The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §295.159.

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

A petition for rulemaking was filed with the commission on February 5, 2019 by Lloyd Gosselink Rochelle & Townsend, P.C. on behalf of the City of Wichita Falls (petitioner). The petitioner requested that §295.159 be amended to include an exception from the notice requirements for orders to extend the deadline to commence or complete construction of a reservoir designed for storage of more than 50,000 acre-feet of water. This rulemaking was opened pursuant to the commission’s order dated March 28, 2019, in which the commission granted the petition considered at a March 27, 2019 public meeting (Project No. 2019-098-PET-NR). The commission’s order required an opportunity for stakeholder involvement concerning the issues raised in the petition prior to rule proposal. Therefore, an informal stakeholder meeting was held at the TCEQ on June 13, 2019 and comments were accepted by the commission until June 27, 2019. All comments were considered.

**Section Discussion**

§295.159, *Notice of Extension of Time To Commence or Complete Construction.*

The commission proposes to add §295.159(c) which provides that the notice requirements in §295.159(a) and (b) do not apply to a permit for construction of a reservoir designed for storage of more than 50,000 acre-feet of water. Existing
§295.159(a) requires published notice and mailed notice (to the same persons to whom notice of the original application for the permit was mailed) for a request for an extension of time to construct if the new date of proposed commencement of construction is more than four years from the date of issuance of the permit or if the new proposed completion time is more than five years from the date of completion required in the original permit. Existing §295.159(b) states that the notice must provide that the commission shall consider whether the appropriation shall be forfeited for failure by the applicant to demonstrate sufficient due diligence and justification for delay.

Texas Water Code (TWC), §11.145 provides that the commission may, by entering an order of record, extend the time for beginning construction of a reservoir, but does not require notice for such extensions. TWC, §11.146, provides that if a permittee fails to begin construction within the time specified in TWC, §11.145, the permittee forfeits all rights to the permit, subject to notice and hearing as prescribed by this section. However, TWC, §11.146(g), provides an exemption from forfeiture under this section for a permit for construction of a reservoir designed for the storage of more than 50,000 acre-feet of water. Therefore, proposed §295.159(c) provides for exempting such reservoirs from notice for extension of time for commencement or completion of construction is consistent with the TWC.
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 other state agencies as a result of administration or enforcement of the proposed rule. A limited number of units of local government may experience a cost savings as a result of administration of enforcement of the proposed rule.

This rulemaking provides that the notice requirements in §295.159(a) and (b) do not apply to a permit for construction of a reservoir designed for storage of more than 50,000 acre-feet of water. This is consistent with TWC, §11.145, which does not require notice for extensions of time and TWC, §11.146, which relates to the exemption of permits for the construction of a reservoir for more than 50,000 acre-feet of water from forfeiture for inaction or failure to timely commence or complete construction.

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 may include a cost savings to units of local government and consistency with TWC, §11.145 and §11.146. As of July 8, 2019, the agency has a record of four permits for the construction of a reservoir that is designed for storage or more than 50,000 acre-feet of water which could be affected by the proposed rule. These permits are held by units of local government, either cities or districts.
The proposed rule is not anticipated 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. The amendment would apply statewide and have the same effect in rural communities as in urban communities.

**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. This rulemaking addresses necessary changes in order to update cross-references and remove obsolete language in various procedural and permitting program rules.
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 does it 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; however, the proposed rule does remove a requirement for a permit relating to public notice. This proposed change is consistent with state law. 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, because it does not meet the definition of a "Major environmental rule" as defined in that statute. The definition of "Major environmental rule" in Texas Government Code, §2001.0225(g)(3), is "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 sector of the state."

The purpose of the proposed rule is to amend §295.159, which requires mailed and published notice for an application to extend the deadline for commencement of construction more than four years or to extend the deadline for completion more than five years. This proposed amendment to §295.159 would include an exception from the notice requirements for applications to extend the deadline to commence or complete construction of a reservoir designed for storage of more than 50,000 acre-feet of water.

The specific intent of the proposed rule is to exempt requests for commencement and completion of large reservoirs, 50,000 acre-feet or more, from notice requirements due to the complexity of constructing large reservoirs and the need for other approvals such as from the Corps of Engineers. Allowing the permittees to proceed without the need for notice is a more efficient and reasonable approach to obtaining needed water
supplies for a growing state.

Additionally, the amendment to §295.159 is consistent with TWC, §11.145, When Construction Must Begin, and TWC, §11.146, Forfeitures and Cancellation of Permit for Inaction. TWC, §11.145, does not require that the commission provide notice of amendments extending the time for commencement or completion of construction of a reservoir if the permit is to construct a reservoir designed for storage of more than 50,000 acre-feet of water. TWC, §11.146, provides an exception from forfeiture or cancellation of a permit for failure to commence or complete construction of a reservoir designed for storage of more than 50,000 acre-feet of water.

