The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §295.158.

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

In 2019, the 86th Texas Legislature passed House Bill (HB) 1964. HB 1964 streamlines the water rights permitting process for simple amendments to a water right that do not affect other water rights or the environment. The types of amendments covered by HB 1964 include changes to the purpose or place of use and small moves of diversion points. Amendments covered by HB 1964 will not be subject to notice and technical review.

The 86th Texas Legislature also passed HB 720, which removes permitting barriers for aquifer storage and recovery (ASR) and aquifer recharge (AR) projects for both new water rights and existing water rights. HB 720 adds recharge as a beneficial use of water and sets out a process for new appropriations for ASR and AR projects. These new appropriations are subject to notice and contested case hearings and TCEQ has 180 days to complete technical review of the application. HB 720 addresses amendments to existing water rights for reservoirs that have not been constructed or existing reservoirs that have lost storage capacity because of sedimentation. A water right holder with a water right authorizing storage that has not been constructed can remove the storage authorization without notice and hearing if other water rights and the environment are not affected by the amendment.

A water right holder can also request to remove the storage authorization and increase
the amount of water to be diverted or the diversion rate, based on an evaporation credit, to increase the amount of water available for ASR. A water right holder can also amend their water right to replace storage capacity lost to sedimentation with an ASR project. These two types of amendments are subject to notice and contested case hearing.

This rulemaking implements changes to notice rules in Chapter 295 required by HB 1964 and HB 720.

As part of this rulemaking, the commission is proposing amendments to 30 TAC Chapter 39, Public Notice; Chapter 281, Applications Processing; Chapter 297, Water Rights, Substantive; and Chapter 331, Underground Injection Control, to implement HB 720.

**Section Discussion**

§295.158, Notice of Amendments to Water Rights

The commission proposes to amend §295.158(b)(3), by adding the word "use" to correct a typographic error in the rule.

The commission proposes to add §295.158(b)(9), to implement Texas Water Code (TWC), §11.158(f). The commission is proposing that amendment applications to: a) increase the amount of water diverted or the diversion rate based on an evaporation credit, or b) to convert storage in a reservoir that has lost capacity due to sedimentation to an ASR project, be subject to full basin mailed and published notice.
The commission proposes to add §295.158(c)(2) to implement TWC, §11.122(b-3) which describes applications that are not subject to notice or technical review. The subsequent paragraph will be renumbered.

The commission proposes to delete renumbered §295.158(c)(3)(C) because this language is now obsolete due to the implementation of TWC, §11.122, as previously stated. Subsequent subparagraphs will be re-lettered.

The commission proposes to amend re-lettered §295.158(c)(3)(C) and (D) to clarify that some changes to the point of diversion in a water right are exempt from notice and technical review under proposed §295.158(c)(2)(C). The commission further proposes to amend re-lettered §295.158(c)(3)(C) and (D) to clarify that the provisions in these subparagraphs relating to interjacent notice apply to water right holders of record and that only existing water right holders of record receive notice of these applications.

The commission proposes to add §295.158(c)(3)(F) to implement the provisions of TWC, §11.158(e) by specifying that applications to amend a water right to remove an authorization for storage in a storage reservoir that has not been constructed may not require additional notice if the water authorized for diversion will be stored in an aquifer storage and recovery project, the diversion amount or diversion rate are not increased, and if the executive director determines after an administrative review that other water rights and the environment would not be affected by the request.
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 significant 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 implements changes to notice rules in Chapter 295 and is required in order to comply with state law, specifically HB 720 and HB 1964. The proposed rule is intended to streamline the water rights permitting process for amendment applications covered by HB 1964 and to implement the notice requirements for applications for AR and ASR projects under HB 720. As a result, the agency may experience a reduction in permit processing times for both types of applications.

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 and the streamlining of water rights permitting process for certain amendment applications.

There may be a cost savings for water rights applicants due to the reduction in information required for submission for amendments under HB 1964. The amount of the cost savings cannot be estimated.

The removal of permit barriers for ASR and AR projects may incentivize the development
of this water source to meet the state’s growing water needs.

**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 it increase or decrease the number of individuals subject to its applicability. However, the proposed rulemaking does limit the notice and contested case hearing requirements for certain applications, as required by 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 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 laws enacted by the Texas Legislature. HB 720 sets forth requirements in TWC, Chapters 11 and 27, for ASR and AR projects. HB 1964 sets forth notice requirements in TWC, Chapter 11, for certain applications to amend water rights.

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 notice requirements consistent with the requirements of HB 720 and HB 1964, 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, §11.122(c) 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 and in HB 1964 for notice requirements for certain water right amendment applications.

The commission determined that the proposed rule would be neither a statutory nor a constitutional taking of private real property. The proposed rule establishes notice requirements for ASR and AR project applications consistent with the requirements in HB 720 and notice requirements for certain applications to amend water rights consistent with the requirements in HB 1964. It is not anticipated that there will be many ASR or AR project applications and the cost of complying with the regulations is not expected to be substantial. The proposed rule will also streamline notice requirements for certain water right amendment applications, allowing these applications to be processed more quickly without imposition of additional fees or costs since no new fees are proposed. 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 regulations.

