

The Texas Natural Resource Conservation Commission (commission) proposes new §§35.1, 35.2, 35.3, 35.11-35.13, 35.21-35.30, 35.101, 35.201, 35.202, 35.301-35.303, 35.401, 35.402, 35.501, 35.502, 35.601, 35.701, 35.801, 35.802-35.809, and 35.901, concerning emergency and temporary orders.

This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs. This action also includes certain changes necessary to implement SB 1, 75th Legislature, 1997, which are noted as follows. Finally, certain provisions of the rules will constitute a revision to the state implementation plan.

The new Chapter 35 is largely derived from previously existing rules. Thus, the commission is concurrently proposing amendments to emergency and temporary order provisions in §§116.410, 291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83. The commission is also proposing the repeal of the following current rules relating to emergency and temporary orders: §§116.411-116.418, 291.10, 291.13, 297.57, 305.22-305.28, 305.30, and 305.32. The commission also proposes new §297.57 and §305.30. These changes are published in this edition of the *Texas Register*.

#### EXPLANATION OF PROPOSED RULES

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue

temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. General application, term, and hearing requirements applicable to all affected programs are included. Finally, specific requirements are listed for specific program areas. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances.

These proposed rules conform with the provisions provided in TWC, Chapter 5, Subchapter L, and provide procedural requirements for implementation. TWC, §5.501, concerning Emergency and Temporary Order or Permit; Temporary Suspension or Amendment of Permit Condition, expressly authorizes the commission to prescribe rules necessary to carry out and administer Subchapter L.

The proposed new Chapter 35 contains general provisions that are applicable to all affected programs and program-specific requirements. The latter are largely derived from emergency and temporary order rules that already exist in other chapters within Title 30 of the Texas Administrative Code (for example, Chapter 305, Subchapter B). These provisions have been derived from current commission rules and placed into the new Chapter 35, and the commission is not proposing many substantive changes to these rules as they currently exist.

However, there are some substantive changes being proposed. As authorized by TWC, §5.501, the proposed new Chapter 35 provides for the delegation of authority to issue certain orders to the

executive director. Additionally, the commission is proposing changes to program-specific requirements that result from the passage of SBs 1 and 1876. Finally, the commission proposes changes to clarify some notice requirements for temporary and emergency orders, and it proposes a fee increase. These changes are noted where applicable.

Proposed new Subchapter A, concerning Purpose, Applicability, and Definitions, sets forth certain general provisions necessary for administration of the chapter. Proposed new §35.1, concerning Purpose, provides that the purpose of the new chapter is to implement the commission's authority under TWC, Chapter 5, Subchapter L, to issue temporary or emergency mandatory, permissive, or prohibitory orders, and by those orders to issue temporary permits or temporarily suspend or amend permit conditions. This provision is in accordance with TWC, §5.501, which contains the statutory authorization for the issuance of these orders.

Proposed new §35.2, concerning Applicability, provides that the chapter applies to any application under TWC, Chapter 5, Subchapter L, to issue temporary or emergency mandatory, permissive, or prohibitory orders.

Proposed new §35.3, concerning Definitions, provides definitions for emergency order, severe property damage, and temporary order. The purpose of this section to provide general definitions for the chapter and to help administer the provisions of TWC, Chapter 5, Subchapter L. An emergency order is defined as an order that must be issued immediately in order to protect human health and safety or the environment; or for reasons specified in proposed new §35.302, concerning Application for Emergency

and Temporary Orders to Discharge. The definition of severe property damage is the same as that in §305.2, concerning Definitions, and is necessary for the requirements governing water quality emergency and temporary orders. Temporary order is defined as an order of short-duration which must be issued as quickly as possible, or which might allow an authorization for a short-term activity, setting conditions and limitations that will adequately protect human health or safety or the environment, or for the reasons specified in new §35.302.

