boundary and the commission has added a new §295.301(4) to provide a definition of the three-mile boundary. The new definition is "(4) Three-mile seaward boundary--The three nautical mile boundary developed by the Texas General Land Office for the Dispersant Use Pre-Approval Zone."

§295.302, Requirements for Diversion of Marine Seawater and Diversion of Seawater

Comment

GBF, NWF, Sierra Club, and TPWD commented that the title of §295.302 should be changed as follows: "§295.302. Requirements for Application for Diversion of Marine Seawater and Diversion of Seawater."

Response

The commission agrees and revised the title of §295.302.

Comment

GBF, NWF, and Sierra Club commented that the phrasing of the first sentence of proposed subsection (a) is somewhat confusing because it isn't clear what the prepositional phrase "for industrial purposes" modifies. That is, it could be read as qualifying both the "diversion of marine seawater" and the "diversion of seawater from a bay or arm of the Gulf of Mexico for industrial purposes." If the changes to definitions in §295.301 are made, that phrase could be eliminated and the sentence could just refer to applications for diversion of marine seawater or diversion of seawater. Alternatively, even without the change to the definitions, by reversing the order in the first sentence, the potential ambiguity could be lessened. These commenters recommended that §295.302(a) be revised as follows:

"(a) An application for diversion of seawater from a bay or arm of the Gulf of Mexico for industrial purposes or for diversion of marine seawater must be submitted in accordance with §295.2 of this title (relating to Preparation of Application) and include, for each applicant, the full name, post office address, telephone number, and federal identification number. If the applicant is a partnership, it shall be designated by the firm name followed by the words "a partnership." If the applicant is acting as trustee for another, it shall be designated by the trustee's name followed by the word "trustee." If one other than the named applicant executes the application, the name, position, post office address, and telephone number of the person executing the application shall be given."

Response

The commission agrees and the rule was changed in response to this comment.

Comment

TPWD commented that §295.302(a) should be revised for clarity and consistency as follows:

"(a) An application for diversion of marine seawater or diversion of seawater from a bay or arm of the Gulf of Mexico must be submitted in accordance with §295.2 of this title (relating to Preparation of Application) and include, for each applicant, the full name, post office address, telephone number, and federal identification number. If the applicant is a partnership, it shall be designated by the firm name followed by the words "a partnership." If the applicant is acting as trustee for another, it shall be designated by the trustee's name followed by the word "trustee." If one other than the named applicant executes the application, the name, position, post office address, and telephone number of the person executing the application shall be given."

Response

The commission agrees that §295.302(a) could be revised for clarity and has revised this subsection in response to another comment.

Comment

GBF, NWF, and Sierra Club commented that in order to assess the potential for adverse impacts for individual diversion locations, the commission will need information about

diversion rate for each individual proposed diversion facility. That information will also be needed in assessing appropriate measures to minimize entrainment and impingement. Accordingly, the application should be required to include diversion rate information for each diversion point. These commenters recommended that §295.302(d) be revised as follows:

"(d) The total amount of marine seawater or seawater from a bay or arm of the Gulf of Mexico to be diverted and used shall be stated in definite terms, i.e., a definite number of acre-feet annually and the application shall state the maximum rate of diversion in gallons per minute or cubic feet per second by diversion point."

Response

The commission agrees that §295.302(d) could be revised for clarity and has revised this subsection in response to another comment.

Comment

TPWD commented that §295.302(d) should be revised for clarity and consistency as follows:

"(d) The total amount of marine seawater or seawater from a bay or arm of the Gulf of Mexico to be diverted and used shall be stated in definite terms, i.e., a definite number of acre-feet annually and the application shall state the maximum rate of diversion in gallons per minute or cubic feet per second for each diversion point."

Response

The commission agrees and the rule was changed in response to this comment.

Comment

TPWD commented that to better describe monthly sampling and for clarity and consistency with TWC, §11.1405 and §18.003, §295.302(e) should be revised as follows and that §295.302(k) should be deleted:

"(e) The application shall state the purpose or purposes of use in definite terms. If the application requests authorization to use marine seawater for multiple purposes, the application shall expressly state an annual amount of marine seawater to be used for the multiple purposes as well as for each purpose of use.

Response

The commission agrees that §295.302(e) could be revised for clarity and has revised this subsection in response to another comment.