Therefore, the proposed 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/](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](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Kathy Ramirez, Water Availability Division, at (512) 239-6757.

(a) On motion of executive director.

(1) If the executive director determines to file a petition to amend a water right, notice of the determination stating the grounds therefore and a copy of a proposed
amendment draft shall be personally served on or mailed by certified mail to the water
right holder at the last address of record with the commission.

(2) This notice shall be given at least 15 days before a petition is filed with
the commission.

(b) Requiring mailed and published notice. Unless authorized by subsection (c) of
this section, applications for amendments to permits, certified filings, or certificates of
adjudication, including, but not limited to, those of the following nature, must comply
with requirements for a water use permit, including the notice requirements in the Texas
Water Code, §11.132, and this subchapter:

(1) to change the place of use when other water users of state water may be
affected;

(2) to increase an appropriation and/or rate or period of diversion;

(3) to change the purpose of use when the change would authorize a greater
consumption of state water or would materially alter the period of time when state water
could be diverted;

(4) to add points of diversion which would result in a greater rate of
diversion or impair other water rights;
(5) to remove or modify the requirements or conditions of a water right which were included for the protection of other water rights;

(6) to change a point of diversion which may impair other water rights;

(7) to relocate or enlarge a reservoir; [or]

(8) to extend the period of duration of any term permit; or [.

(9) to remove the authorization for storage in a reservoir that has not been constructed if the application requests:

   (A) an increase in the amount of water to be diverted or the diversion rate based on an evaporation credit; or

   (B) to change the use or purpose of use of a water right authorizing an appropriation of water for storage in an on-channel storage reservoir that has lost storage because of sedimentation to storage as part of an aquifer storage and recovery project for later retrieval and use as authorized by the original water right.

(c) Not requiring mailed and published notice.
(1) Only an application to amend an existing permit, certified filing, or certificate of adjudication which does not contemplate an additional consumptive use of state water or an increased rate or period of diversion and which, in the judgment of the commission, has no potential for harming any other existing water right, is subject to amendment by the commission without notice other than that provided to the record holder. Once the technical review of an application is complete and the technical memoranda have been filed with the chief clerk of the commission, the commission shall consider whether additional notice is required based on the particular facts of the application.

(2) Applications for the following do not require notice, except to the record holder, and do not require technical review:

(A) to add a purpose of use that does not substantially alter:

(i) the nature of the water right from a water right authorizing only non-consumptive use to a water right authorizing consumptive use; or

(ii) a pattern of use that is explicitly authorized by or required by the original water right;

(B) to add a place of use located in the same river basin as the place of use authorized in the original water right;
(C) to change the point of diversion provided that:

(i) the authorized rate of diversion is not increased;

(ii) the original point of diversion and the new point of diversion are located on the same contiguous tract of land;

(iii) there are no other water right holders with points of diversion located on the same watercourse between the original point of diversion and the new point of diversion;

(iv) there are no streamflow gages located on the watercourse between the original point of diversion and the new point of diversion that are referenced in the original water right or in another water right authorizing a diversion from the same watercourse; and

(v) there are not tributary watercourses that enter the watercourse that is the source of supply located between the original point of diversion and the new point of diversion.

(3) Applications of the following descriptions may not require additional notice:
(A) to cure ambiguities or ineffective provisions in a water right;

(B) to reduce an appropriation or rate of diversion;

[(C) to change the place of use when there will be no increased use of state water and the change will not operate to the injury of any other lawful user of state water. If a water right is owned by more than one party, all other parties will be notified of the proposed changes by certified mail and given two weeks to protest. If no protest is received, further notice will not be required;]

(C) [(D)] to change the point of diversion, except for applications under paragraph (2)(C) of this subsection, when the existing rate of diversion will not be increased and there are no interjacent water right holders [users] of record between the originally authorized point of diversion and the new one, or when interjacent water users agree in writing to the amendment. If written agreements are not obtained, interjacent water right holders [users] will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;

(D) [(E)] to add additional points of diversion, except for applications under paragraph (2)(C) of this subsection, where the existing rate of diversion will not be increased and there are no water right holders [users] of record between any originally
authorized point of diversion and the new one to be added, or when interjacent water right holders [users] agree in writing to the amendment. If written agreements are not obtained, interjacent water users will be notified of the proposed change by certified mail and given two weeks within which to protest. If no protest is received, further notice will not be required;

(E) [(F)] to increase the rate or period for diversion from a storage reservoir; and [.

(F) to remove the authorization for storage in a reservoir that has not been constructed, provided that:

(i) the application does not request an increase in the diversion amount or rate; and

(ii) the executive director determines after an administrative review that the application will not cause a negative impact on other water rights or the environment that is greater than the effect the original permit would have had were the permit rights exercised to the full extent of the original permit.