Proposed new Subchapter B, concerning Authority of Executive Director, is comprised of three sections and regards delegation to the executive director, as authorized by TWC, §5.501. New §35.11, concerning Purpose and Applicability, provides that the purpose of Subchapter B is to allow the executive director to act on behalf of the commission.

Proposed new §35.12, concerning Authority of the Executive Director, authorizes the executive director, or a representative or representatives authorized in writing by the executive director, to act on his or her behalf to receive applications for and issue emergency orders. The section also provides notice and hearing procedures.

Proposed new §35.13, concerning Eligibility of Executive Director, provides for the authority of the executive director or the executive director's representative to act on Texas pollutant discharge elimination system (TPDES) permits or other TPDES-related approvals if the executive director meets the qualifications specified in §50.41, concerning Eligibility of Executive Director.

Proposed new Subchapter C, concerning General Provisions, provides general requirements for issuing emergency and temporary orders. Proposed new §35.21, concerning Action by Commission or Executive Director, allows the commission or executive director to issue temporary or emergency orders and, by temporary or emergency order, to issue a temporary permit or temporarily suspend or amend a permit condition. The new provisions implement TWC, §5.501.

Proposed new §35.22, concerning Term and Renewal of Orders, provides that unless otherwise noted by a program-specific requirement, the term of an emergency order is a maximum of 180 days, and that an emergency order may be renewed once for an additional period of up to 180 days by submittal of a new application. The section also provides that a temporary order is limited to a reasonable time specified by the order. This provision implements TWC, §5.505, concerning Term of Order.

Proposed new §35.23, concerning Effect of Orders, provides that an emergency or temporary order does not vest any rights in the permit holder or recipient and expires in accordance with its terms.

Proposed new §35.24, concerning Application for Emergency or Temporary Order, specifies requirements governing applications. The section prescribes the necessary contents of the application and requires its filing with the chief clerk. Subsection (b) specifies that an application for an emergency or temporary order for a bypass of untreated and partially treated wastewater, if the state has national pollutant discharge elimination system (NPDES) authorization, will constitute prior notice of an anticipated bypass, as required by 30 TAC §305.535. Section 35.24 also requires copies of the application to be provided to the division director of the appropriate program on behalf of the executive

director, and to the public interest counsel, at the same time it is filed with the chief clerk. Finally, the section prescribes the manner in which applications are to be signed. The new section implements TWC, §5.502, concerning Application for Emergency or Temporary Order, and contains procedural requirements necessary for implementation.

Proposed new §35.25, concerning Notice and Opportunity for Hearing, provides the notice and hearing requirements for emergency and temporary orders. The section provides that an emergency order can be issued with or without notice and/or opportunity for hearing, and that if one is issued without a hearing, the order will set a time and place for a hearing to affirm, modify, or set aside the order to be held before the commission or its designee as soon as practicable after the order is issued. In addition, the section provides that unless otherwise provided by program-specific requirements, notice of a hearing for issuance of an emergency order or to affirm, modify, or set aside the order must be given not later than the tenth day before the date set for the hearing and provide that an affected person may request an evidentiary hearing on the issuance of the emergency order. The section also provides that temporary orders require a hearing before their issuance, and that notice must be given not later than the 20th day before the hearing and provide that an affected person can request an evidentiary hearing on issuance of the temporary order. Program-specific notice requirements are also set out. Some of these notice requirements are not in existing Chapter 305 and provide clarification of notice requirements. In addition, the newspaper notice for air catastrophes replaces the existing requirement for notice to be given in the *Texas Register*. The proposed section implements TWC, §5.504.

Proposed new §35.26, concerning Contents of Emergency or Temporary Order, contains the minimum requirements for information that must be included in these types of orders. The contents are derived from the application requirements contained in TWC, §5.502.

Proposed new §§35.27, 35.28, and 35.29, concerning Hearing Required, Hearing Requests, and Procedures for a Hearing, respectively, provide for hearings, hearing requests, and procedures for hearings on emergency and temporary orders. The rules provide that hearings will be conducted in accordance with the Administrative Procedure Act and commission rules. The hearing procedures implement TWC, §5.115(a), concerning Persons Affected in Commission Hearings, and TWC, §5.504, concerning Hearing to Affirm, Modify, or Set Aside Order.

