The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §297.202.

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

In 2015, the 84th Texas Legislature passed House Bill (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 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 concentration based on a yearly average of samples taken monthly at the water source of less than 20,000 milligrams per liter.

HB 2031 required the Texas Parks & Wildlife Department (TPWD) and the Texas General Land Office (GLO) to conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and the discharge of waste resulting from the desalination process. The commission must adopt rules designating diversion and discharge zones by September 1, 2020. Until such time as the commission adopts rules designating diversion and discharge zones, an applicant for a permit to divert marine seawater or discharge waste resulting from the desalination process must consult with the TPWD and the GLO regarding the point(s) of diversion and discharge.

TPWD and GLO completed their study entitled Marine Seawater Desalination Diversion and Discharge Zones Study in September 2018 and developed a map depicting the diversion and
discharge zones which is available on the GLO website in the Coastal Resources Management Viewer. The diversion zones created are applicable only to marine seawater. TPWD and GLO did not designate zones in bays or arms of the Gulf of Mexico where seawater could be diverted for industrial purposes.

This rulemaking would implement the requirement in Texas Water Code (TWC), Chapter 18, for the commission to designate appropriate diversion zones by rule.

As part of this rulemaking, the commission is proposing amendments to 30 TAC Chapter 295, Water Rights, Procedural; and 30 TAC Chapter 318, Marine Seawater Desalination Discharges, to designate appropriate diversion and discharge zones by rule.

Section Discussion

§297.202, Approval Criteria for Diversion of Marine Seawater and Seawater

The commission proposes to amend §297.202(5) which currently states that the commission shall grant an application for a water right to divert marine seawater or seawater for desalination under this subchapter only if the applicant has provided documentation of the results of the consultation with the TPWD and the GLO (required by current §295.302). Proposed §297.202(5) states that the commission shall grant an application for a water right to divert marine seawater or seawater for desalination under this subchapter only if the application includes documentation that the point(s) from which a facility the person proposes to construct for diversion of marine seawater are within the zones approved by the TPWD and the GLO on the date that the application is submitted; or documentation of
the results of the consultation with the TPWD and the GLO regarding the point(s) from which a facility the person proposes to construct may divert seawater for industrial purposes.

**Fiscal Note: Costs to State and Local Government**

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rule.

The rulemaking is proposed in order to comply with state law to specify that the application for a water right to divert marine seawater for desalination contains documentation that the point is located in an approved zone for the diversion of marine seawater.

**Public Benefits and Costs**

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with the state law regarding the permitting process associated with marine seawater desalination.

The proposed rule is not expected to result in fiscal implications for businesses or individuals.
Local Employment Impact Statement

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

Rural Communities Impact Assessment

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

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.
Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rule does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal or limit an existing regulation, nor does it increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state’s economy.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed 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. Texas Government Code, §2001.0225, applies to a "Major environmental rule" which is defined in Texas Government Code, §2001.0225(g)(3) as a rule with 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 proposed 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. HB 2031 required TPWD and GLO to jointly conduct a study to identify zones in the Gulf of Mexico that are appropriate for the diversion of marine seawater and the discharge of waste resulting from the desalination of marine seawater. TPWD and GLO were required to submit a report on the results of the study to the commission, and the commission by rule is required to designate appropriate diversion zones and discharge zones. The stated purpose of HB 2031 is to "streamline the regulatory process for and reduce the time required for and cost of marine seawater desalination." HB 2031 further states that "[t]he purpose of this Act is not to hinder efforts to conserve or develop other surface water supplies but rather to more fully explore and expedite the development of all of this state's water resources in order to balance this state's supply and demand for water, which is one of the most precious resources of this state." Therefore, the intent is not to protect the environment or reduce risks to human health from environmental exposure, but instead 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 proposed amendment in Chapter 297 streamlines the process by authorizing documentation that the point or points from which a facility the person proposes to construct for diversion of marine seawater are within the zones approved by the TPWD and the GLO on the date that the application is submitted or documentation of the results of the consultation with the TPWD and GLO regarding the point(s) from which a facility the person proposes to construct may divert seawater for industrial purposes.