Comment

GBF, NWF, and Sierra Club commented that the proposed language for §295.302(e) is somewhat confusing. In particular, the second and third sentences appear to be redundant. Because, by statute, seawater can only be diverted for a single use under these rules establishing an alternative permitting process, the subsection only needs to

require explanation of multiple uses for diversions of marine seawater and the third sentence of the rule as proposed appears to state that requirement clearly. These commenters recommended that §295.302(e) be revised as follows:

"(e) The application shall state each purpose of use in definite terms. If the application requests authorization to use marine seawater for multiple purposes, the application shall expressly state an annual amount of marine seawater to be used for the multiple purposes as well as for each purpose of use."

Response

The commission agrees and the rule was changed in response to this comment.

Comment

TPWD commented that §295.302(h) be revised for clarity as follows:

"(h) The application shall contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan or, in the alternative, describe conditions that warrant a waiver of this requirement."

Response

The commission agrees and has revised this subsection to be consistent with the rest of the section.

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and Viva! commented that the rules should ensure that entities follow a reasonable protocol for sampling in establishing the yearly average of salinity samples taken monthly. The measurements must be collected evenly across a year to avoid concentrating samples in a non-representative manner. Standard sampling protocols should be mandated to ensure that samples are collected at an appropriate depth, or depths, to accurately characterize conditions at the location.

TPWD commented that §295.302(i) be revised as follows to better describe monthly sampling as follows:

"(i) The application must include documentation determining the total dissolved solids concentration of the marine seawater or seawater at the water source for each proposed diversion point based on analysis of monthly sampling from a period of at least one year and provide the data collected to the commission. The monthly samples shall cover a continuous period of not less than one year with samples taken at approximately the same time in each month in order to provide a representative characterization and shall be collected using protocols for sample collection, including for depth of collection, that are consistent with best practices as reasonably determined by commission staff."

GBF, NWF, and Sierra Club commented that the determination of TDS concentration must be specific for each proposed diversion location and the rule should make that requirement explicit. In addition, in order to ensure that the data accurately characterize conditions at each diversion point, the rules should provide additional direction about data collection. The measurements must be collected evenly across a year to avoid concentrating samples in a non-representative manner. The legislation specifies that data must be collected monthly. However, additional direction about data collection is needed in order to ensure an accurate characterization. The legislation makes clear that the data presented to the commission must demonstrate that the TDS concentration is less than 20 parts per thousand. Accordingly, the commission should provide specific guidance for how to make that demonstration. For example, in the absence of a clear protocol, taking samples at the end of June, end of July, end of August, in early September, and early October could result in maximizing collections when salinity is most likely to be elevated rather than reasonably documenting average conditions across those higher salinity months. Similarly, standard sampling protocols should be mandated to ensure that samples are collected at an appropriate depth, or depths, to accurately characterize conditions at the location. That will be especially important for locations where stratification is likely. The accuracy of salinity determinations is particularly important for purposes of determining if permit exemptions under §295.300(b) apply. These commenters recommended that a cross-reference from §295.300 to this subsection be added so that documentation requirements can be addressed in a single location in the rules. It is essential that the rules establish meaningful minimum requirements for data

collection for salinity determinations, particularly for ensuring that the commission receives the information needed for assessing qualification for exemptions. These commenters recommended that §295.302(i) be revised as follows:

"(i) The application must include a determination of the total dissolved solids concentration of the marine seawater or seawater at the water source for each proposed diversion location based on monthly sampling and analysis and provide the data collected to the commission. The monthly samples shall cover a continuous period of not less than one year with samples taken at approximately the same time in each month in order to provide a representative characterization and shall be collected using protocols for sample collection, including for depth of collection, that are consistent with best practices as reasonably determined by commission staff through publicly available guidance."

Response

The commission responds that Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the substantive requirements for these applications. The commission has modified §297.205 to include more specificity related to sampling and has revised §295.302(i) to include a reference to §297.205. No changes were made in response to this comment.

Comment

TPWD commented that TWC, §18.003(h) directs the TCEQ to prescribe reasonable measures to minimize impingement and entrainment and recommends that §295.302(j) be revised as follows:

"(j) The application shall provide documentation that the applicant will implement reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater or seawater. At a minimum, such measures shall include an intake diversion designed and operated to result in a maximum flow-through screen velocity of 0.5 feet per second. At all times that diversions are occurring, the intake diversion facilities shall be equipped with screens resulting in individual openings no larger than 0.25 square inches in size unless a combination of technologies, management practices, and operational measures representing the best technology available for impingement reduction are used to meet a specified impingement mortality standard."

Response

The commission responds that Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the substantive requirements for these applications. The commission has modified §297.209 to include additional requirements for impingement and entrainment for an application. No changes were made in response to this comment.

