The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §281.19.

The amendment to §281.19 is adopted with change to the proposed text as published in the December 13, 2019, issue of the Texas Register (44 TexReg 7611) and, therefore, this section will be republished.

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

In 2019, the 86th Texas Legislature passed House Bill (HB) 720. HB 720 added Texas Water Code (TWC), §11.157, related to new appropriations of water for: 1) storage in an aquifer storage and recovery project for later recovery for the ultimate authorized beneficial use under the appropriation (ASR) and 2) aquifer recharge (AR) projects.

Under TWC, §11.157(f), the commission has 180 days to complete technical review of applications for new appropriations of water for ASR and AR. The commission must adopt rules implementing TWC, §11.157, by June 1, 2020.

This rulemaking implements the requirement in TWC, §11.157(f), for the commission to complete technical review for applications for new appropriations of water for ASR and AR in 180 days.

As part of this rulemaking, the commission adopts amendments to 30 TAC Chapter 39, Public Notice; Chapter 295, Water Rights, Procedural; Chapter 297, Water Rights,
Substantive; and Chapter 331, Underground Injection Control, to implement HB 720.

**Section Discussion**

§281.19, *Technical Review*

The commission adopts the amendment to §281.19(a). Currently, §281.19(a), requires that technical review of a water rights application be completed within 75 working days after the initial review period. TWC, §11.157(f), provides for a 180-day technical review period for new appropriations of water for ASR and AR. Adopted §281.19(a) will require that technical review for new appropriations of water for ASR and AR be completed 180 days after the application is determined to be administratively complete. Additionally, the commission adopts to further amend §281.19(a) to remove obsolete language referring to 30 TAC §291.102 and §291.109, because it relates to areas that were transferred to the Public Utility Commission of Texas (applications for certificates of public convenience and necessity and applications for sale, transfer, or merger requests).

In response to comments, the commission revised the rule to clarify the distinction between AR, which is defined as a beneficial purpose of use for which the commission can appropriate water, and ASR in which the commission may authorize state water to be stored prior to being later recovered for its authorized beneficial use under the appropriation. The commission revised §281.19(a) to add a reference to TWC, §11.157 and to add the words "storage in an" and "project" to clarify that the new appropriation
of water is for storage in an ASR as defined in the Background section of this preamble. The commission also added the word "for" and deleted the word "project" to clarify that the new appropriation of water is for aquifer recharge, which is defined as a beneficial purpose of use under TWC, §11.023(a)(9).

**Final Regulatory Impact Determination**

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225. A "Major environmental rule" means a rule with a specific intent to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

First, the adopted rulemaking does not meet the statutory definition of a "Major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the rulemaking is to implement HB 720, which enacted requirements in TWC, Chapters 11 and 27, for ASR and AR projects.

Second, the adopted rulemaking does not meet the statutory definition of a "Major
environmental rule" because the rule will not 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. It is not anticipated that there will be a significant cost to comply with the adopted rule because no new fees are proposed, therefore, the cost will not be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs. The adopted rule establishes a time period consistent with the requirements of HB 720 for technical review of applications for a new appropriation of water for ASR or AR, therefore, will not adversely affect in a material way the public health and safety of the state or a sector of the state.

Finally, the adopted rulemaking does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of the preceding four
applicability requirements for the following reasons: this rulemaking does not exceed any standard set by federal law because there are no federal standards governing water rights; does not exceed any express requirement of state law because it is consistent with the requirements of HB 720; does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government because there are no delegation agreements or contracts between the commission and the federal government for the commission's water rights program; and is not based solely under the general powers of the agency, but is based specifically under TWC, §27.019, and HB 720, Section 4, as well as, under the other authority of the commission cited in the statutory authority section of this preamble.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. The commission received no comments regarding the Draft Regulatory Impact Analysis Determination.

**Takings Impact Assessment**

The commission evaluated this rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted action implements legislative requirements in HB 720 for new appropriations of water for ASR or AR.

