The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §281.19.

Background and Summary of the Factual Basis for the Proposed Rule

In 2019, the 86th Texas Legislature passed House Bill (HB) 720. HB 720 added Texas Water Code (TWC), §11.157, related to new appropriations of water for aquifer storage and recovery (ASR) and aquifer recharge (AR) projects. Under TWC, §11.157(f), the commission has 180 days to complete technical review of applications for new appropriations of water for ASR and AR. The commission must adopt rules implementing TWC, §11.157, by June 1, 2020.

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

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

Section Discussion

§281.1, Technical Review

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

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.

This rulemaking addresses necessary changes in order to comply with state law and implement the requirements in the TWC, §11.157(f), which require the commission to complete the technical review of applications for new appropriations of water for ASR and AR projects within 180 days.

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 will be compliance with state law, specifically HB
720, which relates to appropriations of water for recharge of aquifers or use in ASR projects.

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

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

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

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

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 and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The proposed action implements legislative requirements in HB 720 for ASR or AR projects.

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

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

**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 January 7, 2020, 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 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 2019-116-297-OW. The comment period closes on January 21, 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 Ramirez, Water Availability Division, at (512) 239-6757.
Statutory Authority

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

The proposed amendment implements HB 720.


(a) After an application is determined by the executive director to be administratively complete, the executive director shall commence a technical review as necessary and appropriate. For purposes of these sections, the technical review period is that period of time beginning with the completion of the initial review period and will continue for a period of time not to exceed 75 working days. [In the case of applications
filed under §291.102 of this title (relating to Criteria for Considering and Granting Certificates or Amendments), the technical review period is that period of time beginning 30 days after notice of the application has been given in accordance with §291.109 of this title (relating to Report of Sale, Merger, etc.; Investigation; Disallowance of Transaction) and will continue for a period of time not to exceed 75 working days. In the case of applications filed under §335.43 of this title (relating to Permit Required) or §331.7 of this title (relating to Permit Required), the technical review period shall commence upon assignment of the application to a staff member and continue for a period of time not to exceed 120 days. For applications filed under Chapter 336 of this title (relating to Radioactive Substance Rules) and subject to the Notice of Deficiency (NOD) process established in this section, the technical review period shall begin the day after the date of determination of administrative completeness and for issuance, renewal, or major amendments, shall continue for a period of time not to exceed 255 days; however, this time frame may be extended to a maximum of 600 days if an application is technically deficient; or, for applications for minor amendments, shall continue for a period of time not to exceed 90 days; however, this time frame may be extended to a maximum of 150 days if an application is technically deficient. In the case of applications filed under Chapter 295 of this title (relating to Water Rights, Procedural) that request a new appropriation of water for aquifer storage and recovery or aquifer recharge projects, the technical review shall commence on the date the application is administratively complete and will continue for a period of time not to exceed 180 days.
(b) Except as provided in subsection (c) of this section, the applicant shall be promptly notified of any additional technical material as may be necessary for a complete review. If the applicant provides the information within the period of time prescribed by subsection (a) of this section, the executive director will complete processing of the application within the technical review period extended by the number of days required for the additional data. If the necessary additional information is not received by the executive director prior to expiration of the technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 30 days to provide the technical data before an application is returned. Decisions to return material to the applicant during the technical review stage will be made on a case by case basis. The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision instead of having the application returned.

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

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