Comment

GBF, NWF, and Sierra Club commented that TWC, §18.003(h) directs the commission to prescribe by rule reasonable measures to minimize impingement and entrainment. That requirement applies for both exempt and non-exempt facilities. The proposed rules fail to follow that specific requirement. These commenters recommended minimum measures for inclusion in proposed §297.209 and have a cross-reference in §295.302(j) to those substantive requirements as follows:

"(j) The application shall provide documentation that the applicant will take reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater or seawater as required by Section 297.209 of this title (relating to Impingement and Entrainment)."

Response

The commission agrees and the rule has been revised in response to this comment.

Comment

TDA Marine Subcommittee commented that marine desalination facilities intakes will undoubtedly comply with the United States Environmental Protection Agency's (EPA's) 316(b) rules which specify screen size and low velocity intake speeds. Thus, by definition, if an intake uses a 316(b) compliant design or technology, it is using the "best available technology." TDA Marine Subcommittee asks the commission to

consider referencing this EPA publication in §295.302(j).

Response

The commission responds that Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the substantive requirements for these applications. The commission has modified §297.209 to include additional requirements for impingement and entrainment.

Comment

GBF, NWF, and Sierra Club commented that the consultation process should provide useful information for consideration by the commission in determining compliance with applicable requirements. These commenters recommended that the rules require submission of a report on the results of the consultation rather than just evidence that it occurred. The rules should encourage making the consultation process as meaningful as possible. The rationale for differentiating when evidence of consultation must be filed based on whether proposed §295.300(a)(1) or (2) applies is not clear. In either instance, the consultation process should have occurred prior to filing an application and should be required for inclusion in the application. If the reference to §295.300(a)(2) was intended to refer to the required filing of a consultation report as part of the exemption documentation process, as required pursuant to TWC, §18.003(j) proposed §295.302(k) does not appear appropriate for that purpose because that section and this subsection deal only with permit applications. These commenters

recommended that §295.302(k) be revised as follows:

"(k) The application shall include a report on the results of prior consultation with the Texas Parks & Wildlife Department and the Texas General Land Office regarding the point or points from which a facility the person proposes to construct may divert marine seawater or seawater."

Response

The commission agrees that the consultation process should be meaningful. However, the commission does not want to unduly prescribe how consultation with other agencies should occur. The commission would instead require that an entity provide documentation of the results of the consultation required by TWC, §18.003(j) as part of its application for the permit to divert. The commission also revised §295.302(k) to remove the references to §295.300(a)(1) and (2).

Comment

TPWD commented that §295.302(k) be deleted.

Response

The commission does not agree that this subsection should be removed because §295.302 addresses application requirements and an applicant must submit evidence of the required consultation with its application. The commission notes that §295.302(k) was revised in response to other comments.

§295.303, Review Timeframes

Comment

GBF, NWF, and Sierra Club commented that the proposed rule does not make clear that the time for the executive director to complete his technical review is extended by the amount of time that the applicant is given to submit additional documentation. These commenters believe it is important to ensure that the executive director has sufficient time to complete a comprehensive technical review, they believe language should be added to make clear that the review time available for technical review is extended by the period of time the applicant takes in providing the required information. The commenters are concerned that 60 days may be an inadequate amount of time for completing technical review and believe the rules must, at least, clearly ensure that minimum amount of time is available to commission staff. These commenters recommended that §295.303(c) be revised as follows:

"(c) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of this subchapter, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 60 working days, except as extended pursuant to subsection (d) of this section."

GBF, NWF, and Sierra Club commented that the proposed rule does not make clear that the time for the executive director to complete his technical review is extended by the amount of time that the applicant is given to submit additional documentation. It is important to ensure that the executive director has sufficient time to complete a comprehensive technical review and language should be added to make clear that the review time available for technical review is extended by the period of time the applicant takes in providing the required information. These commenters stated that the meaning of the language as proposed is less clear than is ideal. The commenters are concerned that 60 days may be an inadequate amount of time for completing technical review and believe the rules must, at least, clearly ensure that minimum amount of time is available to commission staff. These commenters recommended that §295.303(d) be revised as follows:

"(d) The applicant shall be promptly notified of any additional technical material necessary for a complete review. If the applicant provides the information within the technical review period prescribed by subsection (c) of this section, the executive director will complete processing of the application within the technical review period plus the number of days taken by the applicant to provide the additional data. If the necessary additional information is not received by the executive director prior to expiration of the original technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 30 days to provide the technical

data before an application is returned. And, in no event shall the executive director have less than 60 working days, exclusive of the time spent waiting for submission of additional information, to complete the technical review. Decisions to return the application to the applicant during the technical review stage will be made on a case-by-case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision instead of having the application returned."