The commission determined that the adopted rule will be neither a statutory nor a
constitutional taking of private real property. The adopted rule establishes the time period consistent with the requirements of HB 720 for technical review of an application for a new appropriation of water for ASR or AR. The adopted rule will not affect a landowner's rights in private real property because this rulemaking does not burden constitutionally, nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of the regulation.

Therefore, the rule does not constitute a taking under Texas Government Code, Chapter 2007.

**Consistency with the Coastal Management Program**

The commission reviewed the adopted rulemaking and found it is a rulemaking identified in the Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore,
consistent with CMP goals and policies.

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

Public Comment

The commission offered a public hearing on January 7, 2020. The comment period closed on January 21, 2020. The commission received written comments from the Honorable Lyle Larson, Texas House of Representatives, Chairman of the House Committee on Natural Resources (Chairman Larson), and a joint comment letter from the National Wildlife Federation, Galveston Bay Foundation, Lone Star Chapter Sierra Club, and the Law Offices of Myron Hess, LLC (Joint Commenters).

Chairman Larson and the Joint Commenters suggested changes to the rule.

Response to Comments

Comment

Chairman Larson commented that he greatly appreciates the diligent work that TCEQ and its staff put into the rulemaking effort. Chairman Larson thanked TCEQ for its expedited work on the rulemaking package for HB 720, the opportunity to participate in the rulemaking process, and for TCEQ’s consideration of his comments.
Response

The commission appreciates and acknowledges Chairman Larson’s comments.

Comment

Chairman Larson requested that TCEQ be mindful of the distinction between AR projects, which themselves are defined as a beneficial purpose of use for which the TCEQ can appropriate state water and ASR projects in which the TCEQ may authorize state water to be stored prior to being later recovered for its ultimate authorized beneficial use under an appropriation.

Response

The commission agrees and, in response to this comment, revised the preamble to clarify the distinction between an appropriation of water for AR and an appropriation of water where ASR is a storage component for appropriated water with an authorized beneficial use and made additional changes to support this clarification throughout the preamble.

Comment

Chairman Larson requested that the commission consider rewording the language in §281.19(a) to clarify the difference between an appropriation of water for an AR project and an appropriation of water where ASR is a storage component for
appropriated water with an authorized beneficial use.

Response

The commission agrees and revised §281.19(a) in response to this comment to clarify the difference between an appropriation of water for AR and an appropriation of water where ASR is a storage component of the appropriated water with an authorized beneficial use. The commission also added a reference to TWC, §11.157 in response to other comments to provide further clarification.

Comment

The Joint Commenters commented that they understand that the amendment to §281.19 is intended to implement TWC, §11.157(g), which refers only to amendment applications filed under TWC, §11.157 in establishing the 180-day period for completing technical review. The commenters further added that §281.19(a) should only apply to that subset of applications. The commenters recommend that the proposed rule language be revised to read as follows: "In the case of applications filed under Chapter 295 of this title (relating to Water Rights, Procedural) that solely request a new appropriation of water for aquifer storage and recovery or aquifer recharge projects pursuant to TWC, §11.157, the technical review shall commence on the date the application is administratively complete and will continue for a period of time not to exceed 180 days."
Response

The commission responds that TWC, §11.157(f), which requires that technical review be completed within 180 days applies to both new water rights and amendments. The commission notes that it revised the rule in response to other comments. However, the commission agrees, in part, with this comment and included a reference to TWC, §11.157 to provide further clarification on which applications would be subject to the adopted rule. No further changes were made in response to this comment.
§281.19

Statutory Authority

This amendment is adopted under the authority of Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's general authority to adopt rules; TWC, §5.105, which establishes the commission's authority to set policy by rule; TWC, §5.120, which authorizes the commission to administer the law so as to promote the judicious use and maximum conservation and protection of the environment and natural resources of the state; and House Bill (HB) 720, Section 4, which authorizes and directs the commission to adopt rules implementing TWC, §11.157 and §11.158 and TWC, Chapter 27, Subchapter H.

The adopted amendment implements HB 720.