Proposed new §35.30, concerning Application Fees, provides that the application fee for an emergency or temporary order under this chapter is \$500, plus the actual cost of the required notice. TWC, §5.501, authorizes the adoption of fees for administering the program. In addition, the increase is authorized by TWC, §5.235, which establishes fee authority, and by Rider 9 under the commission's appropriation in Article VI of HB 1, 75th Legislature, 1997, the General Appropriations Act. The commission proposes to increase the current fee from \$100 to \$500 in order to more adequately cover commission expenses incurred when issuing these orders.

Proposed new Subchapter D concerns Emergency Suspension of Beneficial Inflows. The subchapter implements TWC, §5.506, concerning Emergency Suspension of Permit Condition Relating to

Beneficial Inflows to Affected Bays and Estuaries and Instream Uses, and contains previously existing requirements that have been moved to the new Chapter 35.

New §35.101, concerning Emergency Suspension of Permit Conditions Relating to Beneficial Inflows to Affected Bays and Estuaries and Instream Uses, provides the criteria to be used by the commission in its review and action on an application by a water right holder for the temporary suspension of conditions relating to beneficial inflows to bays and estuaries and instream uses during an emergency. The new section is entirely derived from current §297.57, concerning Emergency Suspension of Permit Conditions, and the commission proposes no substantive changes to the requirements as they currently exist in Chapter 297.

Proposed new Subchapter E concerns Emergency Orders for Utilities. The subchapter implements TWC, §5.507, concerning Emergency Order for Operation of Utility that Discontinues Operation or is Referred for Appointment of Receiver, and §5.508, concerning Emergency Order for Rate Increase in Certain Situations. Proposed Subchapter E also includes provisions necessary to implement SB 1, and it includes existing commission rules from Chapter 291 that have been moved to new Chapter 35. While largely derived from current commission rules, the commission proposes to allow the executive director to issue the orders under this subchapter, as authorized by TWC, §5.501.

Proposed new §35.201, concerning Emergency Order for Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver, authorizes the commission or executive director to appoint a person by emergency order to temporarily manage and operate a utility that has

discontinued or abandoned operations, or which has been or is being referred to the Attorney General for the appointment of a receiver under TWC, §13.412. This provision implements both TWC, §5.508, concerning these types of orders; and TWC, §13.412, as amended by SB 1, which expanded the definition of abandonment. The proposed new section also authorizes the issuance of an emergency order in accordance with current §291.142, concerning Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver, and §291.143, concerning Operation of a Utility by a Temporary Manager.

Proposed new §35.202, concerning Emergency Order for Rate Increase in Certain Situations, authorizes the commission or executive director to authorize an emergency rate increase for a utility under certain conditions. Specific requirements in the section are entirely derived from current §291.22, concerning Notice of Intent to Change Rates, that have been moved to the new Chapter 35, and the commission proposes no substantive changes to those requirements.

Proposed new Subchapter F concerns Water Quality Emergency and Temporary Orders. The subchapter implements TWC, §5.509, concerning Temporary or Emergency Order Relating to Discharge of Waste or Pollutants, and includes existing commission rules that have been moved to the new Chapter 35 from Chapter 305, Subchapter B. While largely derived from current commission rules, the commission is proposing to allow the executive director to issue the orders under this subchapter, as authorized by TWC, §5.501. The commission takes this action in order to provide for the more expeditious issuance of emergency and temporary orders.

Proposed new §35.301, concerning Emergency and Temporary Orders Authorized, authorizes the commission or executive director to issue emergency orders, and the commission to issue temporary orders, for the discharge of waste or pollutants into or adjacent to any water in the state when expeditious action is necessary.