Response

The commission agrees and the rule has been revised to reflect these comments.

§295.304, Notice of Application to Divert Marine Seawater or Seawater

Comment

AEM, Asociacion Amiga, CCA-Texas, CWA, EVHN, GEI, SMRF, and Viva! commented that the proposed rule unduly limits notice of applications for permits for diversions of marine seawater. These commenters stated the rules should provide opportunities for additional persons to receive notice, at least via email, of pending applications. County judges and county commissioners for counties in which a facility is located should receive notice. Notice should also be sent to interested persons who file a written request with the Office of the Chief Clerk to receive notices under this chapter. Wider notice is needed to have a meaningful public participation process. Just providing notice to the TPWD and the GLO - agencies that are not allowed to file hearing requests under commission rules - does not provide for a meaningful public notice process.

Improvements are needed in proposed §295.304 and §295.306.

SOS commented that the proposed rules go too far in limiting public notice and that the rules should provide opportunities for additional persons to receive notice and should provide an opportunity for interested persons who file a written request with the Office of the Chief Clerk to receive notice. Just providing notice to the TPWD and the GLO does not provide for a meaningful public notice process.

One thousand, three hundred and twenty-nine individuals commented that notice of permit applications must be provided to county judges and commissioners for counties in which any part of the facility will be located as well as persons who request to receive notice of seawater desalination applications and provide an email address. One individual commented that notice should be given to all state legislators and all local governments that will be the intended beneficiaries of the desalination plant and to all media outlets.

TPWD commented that additional notice to the public should be given for applications to divert marine seawater and recommends that §295.304(a) be revised as follows:

"(a) At the time that the technical review of an application for a permit to divert marine seawater or seawater has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the chief clerk shall give notice by email to the state senator and representative who represent the

general area in which the facility is or will be located, the county judge and county commissioners for each county in which part of the facility is proposed to be located, the Texas Parks and Wildlife Department, the Texas General Land Office, and any person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notices of applications filed under this subchapter, at the email address on file for these individuals and agencies. The notice shall also be posted for public review on the commission's website and made available for public inspection by providing a copy in the county courthouse and to a least one public library in each county where the diversion or diversions will be located."

GBF, NWF, and Sierra Club commented that the proposed notice of applications is unduly constrained. Particularly for diversion facilities proposed to be located in a bay or estuary or facilities proposed to be located in a fish pass or a navigation corridor, many persons, including those involved in recreational and commercial fishing and tourism, may be adversely affected. The proposed notice procedures simply are not adequate to provide reasonable notice. Sending a notice to the TPWD and the GLO informing them of the opportunity to file a contested case hearing request does not constitute meaningful notice, particularly in light of the commission's rule providing that neither agency may file a hearing request. At an absolute minimum, email notice should be sent to the state senator and representative for the area in which all or part of the facility is proposed to be located, to the county judge and county commissioners for each county in which a part of the facility is proposed to be located, and to persons who have submitted a request to the Office of the Chief Clerk

requesting to receive notice of applications under this subchapter and providing an email address. Elected officials representing the area at least have the potential to spread the word about the application to those who might be interested. Providing that level of notice does not constitute an undue burden and email notice can be sent with minimal expense and delay. The notice also should be posted prominently on the commissions' website. These commenters recommended that §295.304(a) and (b)(8) and (9) should be revised to include enhanced notice requirements, a summary of proposed permit conditions in order to allow informed consideration of potential adverse impacts by those receiving notice, and that the deadline for submitting comments or requesting a hearing is described in the notice as follows:

"(a) At the time that the technical review of an application for a permit to divert marine seawater or seawater has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the chief clerk shall give notice by email to the state senator and representative who represent the general area in which the facility is or will be located, the county judge and county commissioners for each county in which part of the facility is proposed to be located, the Texas Parks & Wildlife Department, the Texas General Land Office, and any person who has submitted a written request to the Office of the Chief Clerk providing an email address and asking to receive notices of applications filed under this subchapter, at the email address on file for these individuals and agencies. The notice shall also be posted concurrently for public review on the commission's website.

"(b) ... (8) state the executive director's recommendation regarding the application, including a summary of any proposed permit conditions if issuance of a permit is recommended;

"(b) ... (9) state that an affected person may submit written comments and request a contested case hearing and indicate the deadlines for doing so."

