

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§297.1, 297.13, and 297.19.

Background and Summary of the Factual Basis for the Proposed Rules

This rulemaking implements House Bill (HB) 655, 84th Texas Legislature, 2015, addressing the commission's regulation of aquifer storage and recovery (ASR) projects in Texas. ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. The proposed amendments to Chapter 297 implement amendments to Texas Water Code (TWC), §11.153 and the repeal of TWC, §11.154 under HB 655 regarding the storage of appropriated water in ASR projects.

The 84th Texas Legislature also passed HB 2031. 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 2031 created TWC, Chapter 18, to address marine seawater desalination projects. New TWC, §18.001, added a definition for "Marine seawater." The commission intends to implement statutory requirements for desalination in a separate rulemaking project (Rule Project Number 2015-029-295-OW). Because the commission is proposing changes to definitions in §297.1 to implement HB 655, the commission is also proposing changes to this section

to include a definition from HB 2031 to avoid open section conflicts under *Texas Register* publication requirements when the rest of HB 2031 is implemented in the separate rulemaking project.

In corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes revisions to 30 TAC Chapter 39, Public Notice; Chapter 295, Water Rights, Procedural; and Chapter 331, Underground Injection Control.

Section by Section Discussion

In addition to proposing amendments to implement HB 655 and HB 2031, the commission proposes grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, and establish consistency in the rules. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

§297.1, Definitions

The commission proposes to amend §297.1(5) and to add §297.1(30). The commission proposes to amend the definition of "Aquifer Storage and Retrieval Project" in §297.1(5). HB 655 created new TWC, Chapter 27, Subchapter G, which contains a definition of "Aquifer storage and recovery project." The commission proposes to amend the existing

term and definition in §297.1(5) to bring it into agreement with "Aquifer storage and recovery project" as defined in the amendments to the TWC made by HB 655.

The commission also proposes to add a definition for "Marine seawater" in proposed §297.1(30). HB 2031 created TWC, Chapter 18, to address marine seawater desalination projects. New TWC, §18.001, added a definition for "Marine seawater." Because the commission has opened §297.1 to amend the definition of "Aquifer Storage and Retrieval Project," the commission also proposes to simultaneously add the definition of "Marine seawater" to §297.1(30) to avoid a potential open section conflict with another agency rulemaking. Additionally, the commission proposes to renumber the existing definitions to accommodate adding proposed §297.1(30).

§297.13, Temporary Permit under the Texas Water Code, §§11.138 and 11.153 - 11.155

The proposed amendment would revise the title of §297.13 to remove the TWC reference to TWC, §§11.153 - 11.155, because a temporary permit is no longer required for an ASR project under TWC, Chapter 11. HB 655 amended TWC, §11.153(a) - (c), to allow a water right holder or a person who has contracted for the use of water under a contract that does not prohibit the use of the water in an ASR project to undertake an ASR project without obtaining any additional authorization under TWC, Chapter 11. However, TWC, §11.153, as amended by HB 655, requires the applicant to obtain any necessary authorizations for an ASR project under TWC, Chapter 27, Subchapter G, and TWC,

Chapter 36, Subchapter N. In addition, HB 655 repealed TWC, §11.153(d) and (e), and TWC, §11.154, which included the repeal of Phase I ASR projects. The commission proposes to amend §297.13(a), which includes a description of the types of projects a temporary permit is designed for, by deleting, "evaluation of Phase I of an aquifer storage and retrieval project" since HB 655 repealed Phase I ASR projects.

§297.19, Term Permit under Texas Water Code, §§11.1381 and 11.153 - 11.155

The proposed amendment would revise the title of §297.19 to remove the TWC reference to TWC, §§11.153 - 11.155, and delete §297.19(d) because the term permit is no longer required for an ASR project under TWC, Chapter 11, as amended by HB 655.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of the administration or enforcement of the proposed rules.

The proposed rules implement HB 655. HB 655 amended TWC, Chapters 11, 27, and 36, regarding regulation of ASR projects. In corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes revisions to 30 TAC Chapters 39, 295, and 331. This fiscal note applies only to the proposed amendments to Chapter

297.