Proposed new §35.302, concerning Application for Emergency and Temporary Orders to Discharge, contains application requirements that are specific to Subchapter F. In addition to the application requirements specified in proposed §35.24, this proposed section requires a person desiring to obtain an emergency or temporary order to provide specific information, including a statement that the order is necessary to enable action to be taken more expeditiously than is otherwise provided by TWC, Chapter 26, to effectuate the policy and purposes of that chapter, and statements on the nature of the proposed discharge. Additionally, the section reflects a change in the law that provides that amelioration of serious drought conditions can be a condition necessitating the issuance of an emergency or temporary order to the extent consistent with state assumption of the NPDES program. Further, upon assumption of the NPDES program, a permittee seeking to discharge into state waters must address alternatives to a bypass in its application.

Proposed new §35.303, concerning Emergency Orders and Temporary Orders, provides the conditions under which the commission or executive director may issue emergency or temporary orders.

Proposed new Subchapter G concerns Solid Waste and Uranium By-product Emergency Orders. It implements TWC, §5.511, concerning Emergency Administrative Order Concerning Imminent and

Substantial Endangerment, and §5.512, concerning Emergency Order Concerning Activity of Solid Waste Management, and contains provisions from existing commission rules. While largely derived from current commission rules, the commission is proposing to allow the executive director to issue the orders under this subchapter, as authorized by TWC, §5.501.

Proposed new §35.401, concerning Emergency Orders for Nonhazardous Solid Waste Activities and Underground Injection of Uranium By-product Materials, authorizes the commission or executive director to issue a mandatory or prohibitory emergency order regarding any activity of solid waste management within its jurisdiction, whether the activity is covered by permit or not, if it determines that an emergency exists. The section also provides for terms of these orders. The new section was derived from existing §305.29, concerning Emergency Orders for Solid Waste Activities. As noted, the commission proposes to authorize the executive director to issue these orders, as allowed by statute. In addition, the commission proposes to add requirements for underground injection control (UIC) emergency orders previously only set out in federal rules.

Proposed new §35.402 concerns Emergency Actions Concerning Hazardous Waste, and was derived in its entirety from current §305.30, concerning Emergency Actions Concerning Hazardous Waste. As previously noted, the commission proposes to allow the executive director to issue orders under the proposed section.

Proposed Subchapter H concerns Radioactive Substances and Materials Emergency Orders. The proposed subchapter implements TWC, §5.516, which authorizes the issuance of emergency orders under Health and Safety Code (HSC), §401.056, concerning Emergency Orders.

Proposed new §35.501, concerning Emergency Orders Relating to Radioactive Substances, provides for commission or executive director action if it is determined that radioactive substances threaten the public health or safety or the environment, and that a licensee managing the radioactive substances is unable to remove the threat. The section also provides program-specific notice and hearing requirements, as well as provisions relating to financial assurance. The section is entirely derived from current §305.31, concerning Emergency Orders Relating to Radioactive Substances, but the commission does propose modifications. The proposed rule provides for action by the executive director. In addition, proposed §35.501(g), concerning financial assurance, contains changes to what is in current §305.31(h), to better reflect the relevant statutory language. Additionally, former §305.31(b) and (c), concerning by-product material, are deleted due to the transfer of jurisdiction over those wastes to the Texas Department of Health, under SB 1857, 75th Legislature, 1997 (see this edition of the *Texas Register*). The commission proposes no other changes to the rules concerning this matter as they currently exist, and the provisions are simply incorporated into the new Chapter 35.

Proposed new §305.502, concerning Emergency Impoundment of Radioactive Material, provides for commission and executive director action to impound or order the impoundment of radioactive material possessed by any person not equipped to observe, or failing to observe, the provisions of the Texas Radiation Control Act (TRCA), the rules of 30 TAC Chapter 336 (relating to Radioactive Substance

Rules), or a license or order issued by the commission under TRCA or Chapter 336. The section also provides for the disposition of the radioactive material. The section is derived from current §305.32, concerning Emergency Impoundment of Radioactive Material, and the commission proposes only to provide for action by the executive director. The commission proposes no other changes to the rules concerning this matter as they currently exist, and the provisions are simply incorporated into the new Chapter 35.

