The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes the repeal of §318.9 and simultaneously proposes new §318.9.

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

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. In HB 2031, the legislature created new Texas Water Code (TWC), Chapter 18, to address marine seawater desalination projects.

Additionally, 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 (TPWD/GLO study) and developed a map depicting the diversion and discharge zones which is available on the GLO website on the *Coastal Resources Management Viewer* (CRM Viewer).
This rulemaking would implement the requirement in TWC, Chapter 18, for the commission to designate appropriate discharge 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 297, Water Rights, Substantive, to designate appropriate diversion zones by rule.

Section by Section Discussion


The commission proposes the repeal of §318.9 which requires applicants for near-shore and off-shore discharges from marine seawater desalination facilities to consult with TPWD and GLO regarding the discharge location which is required by TWC, §18.005(h) until the commission adopts rules under TWC, §18.005(g) designating discharge zones.

The commission proposes a new §318.9, which would require marine seawater desalination facilities for near-shore and off-shore discharges to locate their outfalls within a discharge zone recommended in the TPWD/GLO study and depicted in the CRM Viewer.

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 rulemaking 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 rulemaking.

The rulemaking is proposed in order to adopt the zones that were identified in the report by TPWD and the GLO for the discharge of waste resulting from the desalination of marine seawater.

Public Benefits and Costs

Ms. Bearse 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 rules will be compliance with state law.

The proposed rulemaking 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 rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five
years that the proposed rulemaking 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 rules for the first five-year period the proposed rulemaking 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 rulemaking does not adversely affect a small or micro-business in a material way for the first five years the proposed rulemaking 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 rules do 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 rulemaking 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 rulemaking streamlines the process by authorizing marine seawater desalination facilities for near-shore and off-shore discharges to locate their outfalls within a discharge zone recommended in the TPWD/GLO study and depicted in the CRM Viewer.

Second, the proposed rulemaking does not meet the statutory definition of a "Major environmental rule" because the proposed rulemaking 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 rulemaking will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed rulemaking 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 these proposed rulemaking constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the rulemaking 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 rulemaking would substantially advance this stated purpose by requiring marine seawater desalination facilities for near-shore and off-shore discharges to locate their outfalls within a discharge zone recommended in the TPWD/GLO study and depicted in the CRM Viewer.
The commission’s analysis indicates that Texas Government Code, Chapter 2007, does not apply to this proposed rulemaking 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 or real property rights that have been granted for uses of the water in the Gulf of Mexico. 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.

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 rulemaking 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 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 proposed rulemaking includes: discharges must comply with water quality-based effluent limits; discharges that increase pollutant loadings to coastal waters must not impair designated uses of coastal waters and must not significantly degrade coastal water quality, unless necessary for important economic or social development; and to the greatest extent practicable, new wastewater outfalls must be located where they will not adversely affect critical areas.

Promulgation and enforcement of this rulemaking will not violate or exceed any standards identified in the applicable CMP goals and policies. The proposed rulemaking is consistent with these CMP goals and policies because this rulemaking does not create or have a direct or significant adverse effect on any CNRAs, and because the proposed rulemaking does not allow a discharge from marine seawater desalination projects into or adjacent to water in the state, except in accordance with an individual permit issued by the commission. Individual permits issued under this proposed rulemaking will include effluent limitations to ensure compliance with water quality standards. The proposed rulemaking requires wastewater discharges to be located in an approved discharge zone in 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 Laurie Fleet, Water Quality Division, at (512) 239-5445.
Statutory Authority

The repeal of §318.9 is proposed under Texas Water Code (TWC), §5.013 concerning the commission's general jurisdiction; 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; TWC, §26.011, concerning the commission's general authority to adopt rules for waste discharge or impending waste discharges under TWC, Chapter 26; TWC, §26.027, concerning the commission's authority to issue permits for the discharge of waste into or adjacent to water in the state; and TWC, §26.041, concerning the commission's authority to prevent a discharge of waste that is injurious to public health.

The proposed repeal implements TWC, §18.005 and House Bill (HB) 2031 passed by the 84th Texas Legislature, 2015.


[An application for near-shore discharges or off-shore discharges must contain documentation of the results of consultation with the Texas Parks and Wildlife Department]
and the Texas General Land Office regarding the outfall location(s) as required by Texas Water Code, §18.005(h). This provision only applies to new applications and amendment applications that propose a new outfall or a new location for an existing outfall.]
SUBCHAPTER A: GENERAL REQUIREMENTS FOR MARINE SEAWATER DESALINATION DISCHARGES

§318.9

Statutory Authority

New §318.9 is proposed under Texas Water Code (TWC), §5.013, concerning the commission's general jurisdiction; 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; TWC, §26.011, concerning the commission's general authority to adopt rules for waste discharge or impending waste discharges under TWC, Chapter 26; TWC, §26.027, concerning the commission’s authority to issue permits for the discharge of waste into or adjacent to water in the state; and TWC, §26.041, concerning the commission's authority to prevent a discharge of waste that is injurious to public health.

The proposed new section implements TWC, §18.005, and House Bill 2031 passed by the 84th Texas Legislature, 2015.


For near-shore discharges or off-shore discharges, the point at which a facility may discharge wastewater resulting from the desalination of marine seawater must be located in a discharge zone recommended and depicted by the Texas Parks and Wildlife Department.
(TPWD) and the Texas General Land Office (GLO) pursuant to Marine Seawater Desalination Diversion and Discharge Zones Study (September 2018) as amended, available on the TPWD website, and as depicted on the Coastal Resources Management Viewer, on the GLO website.