Response

The commission agrees that §295.304 related to notice of an application should be revised to add additional notice to the county judge for the county in which the facility is located and to other individuals who submit requests to be notified of these types of applications. The commission also agrees that notice of these applications should be posted on its website, consistent with posting of notices for all other water rights applications that require notice. The commission responds that §295.304(b)(8) already requires the notice to include the executive director's recommendation; therefore additional language related to a summary of permit conditions is not needed. The commission agrees that the notice should include deadlines and has added that requirement. The commission also revised §295.304(b)(9) to clarify that a person may submit written comments on an application and to add that in addition to "an affected person," the commission, executive director, and applicant can request a contested case hearing.

§295.305, Requirements for an Authorization to Convey Treated Marine Seawater in

Bed and Banks

Comment

TPWD commented that there are numerous constituents that make up fresh surface water that are critical to maintaining the ecological condition of that water body but that do not have associated water quality standards. While seawater may be treated to a level where it can be used for specific purposes such as industrial uses or public drinking water supply, the treated water will likely have a composition very different from the receiving stream. Fish and other aquatic life are adapted to the specific composition of the stream water, including the composition of ions such as calcium, sodium, and potassium. Because aquatic organisms are adapted to the ion composition of ambient waters, a discharge into a freshwater stream with a different ion concentration water may cause a fish kill, or at the least, physiological distress to the aquatic life in the stream. To address this concern, TPWD recommends consideration of parameters unique to each receiving stream and appropriate treatment to ensure that treated water transported in designated rivers and streams falls within a designated range of the natural condition along that water course. TPWD comments that the rule should be revised to be consistent with 30 TAC §297.16 and TWC, §11.042(c) as follows:

"(a) An application for authorization to convey treated marine seawater pursuant to Section 18.004 of the Texas Water Code shall include evidence that the marine seawater conveyed under a permit subject to the requirement in this section will be treated to meet standards that are at least as stringent as the water quality standards

adopted by the commission and applicable to each receiving stream or impoundment proposed for conveyance of the treated marine seawater. Additional treatment to alter constituents not addressed by the water quality standards may be required if the executive director, in consultation with TPWD, determines that such treatment is necessary to protect fish and wildlife in each affected receiving stream or impoundment.

"(e) The commission in issuing an authorization to convey treated marine seawater shall allow to be diverted only the amount of water put into a watercourse or stream, less carriage losses and subject to any special conditions to protect water quality and that may address the impact of the discharge, conveyance, and diversion of treated marine seawater on existing water rights, instream uses, and freshwater inflows to bays and estuaries."

Response

The commission responds that adopted §295.305(a) already requires that an application to convey treated marine seawater be treated to meet the requirements of the receiving stream as required by TWC, §18.004(a). The commission agrees that it is possible more stringent treatment could be required and has revised §295.305(a) in response to other comments. Regarding the proposed addition of a new §295.305(e), Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the

substantive requirements for these applications. The commission did not revise the rule to add a new provision as requested by this and other commenters because TWC, §18.004(e) requires that applications under this subchapter be subject to the requirements in TWC, §11.042(c).

Comment

GBF, NWF, and Sierra Club commented that, although rare, there may be instances where water quality standards adopted by the EPA could apply. Because HB 2031 only establishes minimum requirements, including a reference to compliance with applicable water quality standards without a specific reference to commission adoption ensures coverage in case that unusual circumstance were to occur. In addition, because treated marine seawater may flow through a number of streams or impoundments, the rule should acknowledge that treatment levels must comply with applicable standards for all water bodies through which the treated marine seawater is proposed to be conveyed. The rule should also include an acknowledgement that the commission retains authority to require more stringent treatment if it is necessary to protect water quality. Although it may be unlikely that it will be needed, because the state does not have experience with the impacts of conveying treated marine seawater on water quality, the potential authority for requiring additional treatment, beyond the minimum levels required by statute, should be retained. These commenters recommended that §295.305(a) be revised as follows:

"(a) An application for authorization to convey treated marine seawater pursuant to Section 18.004 of the Water Code shall include evidence that the marine seawater conveyed will be treated to meet standards that are at least as stringent as the water quality standards applicable to each stream or impoundment through which the treated marine seawater is proposed to be conveyed. More stringent treatment may be required if the commission determines it is necessary to protect water quality."

Response

The commission responds that adopted §295.305(a) already requires that an application to convey treated marine seawater be treated to meet the requirements of the receiving stream as required by TWC, §18.004(a). The commission agrees that it is possible more stringent treatment could be required and has revised §295.305(a) in response to other comments.