Thus, the specific intent of this rulemaking is not 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 sector of the state. The proposed rulemaking is a procedural rule, is not a "Major environmental rule," and a full Regulatory Impact Analysis (RIA) is not required.

Even if the proposed rule was a "Major environmental rule," Texas Government Code, §2001.0225, applies to a "Major environmental rule" which exceed standards set by federal law unless the rule is specifically required by state law; exceed requirements of a delegation agreements between state and federal governments to implement a state
and federal program; or are adopted solely under the general powers of the agency instead of under a specific state 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 solely under the TCEQ's general rulemaking authority. It is an amendment of an existing rule that was adopted under TWC, §11.145 and §11.146, as previously discussed. It not based solely under the general powers of the agency instead of under a specific state law.

Written comments on the Draft RIA 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 rule amendment and performed analysis of whether the proposed rule constitutes a takings under Texas Government Code, Chapter 2007.

This proposed rulemaking will amend §295.159, which requires mailed and published notice for an application to extend the deadline for commencement of construction more than four years or to extend the deadline for completion more than five years. This proposed amendment to §295.159 would include an exception from this notice requirement for applications to extend the deadline to commence or complete
construction of a reservoir designed for storage of more than 50,000 acre-feet of water.

The specific intent of the proposed rule is to allow commencement and completion of large reservoirs, 50,000 acre-feet or more, to be exempt from notice requirements due to the complexity of constructing large reservoirs and the need for other approvals such as from the Corps of Engineers. Allowing the permittees to proceed without the need for notice and the possibility of another hearing is a more efficient and reasonable approach to obtaining needed water supplies for a growing state.

Additionally, the amendment to §295.159 is consistent with TWC, §11.145, When Construction Must Begin, and TWC, §11.146, Forfeitures and Cancellation of Permit For Inaction. TWC, §11.145, does not require that the commission provide notice of amendments extending the time for commencement or completion of construction of a reservoir if the permit is to construct a reservoir designed for storage of more than 50,000 acre-feet of water. TWC, §11.146, provides an exception from forfeiture or cancellation of a permit for failure to commence of complete construction of a reservoir designed for storage of more than 50,000 acre-feet of water.

This rulemaking would substantially advance the stated purposes of efficiency and consistency by amending §295.159 to allow an exemption from notice for applications for extension of time to commence and complete the reservoir if the reservoir is
greater than 50,000 acre-feet.

The commission’s analysis indicates that Texas Government Code, Chapter 2007, does not apply to this proposed rulemaking because there are no burdens imposed on private real property by the proposed rule. This rulemaking is an administrative rule that relates to procedural requirements for an application for extension of time to commence and complete the construction of an already permitted reservoir. The rulemaking does not affect an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's rights to the property that would otherwise exist in the absence of the governmental action.

Thus, Texas Government Code, Chapter 2007, does not apply to this proposed rule because the rulemaking does impact private real property.

**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 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 December 3, 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 Paige Bond, 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/](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 2019-109-295-OW. The comment period closes on December 16, 2019. Copies of the proposed rulemaking can be obtained from the commission’s website at [https://www.tceq.texas.gov/rules/propose_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Kathleen Ramirez, Water Availability Division, (512) 239-6757.
SUBCHAPTER C: NOTICE REQUIREMENTS FOR WATER RIGHT APPLICATIONS

§295.159

Statutory Authority

This amendment is proposed under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by the TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.105, which authorizes the commission to adopt rules and policies necessary to carry out its responsibilities and duties under the TWC; TWC, §5.013(a)(1) concerning the TCEQ's authority over water and water rights; TWC, §11.145, which provides requirements for commencement of construction of a reservoir; and TWC, §11.146, which provides forfeiture or cancellation of a water rights permit for inaction.

The proposed amendment implements TWC, §§5.013, 5.102, 5.103, 5.105, 11.145, and 11.146.

§295.159. Notice of Extension of Time to Commence or Complete Construction.
(a) If the new date of proposed commencement of construction is more than four years from the date of issuance of the permit, or if the new proposed completion time is more than five years from the date of completion required in the original permit, notice of an application for extension of time shall be mailed and published as required by the Texas Water Code, §11.132 and §11.143, and §295.151 of this title (relating to Notice of Application and Commission Action), §295.152 of this title (relating to Notice by Publication), and §295.153 of this title (relating to Notice by Mail). The chief clerk shall mail notice of the public hearing to the same persons to whom notice of the application for the permit was mailed. The applicant shall be required to publish was mailed. The applicant shall be required to publish notice of the hearing in the same manner in which an applicant for a water use permit is required to publish notice of an application. No other notice is required.

(b) The notice of any application for an extension of time to commence or complete construction must provide that the commission shall also consider whether the appropriation shall be forfeited for failure by the applicant to demonstrate sufficient due diligence and justification for delay.

(c) This section does not apply to a permit for construction of a reservoir designed for storage of more than 50,000 acre-feet of water. No notice shall be required for an extension of time to commence or complete construction of a reservoir designed for storage of more than 50,000 acre-feet of water.