Texas Commission on Environmental Quality
Interoffice Memorandum

To: Commissioners

Date: November 1, 2019

Thru: Bridget C. Bohac, Chief Clerk
      Toby Baker, Executive Director

From: L'Oreal W. Stepney, P.E., Deputy Director
      Office of Water

Docket No.: 2019-1000-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 39, Public Notice
Chapter 281, Applications Processing
Chapter 295, Water Rights, Procedural
Chapter 297, Water Rights, Substantive
Chapter 331, Underground Injection Control
HB 720 and HB 1964: Procedure for Action on Certain Water Right
Amendment Applications and Surface Water Appropriations for Aquifer
Recharge and Aquifer Storage and Recovery
Rule Project No. 2019-116-297-OW

Background and reason(s) for the rulemaking:
This rulemaking would implement House Bill (HB) 720, 86th Texas Legislature, 2019,
addressing the commission's regulation of aquifer recharge (AR) projects and aquifer
storage and recovery projects (ASR) in Texas. HB 720 adds Subchapter H, Aquifer
Recharge Projects, to the Texas Water Code (TWC), Chapter 27. The proposed Chapter 39
amendments add AR projects to notification requirements, and the Chapter 331
amendments add definitions, authorization mechanisms, standards, and requirements
for Class V recharge wells associated with AR projects.

HB 720 also clarifies that AR projects are a beneficial use of water under TWC, Chapter
11, and removes permitting barriers for ASR and AR projects for both new water rights
and existing water rights. HB 720 requires the Texas Commission on Environmental
Quality (commission or TCEQ) to adopt rules for availability criteria for applications for
new or amended water rights that seek a new appropriation for ASR or AR projects and
sets out a timeframe for technical review of these applications. The proposed amendment
to Chapter 281 adds the technical requirement for review of these projects. The proposed
changes to the notice rules in Chapter 295 and the amended requirements in Chapter 297
for granting an application, including water availability and beneficial use, implement the
requirements in TWC, §§11.023, 11.157, and 11.158.

HB 1964, 86th Texas Legislature, 2019, 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 would not be subject to notice and technical review. The proposed changes to the
notice rules in Chapter 295, as mentioned above, would also implement HB 1964.

In addition, proposed amendments to §39.651(e), related to notice of public meetings, are
necessary due to the Quadrennial Review of Chapter 39.
Scope of the rulemaking:

A.) Summary of what the rulemaking will do:
The rulemaking would add new Subchapter O to Chapter 331, Underground Injection Control, to implement new TWC, Chapter 27, Subchapter H; amend existing underground injection control requirements for public notice in §39.651(h) to include AR projects; and amend existing definitions, authorization mechanisms, standards, and requirements to include new standards for underground injection control AR projects.

The rulemaking would add requirements related to the processing time frame for technical review of new appropriations of water for AR projects or ASR projects to Chapter 281. The rulemaking would also amend the notice rules in Chapter 295 to implement TWC, §§11.122 (b-3), 11.157 and 11.158, which include notice requirements for new water rights and various types of amendments to a water right. These provisions specify that simple amendments to a water right or an amendment to remove a storage authorization from a water right do not require notice and that an amendment to increase the diversion amount based on an evaporation credit or to replace storage capacity lost to sedimentation requires mailed and published notice. Finally, the rulemaking would amend definitions and the considerations for granting a new water right, including water availability and beneficial use in Chapter 297, as required in TWC, §§11.023, 11.157, and 11.158.

The rulemaking would allow different mechanisms of authorization of underground injection control AR projects and provide standards and requirements for underground injection control AR projects. Because of this, the rulemaking would affect any persons who choose to implement an AR project. The rulemaking would also affect any water right holders who seek simple amendments to their water rights or seek to amend their water rights to support AR projects or ASR projects.

In addition, the rulemaking would remove obsolete text in §39.651(e) as a result of the Quadrennial Review of Chapter 39.

B.) Scope required by federal regulations or state statutes:
The rulemaking is in response to changes made to the TWC, by HB 720 and HB 1964. The amendment to §39.651(e) is in response to the commission's determination that certain rules in Chapter 39 are obsolete pursuant to review of the rules as required by the Texas Administrative Procedure Act, Texas Government Code, §2001.039.

C.) Additional staff recommendations that are not required by federal rule or state statute:
None.

Statutory authority:
TWC, Chapter 5, Subchapter M; and TWC, §§5.013, 5.102, 5.103, 5.105, 5.120, 11.122(c), 11.157, 11.158, 27.003, 27.011, and 27.019; TWC, Chapter 27, Subchapter H; Texas Health and Safety Code, §§361.017, 361.024, 361.0666, 361.0791, and 361.082; Texas Government Code, §2001.004; HB 720, Section 4; and HB 1964.
Effect on the:

A.) Regulated community:
Owners and operators of injection projects implemented under these rules would have to comply with these rules. Applicants for a new or amended water right may also be subject to these rules, depending on the type of application. In addition, permit applications would have greater clarity regarding the applicable public participation requirements.

B.) Public:
The public would benefit from additional AR projects, which will supplement groundwater quantities, and have a better understanding of the applicable public participation requirements for certain types of permit applications. The public would also benefit from streamlining water rights permitting for simple amendments and from removing barriers to seeking new or amended water rights for use in an AR project or ASR project.

C.) Agency programs:
The Underground Injection Control Program regulates injection of water through permits and authorizations by rule. Because the applicants would have a more thorough understanding of the application and operation requirements, the applicants could build these requirements into their plans from the start. The Underground Injection Control program would benefit because applicants would submit more comprehensive and accurate initial applications. This would enable the agency to process applications with fewer iterations of requests for more information and expend less agency resources to maintain project compliance over time.

The Water Availability Division administers water rights permitting for applications for new or amended water rights. The rule will streamline the water rights permitting process by reducing the processing time for certain water right amendment applications. The rule will also clarify the permitting process for new or amended water right that support AR and ASR projects and will result in a more simplified process for these types of water right applications.

Stakeholder meetings:
A stakeholder meeting was held in Austin on August 1, 2019. The TCEQ received two comments. The rule team considered stakeholder input in the development of these rules.

Additionally, a rule public hearing will be held in Austin during the comment period.

Potential controversial concerns and legislative interest:
There is legislative interest regarding the implementation of HB 720 and HB 1964 related to adopting the rule in a timely manner.
Will this rulemaking affect any current policies or require development of new policies?
No.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?
HB 720 directed the TCEQ to adopt rules no later than June 1, 2020; this rulemaking complies with that directive. There are no alternatives to rulemaking. In addition, this rulemaking is necessary to ensure the rules regarding public notice and public participation in certain permit applications are current.

**Key points in the proposal rulemaking schedule:**
- **Anticipated proposal date:** November 20, 2019
- **Anticipated Texas Register publication date:** December 13, 2019
- **Anticipated public hearing date:** January 7, 2020
- **Anticipated public comment period:** December 13, 2019 - January 21, 2020
- **Anticipated adoption date:** May 6, 2020

**Agency contacts:**
Kathy Ramirez, Rule Project Manager, Water Availability Division, (512) 239-6757
Ruth Takeda, Staff Attorney, (512) 239-6635
Paige Bond, Texas Register Rule/Agenda Coordinator, (512) 239-2678

**Attachments:**
HB 720
HB 1964

**cc:** Chief Clerk, 2 copies
Executive Director’s Office
Jim Rizk
Martha Landwehr
Brody Burks
Office of General Counsel
Kathy Ramirez
Paige Bond