ASR involves the use of one or more injection wells for the purpose of placing a water supply into a subsurface geologic formation, or aquifer, for storage so that the water may be subsequently recovered and used by the project operator. ASR allows the operator to utilize an existing aquifer as a storage reservoir rather than using aboveground storage options. The stored water can be available for public or private drinking water supplies, agriculture, or industrial uses. The operator must assure that the aquifer formation receiving the injected water has appropriate geologic and hydrologic properties that are amenable to injection and will allow the control or containment of the injected water. The operator must also assure that the injection will not pollute the native groundwater already in the aquifer or other underground sources of drinking water. TCEQ's Underground Injection Control program regulates the authorization, construction, operation, and closure of the injection wells used for ASR projects.

HB 655 repealed the requirement that a pilot project be part of the ASR authorization process. HB 655 also provided a definition for "aquifer storage and recovery project" and in this definition removed the reference to the requirement for a pilot project. The commission proposes to amend the existing term and definition in §297.1(5) to bring it into agreement with "aquifer storage and recovery project" as defined by HB 655. The

proposed rules also remove reference to TWC, §§11.153 - 11.155 because the requirement for a temporary or term permit was repealed under HB 655.

The proposed rules also add the definition of "Marine seawater." Addition of this definition is necessary to address changes to TWC, §18.001 from the passage of HB 2031. This definition is added as part of this rulemaking to avoid a potential open section conflict with another rulemaking.

The proposed revisions for the definition of "Aquifer Storage and Recovery Project" and the addition of the definition for "Marine seawater" are not expected to result in fiscal implications for the agency or for any other units of state or local government. Removal of the requirement for a temporary or term permit for a pilot project simplifies the ASR authorization process because now only one authorization is required. Prior to passage of HB 655, a pilot project was required as part of the ASR approval process. One of the requirements of the pilot project was that the applicant had to obtain either a temporary or term water rights permit for the volume of water that would be injected and recovered as part of the pilot project. Fees associated with the permit are \$1.00 per acre-foot and are assessed on a one-time basis. Associated notice fees could be up to \$1,200. Injected and recovered volumes associated with pilot projects are generally less than 1,000 acre-feet. Based on these assumptions, the estimated savings to an ASR applicant would be about \$2,000, which is not a significant portion of the costs to establish an

ASR project.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rulemaking would be compliance with state law and the implementation of a process for authorizing ASR projects which are a recognized strategy for alleviating the effects of prolonged drought and for ensuring adequate water supplies.

No fiscal implications are anticipated for businesses or individuals as a result of the administration or enforcement of the proposed rules. The proposed revisions for the definition of "Aquifer Storage and Recovery Project" and the addition of the definition for "Marine seawater" are not expected to result in fiscal implications for any affected businesses or individuals. Removal of the requirement for a temporary or term permit for a pilot project simplifies the ASR authorization process because now only one authorization is required and is not expected to result in significant cost savings for applicants.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. The proposed rules would have the same effect on a small

business as it does on a large business. The proposed revisions for the definition of "Aquifer Storage and Recovery Project" and the addition of the definition for "Marine seawater" are not expected to result in fiscal implications for any small or micro-business. Removal of the requirement for a temporary or term permit for a pilot project simplifies the ASR authorization process because now only one authorization is required.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking is necessary in order to comply with state law and does not adversely affect a small or micro-businesses in a material way for the first five years that the proposed rulemaking is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of injection wells associated with ASR projects and associated water rights; and implements HB 2031, by adding a definition of "Marine seawater." The proposal does not meet the definition of "major environmental rule" because the rulemaking does not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment or public health and safety of the state or a sector of the state. The proposed rules implement the statutory repeal of the requirement to establish a pilot project for an ASR project under HB 655 by removing rule requirements for temporary and term permits for ASR projects and amends definitions consistent with HB 655 and HB 2031.

Furthermore, the proposed rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). The proposed rules do not exceed a standard set by federal law, because there are no federal standards regarding Texas water rights. The proposed rules do not exceed an express requirement of state law because the rules are consistent with the express requirements of HB 655; TWC, §11.153; the repeal of TWC, §11.154; and TWC, §18.001, as established in HB 2031. The proposed rules do not exceed requirements of a federal delegation agreement or contract because there is no federal delegation or contract for the Texas Water Rights program. The rulemaking is not proposed under the general powers of the agency and is proposed under the express requirements of HB 655, Section 6.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this rulemaking action and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. The proposed action implements legislative requirements in HB 655, which revises the requirements for the commission's regulation of water rights associated with ASR projects; and implements HB 2031 by adding a definition of "Marine seawater."

The proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules eliminate requirements for temporary or term permits because ASR projects do not have to establish a pilot project or develop the project in phases under the requirements of HB 655. The proposed rules also amend definitions to implement HB 655 and HB 2031. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action 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 regulations.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Texas 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on January 22, 2016, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal

Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-022-331-WS. The comment period closes on February 8, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact David Murry, Radioactive Materials Division, (512) 239-6080.

SUBCHAPTER A: DEFINITIONS AND APPLICABILITY
§297.1

Statutory Authority

The amended section is proposed under the Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission 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) 655, Section 6, 84th Texas Legislature, 2015.

The amended section implements HB 655, TWC, §11.153, and the repeal of TWC, §11.154; and HB 2031, 84th Texas Legislature, 2015, and TWC, §18.001.

§297.1. Definitions.

The following words and terms, when used in this chapter and in Chapters 288 and 295 of this title (relating to Water Conservation Plans, Drought Contingency Plans,

Guidelines and Requirements; and Water Rights, Procedural, respectively), shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agriculture or agricultural--~~Any~~ [means any] of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management;

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure; and

(G) aquaculture as defined in Texas Agriculture Code, §134.001, which reads "'aquaculture' or 'fish farming' means the business of producing and selling cultured species raised in private facilities. Aquaculture or fish farming is an agricultural activity."

(2) Agricultural use--Any use or activity involving agriculture, including irrigation.

(3) Appropriations--The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water.

(4) Appropriative right--The right to impound, divert, store, take, or use a specific quantity of state water acquired by law.

(5) Aquifer Storage and Recovery [Retrieval] Project--A project involving the injection of water into a geologic formation for the purpose of subsequent recovery and beneficial use by the project operator. [with two phases that anticipates the use of a Class V aquifer storage well, as defined in §331.2 of this title (relating to Definitions), for injection into a geologic formation, group of formations, or part of a formation that is capable of underground storage of appropriated surface water for subsequent retrieval and beneficial use. Phase I of the project requires commission authorization by a temporary or term permit to determine feasibility for ultimate storage and retrieval for beneficial use. Phase II of the project requires commission authorization by permit or permit amendment after the commission has determined that Phase I of the project has been successful.]

(6) Baseflow or normal flow--The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, agricultural, or other uses of ground or surface waters may be included at times.)

(7) Beneficial inflows--Freshwater inflows providing for a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary that is necessary for the maintenance of

productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(8) Beneficial use--Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

(9) Certificate of adjudication--An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of Texas Water Code, §11.323, or the final judgment and decree in State of Texas v. Hidalgo County Water Control and Improvement District No. 18, 443 S.W.2d 728 (Texas Civil Appeals - Corpus Christi 1969, writ ref. n.r.e.).

(10) Certified filing--A declaration of appropriation or affidavit which was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, §14, as amended.

(11) Claim--A sworn statement filed under Texas Water Code, §11.303.

(12) Commencement of construction--An actual, visible step beyond planning or land acquisition, which forms the beginning of the on-going (continuous) construction of a project in the manner specified in the approved plans and specifications, where required, for that project. The action must be performed in good faith with the bona fide intent to proceed with the construction.

(13) Conservation--Those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(14) Conserved water--That amount of water saved by a water right holder through practices, techniques, or technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from the storage, transportation, distribution, or application of the water. Conserved water does not mean water made available simply through its non-use without the use of such practices, techniques, or technologies.

(15) Dam--Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam. A structure used only for diverting water from a watercourse by gravity is a diversion dam.

(16) Diffused surface water--Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)

(17) District--Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(18) Domestic use--Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

(19) Drought of record--The historic period of record for a watershed in which the lowest flows were known to have occurred based on naturalized streamflow.

(20) Firm yield--That amount of water, that the reservoir could have produced annually if it had been in place during the worst drought of record. In performing this simulation, naturalized streamflows will be modified as appropriate to account for the full exercise of upstream senior water rights is assumed as well as the passage of sufficient water to satisfy all downstream senior water rights valued at their full authorized amounts and conditions as well as the passage of flows needed to meet all applicable permit conditions relating to instream and freshwater inflow requirements.

(21) Groundwater--Water under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.

(22) Habitat Mitigation--Actions taken to off-set anticipated adverse environmental impacts from a proposed project. Such actions and their sequence include:

(A) avoiding the impact altogether by not taking a certain action or parts of an action or pursuing a reasonably practicable alternative;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(23) Hydropower use--The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(24) Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric, but does not include agricultural use.