Second, the proposed rulemaking does not meet the statutory definition of a "Major
environmental rule" because the proposed rule would 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 the cost of complying with the proposed rule will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed amendment will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Finally, the proposed rulemaking does not meet any of the four applicable 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 specific law." This rulemaking is not governed by federal law, does not exceed state law, does not come under a delegation agreement or contract with a federal program, and is not being proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under specific state statutes enacted in HB 2031.

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 proposed rulemaking and performed a preliminary assessment of whether the proposed rule constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to add procedures for the development of plentiful and cost-effective water supplies to meet the ever increasing demand for water and streamline the process for these permits. The proposed rule would substantially advance this stated purpose by authorizing documentation that the point(s) from which a facility the person proposes to construct for diversion of marine seawater are within the zones approved by the TPWD and the GLO on the date that the application is submitted or documentation of the results of the consultation with the TPWD and GLO regarding the point(s) from which a facility the person proposes to construct may divert seawater for industrial purposes.

The commission’s analysis indicates that Texas Government Code, Chapter 2007 does not apply to the proposed rule because this rule does not impact private real property. In HB 2031, the legislature expressed that "[i]n 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 or private real property rights that have been granted for uses of the water in the Gulf of Mexico. For seawater in a bay or arm of the Gulf of Mexico, 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 to 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 cannot be taken from a bay or arm of the Gulf of Mexico under Chapter 295, Subchapter G.

**Consistency with the Coastal Management Program**

The commission reviewed the proposed rulemaking and found that the proposal 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 proposed rules in accordance with Coastal Coordination Act implementation rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rule 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 proposed rule include: Impoundments and diversion of state water within 200 stream miles of the coast.

Promulgation and enforcement of this rule will not violate or exceed any standards
identified in the applicable CMP goals and policies. The proposed rule is consistent with these CMP goals and policies because this rule does not create or have a direct or significant adverse effect on any CNRAs, and because the proposed rule requires diversion to be located in an approved diversion zone in the Gulf of Mexico or consultation with the TPWD and GLO regarding the location of any diversion point in a bay or arm of the Gulf of Mexico.

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 December 17, 2019, at 10:00 a.m. in Room 201S in Building E, 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 Andreea Vasile, 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: https://www6.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 2019-102-295-OW. The comment period closes on January 6, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Kathy Alexander, Water Availability Division, at (512) 239-0778.
SUBCHAPTER K: DESALINATION, SUBSTANTIVE

§297.202

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013(a)(1) concerning the commission’s general jurisdiction over water and water rights; TWC, §5.102, concerning the general powers of the commission; TWC, §5.103, concerning the adoption of rules by the commission; TWC, §5.105, concerning the commission’s approval of general policy; TWC, Chapter 18, concerning marine seawater desalination projects; and TWC, §11.1405, concerning desalination of seawater for use for industrial purposes.

The proposed amendment implements TWC, §11.1405 and §18.003 and House Bill 2031 passed by the 84th Texas Legislature, 2015.


The commission shall grant an application for a water right to divert marine seawater or seawater for desalination under this subchapter only if:

(1) the application conforms to the requirements prescribed by §295.302 of this title (relating to Requirements for Application for Diversion of Marine Seawater and Diversion of Seawater) and is accompanied by the prescribed fee;
(2) the point of diversion is located less than three miles seaward of any point located on the coast of this state; or the water 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, in accordance with the requirements set out in §297.205 of this title (relating to Determination of Total Dissolved Solids Concentration);

(3) the diverted marine seawater or seawater is intended for a beneficial use and the marine seawater or seawater will be treated in accordance with applicable commission rules, based on the purpose for which the marine seawater or seawater is to be used, before it is used;

(4) the application is not detrimental to the public welfare;

(5) the applicant has provided documentation;

(A) that the point or points from which a facility the person proposes to construct for diversion of marine seawater are within the zones approved by the Texas Parks and Wildlife Department (TPWD) and the Texas General Land Office (GLO) on the date that the application is submitted; or

(B) [of] the results of the consultation with the TPWD and GLO [Texas Parks and Wildlife Department and the Texas General Land Office] regarding the location of a facility the person proposes to construct for diversion of seawater;
(6) the application addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan unless the commission determines that new, changed, or unaccounted for conditions warrant waiver of this requirement; and

(7) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by §297.1 of this title (relating to Definitions).