Comment

GBF, NWF, and Sierra Club commented that the rules should incorporate the basic requirements for issuance of a bed and banks authorization under TWC, §11.042(c) as directed by TWC, §18.004 (e) and recommend that a new §295.305(e) be added as follows:

"(e) The commission in issuing an authorization to convey treated marine seawater shall ensure that:

"(1) the amount authorized to be diverted does not exceed the amount put into the stream minus the amount lost between the point of discharge and the point of diversion;

"(2) appropriate special conditions are included to address the impact of the discharge, conveyance, and diversion of treated marine seawater on existing water rights, instream uses, and freshwater inflows to bays and estuaries; and

"(3) water quality is protected."

Response

The commission responds that Chapter 295, Subchapter G is intended to provide the procedural requirements and content of an application for diversion of marine seawater or seawater under this subchapter. Chapter 297, Subchapter K contains the substantive requirements for these applications. The commission did not revise the rule to add a new provision as requested by this and other commenters because TWC, §18.004(e) already requires that applications under this subchapter be subject to the requirements in TWC, §11.042(c).

§295.306, Notice of Application to Convey Treated Marine Seawater in Bed and Banks

Comment

TPWD commented that additional notice should be given to the public and recommends §295.306(a) be revised as follows:

"(a) Notice of an application to convey treated marine seawater in the bed and banks of a stream or watercourse shall be provided by first class mail, postage prepaid, by the commission to every water right holder of record downstream of the discharge point at least 30 days prior to commission consideration of the application. The commission shall concurrently post the notice on the commission's website and shall email the notice to any person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notices of applications filed under this subchapter at the email address on file for these individuals and agencies. In addition, the notice of an application shall be made available by providing a copy in the county courthouse and in at least one public library of each county where the diversion or diversions will be located."

GBF, NWF, and Sierra Club commented that the proposed notice of applications is unduly constrained. The rules should provide for email notice to those who have requested notice of applications under this subchapter and for posting of the notice on the commission's website. That would allow persons concerned about potential impacts to follow the various phases of a desalination project while minimizing expense and delay. These commenters recommended that §295.306(a) and (b)(8) be revised to include enhanced notice requirements, and to remove the limitation on filing of comments to affected persons as follows:

"(a) Notice of an application to convey treated marine seawater in the bed and banks of a stream or watercourse shall be provided by first class mail, postage prepaid, by the commission to every water right holder of record downstream of the discharge point at least 30 days prior to commission consideration of the application. In addition, the commission shall concurrently post the notice on the commission's website and provide email notice to those persons who have submitted a written request to the Office of the Chief Clerk asking to receive notices of applications filed under this subchapter and providing a valid email address.

"(d) ... (8) for applications that do not request authorization to convey treated marine seawater through a reservoir or impoundment the notice shall state that a person may provide written comments but may not request a contested case hearing."

Response

The commission agrees that §295.306 related to notice of an application to convey treated marine seawater should be revised to add additional notice to other individuals who submit requests to be notified of these types of applications. The commission also agrees that notice of these applications should be posted on its website, consistent with posting of notices for all other water rights applications that require notice. In addition, the commission revised §295.306(d)(8) to clarify that a person may submit written comments on an application and §295.306(d)(10) to add that in addition to "an affected person," the commission, executive director, and applicant can request a contested case hearing.

SUBCHAPTER G: DESALINATION, PROCEDURAL

§§295.300 - 295.306

Statutory Authority

The rules are adopted under 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; and TWC, §11.1405, concerning Desalination of Seawater for the Use of Industrial Purposes.

The adopted rules implement TWC, §§5.013, 5.102, 5.103, 5.120, and 18.005; and House Bill (HB) 2031 and HB 4097 (84th Texas Legislature, 2015).

§295.300. Applicability.

(a) This subchapter only applies to diversion and use of marine seawater for desalination, diversion of seawater from a bay or arm of the Gulf of Mexico for desalination solely for industrial purposes, and conveyance of treated marine seawater through the bed and banks of a flowing stream. The commission may issue a permit under this subchapter to authorize a diversion of state water from the Gulf of Mexico

or a bay or arm of the Gulf of Mexico for desalination and use if:

(1) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or

(2) the water at the proposed diversion point contains a total dissolved solids concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter.

(b) A person may divert and use state water that consists of marine seawater or seawater without obtaining a permit if subsection (a) of this section does not apply.

(c) A person may not begin construction of a facility for the diversion of marine seawater or seawater without obtaining a permit until the person has provided data to the commission demonstrating:

(1) based on the location of each proposed diversion location, that subsection (a)(1) of this section does not apply; and

(2) based on the analysis of samples taken at the water source for each proposed diversion location over a period of at least one year, in accordance with the requirements set out in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration) that subsection (a)(2) of this section does not apply.