(25) Instream use--The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other instream use recognized by law. An instream use is a beneficial use of water. Water necessary to protect instream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

(26) Irrigation--The use of water for the irrigation of crops, trees, and pasture land, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(27) Irrigation water efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include but are not limited to evapotranspiration needs for vegetative maintenance and growth and salinity management and leaching requirements associated with irrigation.

(28) Livestock use--The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in Texas Agriculture Code, §142.001 [of the Agriculture Code], and the terms game animals and fur-bearing animals are to be used as defined in Texas Parks and Wildlife Code, §63.001 and §71.001, respectively[, of the Parks and Wildlife Code].

(29) Mariculture--The propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.

(30) Marine seawater--Water that is derived from the Gulf of Mexico.

(31) [(30)] Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(32) [(31)] Municipal per capita water use--The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(33) [(32)] Municipal use--

(A) The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, other public or recreational spaces; or

(B) the use of reclaimed water in lieu of potable water for the preceding purposes; or

(C) the use of return flows authorized pursuant to Texas Water Code, §11.042, in lieu of potable water for the preceding purposes. Return flows used for human consumption as defined in §290.38(34) [(32)] of this title (relating to Definitions) must be of a quality suitable for the authorized beneficial use as may be required by applicable commission rules; or

(D) the application of municipal sewage effluent on land, under a Texas Water Code, Chapter 26, permit where:

(i) the application site is land owned or leased by the Chapter 26 permit holder; or

(ii) the application site is within an area for which the commission has adopted a no-discharge rule.

(34) [(33)] Navigable stream--By law, Texas Natural Resources Code, §21.001(3), any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more, at which point it becomes statutorily nonnavigable.

(35) [(34)] Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(36) [(35)] One-hundred-year flood--The flood peak discharge of a stream, based upon statistical data, which would have a 1.0% chance of occurring in any given year.

(37) [(36)] Permit--The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.

(38) [(37)] Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful or detrimental to humans, animal life, vegetation, or property, or the public health, safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(39) [(38)] Priority--As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law.

(40) [(39)] Reclaimed water--Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or agricultural tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized beneficial use.

(41) [(40)] Recreational use--The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including aquatic and wildlife enjoyment, and aesthetic land enhancement of a subdivision, golf course, or similar development.

(42) [(41)] Register--The *Texas Register*.

(43) [(42)] Reservoir system operations--The coordinated operation of more than one reservoir or a reservoir in combination with a direct diversion facility in order to optimize available water supplies.

(44) [(43)] Return water or return flow--That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(45) [(44)] Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(46) [(45)] River basin--A river or coastal basin designated by the Texas Water Development Board as a river basin under Texas Water Code, §16.051. The term does not include waters originating in bays or arms of the Gulf of Mexico.

(47) [(46)] Runoff--That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(48) [(47)] Secondary use--The reuse of state water for a purpose after the original, authorized use.

(49) [(48)] Sewage or sewage effluent--Water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with any groundwater infiltration and surface waters with which it may be commingled.

(50) [(49)] Spreader dam--A levee-type embankment placed on alluvial fans or within a flood plain of a watercourse, common to land use practices, for the purpose of overland spreading of diffused waters and overbank flows.

(51) [(50)] State water--The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, and watercourse in the state. State water also includes water which is imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state. Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water. State water does not include percolating groundwater; nor does it include diffuse surface rainfall runoff, groundwater seepage, or springwater before it reaches a watercourse.

(52) [(51)] Stormwater or floodwater--Water flowing in a watercourse as the result of recent rainfall.

(53) [(52)] Streamflow--The water flowing within a watercourse.

(54) [(53)] Surplus water--Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law. Water that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

(55) [(54)] Unappropriated water--The amount of state water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.

(56) [(55)] Underflow of a stream--Water in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(57) [(56)] Waste--The diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system, or the diversion or use of water in any manner that causes or threatens to cause pollution of water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance with all applicable rules and standards prior to its discharge into or adjacent to water in the state so that it may be subsequently beneficially used.

(58) [(57)] Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for preventing or reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate planning document or may be contained within another water management document(s).

(59) [(58)] Water in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(60) [(59)] Watercourse--A definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter with some degree of regularity, depending on the characteristics of the sources.)

(61) [(60)] Water right--A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water.