(a) 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 these sections, 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 75 working days. [In the case of
applications filed under §291.102 of this title (relating to Criteria for Considering and Granting Certificates or Amendments), the technical review period is that period of time beginning 30 days after notice of the application has been given in accordance with §291.109 of this title (relating to Report of Sale, Merger, etc.; Investigation; Disallowance of Transaction) and will continue for a period of time not to exceed 75 working days. In the case of applications filed under §335.43 of this title (relating to Permit Required) or §331.7 of this title (relating to Permit Required), the technical review period shall commence upon assignment of the application to a staff member and continue for a period of time not to exceed 120 days. For applications filed under Chapter 336 of this title (relating to Radioactive Substance Rules) and subject to the Notice of Deficiency (NOD) process established in this section, the technical review period shall begin the day after the date of determination of administrative completeness and for issuance, renewal, or major amendments, shall continue for a period of time not to exceed 255 days; however, this time frame may be extended to a maximum of 600 days if an application is technically deficient; or, for applications for minor amendments, shall continue for a period of time not to exceed 90 days; however, this time frame may be extended to a maximum of 150 days if an application is technically deficient. In the case of applications filed under Chapter 295 of this title (relating to Water Rights, Procedural) that request a new appropriation of water pursuant to Texas Water Code, §11.157 for storage in an aquifer storage and recovery project or for aquifer recharge projects, the technical review shall commence on the
date the application is administratively complete and will continue for a period of time not to exceed 180 days.

(b) Except as provided in subsection (c) of this section, the applicant shall be promptly notified of any additional technical material as may be necessary for a complete review. If the applicant provides the information within the period of time prescribed by subsection (a) of this section, the executive director will complete processing of the application within the technical review period extended by the number of days required for the additional data. If the necessary additional information is not received by the executive director prior to expiration of the 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. Decisions to return material 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.

(c) For applications for radioactive material licenses, the applicant shall be promptly notified of any additional technical information necessary to complete technical review. For new applications, renewal applications, or major amendment
applications, the executive director shall complete application processing within the technical review period (600 days) if the applicant provides the information within 75 days of the date of the first NOD and 60 days of the subsequent NODs. For minor amendments, the applicant must provide the information within 20 days from the date of the first NOD and 20 days from the date of the second NOD. If the necessary additional information is not received by the executive director prior to the end of the response period, the executive director may return the application to the applicant. In no instance shall the executive director issue more than four NODs before returning the application. The applicant has the option of having the question of sufficiency of necessary technical information referred to the commission for a decision instead of having the application returned. The applicant may request additional time to respond to a notice of technical deficiency. The request must be in writing, set forth the reasons why the applicant cannot respond within the time provided and specify the amount of additional time requested. Any extension of time must be approved by the executive director in writing. The executive director may extend or delay the schedule for the processing of an application under this subsection to comply with the priority established by law for processing and review of radioactive material licenses.

(d) This subsection applies to the technical review of applications for radioactive material licenses submitted to the Texas Department of State Health Services on or before June 18, 2007. For new applications, renewal applications, or major amendment applications, the executive director shall complete application processing within the
technical review period (600 days) if the applicant provides the information within 75
days of the date of the first NOD and 60 days of the second NOD. For minor
amendments, the applicant must provide the information within 20 days from the date
of the first NOD and 20 days from the date of the second NOD. If the necessary
additional information is not received by the executive director prior to the end of the
response period, the executive director may return the application to the applicant. In
no instance shall the executive director issue more than two NODs before returning the
application. The applicant has the option of having the question of sufficiency of
necessary technical information referred to the commission for a decision instead of
having the application returned. The applicant may request additional time to respond
to a notice of technical deficiency. The request must be in writing, set forth the
reasons why the applicant cannot respond within the time provided and specify the
amount of additional time requested. Any extension of time must be approved by the
executive director in writing. The executive director may extend or delay the schedule
for the processing of an application under this subsection to comply with the priority
established by law for processing and review of radioactive material licenses.