(d) A person who has begun construction of a facility for the diversion of marine seawater or seawater without obtaining a permit because the person has demonstrated that subsection (a)(2) of this section does not apply is not required to obtain a permit for the facility if the total dissolved solids concentration of the marine seawater or seawater at the water source subsequently changes so that subsection (a)(2) of this section applies.

(e) This subchapter does not apply to a diversion of marine seawater from a point of diversion located in a bay or estuary unless the diversion is solely for the purpose of desalination of seawater for industrial use under Texas Water Code (TWC), §11.1405.

(f) TWC, Chapter 11, applies to a permit or authorization under this subchapter in the same manner as that chapter applies to a permit or authorization under that chapter which is not subject to this subchapter.

(g) If a person seeks to utilize a facility that was constructed or permitted for the diversion of seawater solely for the purpose of desalination for industrial use under this subchapter to divert seawater for another use, the person must first obtain a water right permit pursuant to provisions of TWC, Chapter 11, other than TWC, §11.1405.

§295.301. Definitions.

The following words or phrases have the following meanings in this subchapter unless the context clearly indicates otherwise:

(1) Affected person--A person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. The determination of whether a person is affected shall be governed by §55.256 of this title (relating to Determination of Affected Person).

(2) Marine seawater--Water that is derived from the Gulf of Mexico for desalination.

(3) Seawater--Water that is derived from a bay or arm of the Gulf of Mexico for desalination and use solely for industrial purposes.

(4) Three-mile seaward boundary--The three nautical mile boundary developed by the Texas General Land Office for the Dispersant Use Pre-Approval Zone.

§295.302. Requirements for Application for Diversion of Marine Seawater and Diversion of Seawater.

(a) An application for diversion of seawater from a bay or arm of the Gulf of Mexico for industrial purposes or for diversion of marine seawater must be submitted in accordance with §295.2 of this title (relating to Preparation of Application) and include, for each applicant, the full name, post office address, telephone number, and federal identification number. If the applicant is a partnership, it shall be designated by the firm name followed by the words "a partnership." If the applicant is acting as trustee for another, it shall be designated by the trustee's name followed by the word "trustee." If one other than the named applicant executes the application, the name, position, post office address, and telephone number of the person executing the application shall be given.

(b) The application shall include the signature of the applicant in accordance with §295.14 of this title (relating to Signature of Applicant). Each applicant shall subscribe and swear to the application before any person entitled to administer oaths, who shall also sign his or her name and affix his or her seal of office to the application.

(c) The application shall state the location of point(s) of diversion and provide latitude and longitude coordinates in decimal degrees to six decimal places for each point.

(d) The total amount of marine seawater or seawater from a bay or arm of the Gulf of Mexico to be diverted and used shall be stated in definite terms, i.e., a definite number of acre-feet annually and the application shall state the maximum rate of

diversion in gallons per minute or cubic feet per second for each diversion point.

(e) The application shall state each purpose of use in definite terms. If the application requests authorization to use marine seawater for multiple purposes, the application shall expressly state an annual amount of marine seawater to be used for the multiple purposes as well as for each purpose of use.

(f) The applicant shall provide evidence that the marine seawater or seawater diverted from a bay or arm of the Gulf of Mexico will be treated in accordance with applicable commission rules, based on the purpose for which the water is to be used, before it is used.

(g) The application must include a water conservation plan meeting the requirements contained in §297.208 of this title (relating to Consideration of Water Conservation).

(h) The application shall contain information describing how it addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan or, in the alternative, describe conditions that warrant a waiver of this requirement.

(i) The application must include a determination of the total dissolved solids concentration of the marine seawater or seawater at the water source based on

monthly sampling and analysis, as described in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration), and provide the data collected to the commission.

(j) The application shall provide documentation that the applicant will take reasonable measures to minimize impingement and entrainment associated with the diversion of marine seawater or seawater as described in §297.209 of this title (relating to Impingement and Entrainment).

(k) The application shall include documentation of the results of the consultation with the Texas Parks and Wildlife Department and the Texas General Land Office regarding the point or points from which a facility the person proposes to construct may divert marine seawater or seawater.

§295.303. Review Timeframes.

(a) The review timeframes in this section only apply to applications which are determined to be administratively complete when submitted. If the application is not administratively complete, the application will not be considered for expedited processing under this section.

(b) Applications shall be reviewed by the staff for administrative completeness within 10 working days of receipt of the application by the executive director.

(c) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of this subchapter, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 60 working days, except as extended pursuant to subsection (d) of this section.