(62) [(61)] Watershed--A term used to designate the area drained by a stream and its tributaries, or the drainage area upstream from a specified point on a stream.

(63) [(62)] Water supply--Any body of water, whether static or moving, either on or under the surface of the ground, available for beneficial use on a reasonably dependable basis.

(64) [(63)] Wetland--An area (including a swamp, marsh, bog, prairie pothole, playa, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including, but not limited to, impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts. This definition does not apply to man-made wetlands described under this subparagraph constructed or created on or after August 28, 1989. If this definition conflicts with the federal definition in any manner, the federal definition prevails.

SUBCHAPTER B: CLASSES OF WATER RIGHTS
§297.13, §297.19

Statutory Authority

The amended sections are proposed under the Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission 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) 655, Section 6, 84th Texas Legislature, 2015.

The amended sections implement HB 655, TWC, Chapter 11, §11.153, and the repeal of TWC, §11.154.

§297.13. Temporary Permit under the Texas Water Code, [§]§11.138 [and 11.153-11.155].

(a) A commissioner may authorize temporary permits under this section for beneficial purposes to the extent that they do not interfere with or adversely affect prior

appropriations or vested rights on a stream from which water is to be diverted under such temporary water rights or environmental flow needs. A temporary permit is primarily designed for those persons who require state water for highway construction, oil or gas well drilling projects, [evaluation of Phase I of an aquifer storage and retrieval project,] hydro-static tests for pipelines, and other types of short duration projects.

(b) A temporary permit may not be granted for a period of time exceeding three years and shall be junior to all affected prior appropriations and vested rights on a stream. This permit does not vest in the holder any permanent right to the use of state water and expires in accordance with its terms and may be suspended upon notice by the executive director or watermaster, as applicable, in order to protect senior water rights. The permit may also have conditions for the protection of instream uses, water quality, aquatic and wildlife habitat, and freshwater inflows to bays and estuaries.

(c) The period of time to use water authorized by a temporary permit which was initially granted for a period of less than three years may be extended by the commission upon written request by the permittee, but in no event shall the entire period including the initial period as well as any extension exceed three years nor shall an extension of time seek a change of diversion rate, diversion point, or additional water.

(d) A temporary permit for the use of ten acre-feet or less for a period of one calendar year or less may be authorized without notice and hearing upon the 30th [thirtieth] day after a registration and fee as provided by §295.132 of this title (relating to Filing, Recording, and Notice Fees) is filed with the TCEQ [TNRCC] regional director or the watermaster, as applicable, unless the applicant is notified by the regional director or watermaster within the thirty day period that the registration is denied for failure to meet the requirements of this section. The registration must contain a sworn statement by the applicant containing the following minimum information:

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

(2) the diversion point and location of use as indicated on a United States Geological Survey [USGS] 7.5 minute map(s);

(3) the purpose of use, as authorized under Texas Water Code, §11.023;

(4) the proposed maximum diversion rate;

(5) amount of water to be diverted not to exceed ten acre-feet per year; and

(6) the period for which the water is to be used, not to exceed one year from the [thirtieth (30th)] day from the date the registration is filed with the TCEQ regional director or watermaster, as applicable.

§297.19. Term Permit under Texas Water Code, [§]§11.1381 [and 11.153-11.155].

(a) The commission may issue a permit for a term of years for the use of unused appropriated water when there is insufficient unappropriated water in the source of supply to satisfy the application.

(b) An application for a term permit under this section shall be denied if:

(1) the commission finds there is a substantial likelihood that the issuance of the term permit will jeopardize financial commitments made for water projects that have been built or that are being built to optimally develop the water resources in the area;

(2) if the holder of an affected unused appropriation can demonstrate that the issuance of the permit would prohibit the holder from beneficially using the water right during the term of the permit. Such demonstration may be made by using water

use projections contained in the state or regional water plans, economic indicators, population growth projections, electrical generation needs, or other reasonable projections based on accepted methods;

(3) the proposed permit is not intended for a beneficial use; or

(4) the proposed permit would be detrimental to the public welfare.

(c) A term permit is subordinate to any vested or senior appropriative water right. Additionally, conditions may be placed in the permit as necessary to protect instream uses and freshwater inflows to bays and estuaries.

[(d) The commission may grant a permit under this section for an aquifer storage and retrieval project as defined in §297.1 of this title (relating to Definitions).]