(d) The applicant shall be promptly notified of any additional technical material necessary for a complete review. If the applicant provides the information within the technical review period prescribed by subsection (c) of this section, the executive director will complete processing of the application within the technical review period extended by the number of days taken by the applicant to provide the additional data. If the necessary additional information is not received by the executive director prior to expiration of the original technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 30 days to provide the technical data before an application is returned. And, in no event shall the executive director have less than 60 working days, exclusive of any time spent waiting for submission of additional information, to complete the technical review. Decisions to return the application to the applicant during the technical review stage will be made on a case-by-case basis. The applicant has the option of having the question of sufficiency of

necessary technical data referred to the commission for a decision instead of having the application returned.

§295.304. Notice of Application to Divert Marine Seawater or Seawater.

(a) At the time that the technical review of an application for a permit to divert marine seawater or seawater has been completed and the technical memoranda have been filed by the executive director with the chief clerk of the commission, the chief clerk shall give notice by email to the county judge for each county in which the proposed facility is proposed to be located, the Texas Parks and Wildlife Department, the Texas General Land Office, and any person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notice of applications filed under this subchapter. The notice shall also be posted on the commission's website.

(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 purpose and amount of the proposed diversion of marine seawater or seawater;

(7) identify the location of the diversion point(s);

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

(9) state that a person may submit written comments and that an affected person, the applicant, the executive director, and the commission may request a contested case hearing and indicate the deadlines for doing so;

(10) 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

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

(c) Requests for a contested case hearing will be processed in accordance with Chapter 55, Subchapter G of this title (relating to Requests for Contested Case Hearing and Public Comment on Certain Applications).

§295.305. Requirements for an Authorization to Convey Treated Marine Seawater in Bed and Banks.

(a) The application shall include evidence that the marine seawater conveyed under a permit subject to the requirement in this section will be treated so as to meet standards that are at least as stringent as the water quality standards adopted by the commission and applicable to the receiving stream or impoundment. More stringent treatment may be required if the commission determines it is necessary to protect water quality.

(b) Treated marine seawater that is conveyed under an authorization granted under this section may be used only by the person to whom the authorization is granted.

(c) This section does not prohibit a person from conveying treated marine seawater in any other manner authorized by law.

(d) A person wishing to place treated marine seawater into a stream or watercourse, convey the treated marine seawater in the watercourse or stream, and subsequently divert such treated marine seawater shall file an application with the commission containing the following information:

(1) the name, mailing address, and telephone number of the applicant;

(2) the name of the stream and the locations of the point of discharge and diversion as identified on a United States Geological Survey 7.5-minute topographical map(s);

(3) the source, amount, and rates of discharge and diversion;

(4) a description of the water quality of the water discharged and the permit number and name of any related discharge permit;

(5) an assessment of the adequacy of the quantity and quality of flows remaining after the proposed diversion to meet instream uses and bay and estuary freshwater inflow needs;

(6) the estimated amount of treated marine seawater that will be lost to transportation, evaporation, seepage, channel or other associated carriage losses from the point of discharge to the point of diversion, including the method used to calculate the losses;

(7) an accounting plan that demonstrates that the applicant will only divert the amount of treated marine seawater discharged less losses; and

(8) any other information the executive director may need to complete an analysis of the application.

§295.306. Notice of Application to Convey Treated Marine Seawater in Bed and Banks.

(a) Notice of an application to convey treated marine seawater in the bed and banks of a stream or watercourse shall be provided by first class mail, postage prepaid, by the commission to every water right holder of record downstream of the discharge point at least 30 days prior to commission consideration of the application. Notice shall also be provided to any person who has submitted a written request to the Office of the Chief Clerk providing a valid email address and asking to receive notice of applications filed under this subchapter. The notice shall be posted on the commission's website.

(b) No published notice shall be required for an application under this section.

(c) The applicant shall be responsible for the costs of providing notice under this section.

(d) 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 purpose of use for the conveyed treated marine seawater;

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

(8) state that a person may provide written comments on the application and indicate the deadline for doing so;

(9) for applications that do not request authorization to convey treated marine seawater through a reservoir or impoundment, the notice shall state that a person may not request a contested case hearing;

(10) for applications that request authorization to convey treated marine seawater through a reservoir or impoundment, the notice shall state that an affected person, the commission, the executive director, and the applicant may request a contested case hearing and indicate the deadline for doing so;

(11) 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

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

(e) Requests for a contested case hearing will be processed in accordance with

Chapter 55, Subchapter G of this title (relating to Request for Contested Case Hearing and Public Comment on Certain Applications).

(f) Nothing in this section is intended to deny any additional notice to an affected person that may be required under the Texas Administrative Procedure Act.