Proposed new Subchapter I concerns Storage Tank Emergency Orders. The subchapter implements TWC, §5.510, which authorizes the issuance of these orders. Proposed §35.601, concerning Emergency Order Concerning Underground or Aboveground Storage Tanks, authorizes the commission or executive director to issue an order to the owner or operator of an underground storage tank regulated under TWC, Chapter 26, and 30 TAC Chapter 334 (relating to Underground and Aboveground Storage Tanks). The section contains program-specific requirements concerning the content of the order, and it provides for the delivery of the order to people identified in the order. The section is derived from current §334.83, concerning Emergency Orders. The only significant change proposed by the commission is to provide for action by the commission, as well as the executive director, whereas the existing rule provides only for action by the executive director. Otherwise, the commission proposes no other changes to the rules concerning this matter as they currently exist, and the provisions are simply incorporated into the new Chapter 35.

Proposed new Subchapter J, concerning Imminent and Substantial Endangerment, implements TWC, §5.511, concerning Emergency Administrative Order Concerning Imminent and Substantial

Endangerment. Proposed §35.701, concerning Emergency Orders, allows the commission or the executive director to issue an emergency administrative order under HSC, §361.272, in the manner prescribed by proposed Chapter 35.

Proposed new Subchapter K, concerning Air Orders, implements TWC, §5.514 and §5.515, concerning Order Issued Under Air Emergency and Emergency Order Because of Catastrophe, respectively. The proposed rules are derived from current Chapter 116, Subchapter E, concerning Emergency Orders. The commission proposes changes to make the provisions consistent with SB 1876. This subchapter will also become part of the state implementation plan because it replaces the rules currently found in Chapter 116, Subchapter E.

Proposed new §35.801, concerning Emergency Orders Because of Catastrophe, authorizes the commission or executive director to issue an emergency order authorizing immediate action for the addition, replacement, or repair of facilities or control equipment, and authorizing associated emissions of air contaminants, whenever catastrophic event necessitates such action that would otherwise be precluded by the Texas Clean Air Act. Catastrophic events are also defined.

Proposed new §35.802, concerning Application for an Emergency Order, requires the submission of an application in accordance with proposed §35.24. The section also provides the information that must be submitted in addition to the general application requirements. The section is derived from current §116.411, concerning Application for an Emergency Order.

Proposed new §35.803, concerning Public Notification, is derived from current §116.412 and contains changes to rules as they currently exist in that section. The new section requires the commission or executive director to publish notice of the emergency order and the hearing to affirm, modify, or set aside in a newspaper of general circulation in the nearest municipality not later than the tenth day before the hearing. This is a change from current §116.412, which requires *Texas Register* notice as soon as practicable after issuance. The new section also contains changes allowing the commission or the executive director to act.

Proposed new §35.804, concerning Issuance of Order, authorizes the commission or executive director to issue an order under this subchapter if certain conditions are found to exist.

Proposed new §35.805, concerning Contents of an Emergency Order, prescribes content requirements that are in addition to those specified in §35.38. The provisions are derived entirely from current §116.415, concerning Contents of an Emergency Order.

Proposed new §35.806, concerning Requirement to Apply for a Permit or Modification, requires the owner or operator of a facility for which an emergency order has been issued to submit an application within 60 days of issuance of the order in accordance with statute and commission rules. The section is derived in its entirety from current §116.416, concerning Requirement to Apply for a Permit or Modification.

Proposed new §35.807, concerning Affirmation of an Emergency Order, provides the conditions under which the commission affirms a proposed or issued order. The section is derived in its entirety from current §116.414, concerning Affirmation of an Emergency Order.

Proposed new §35.808, concerning Modification of an Emergency Order, provides the conditions under which an emergency order must be modified. The section is derived from current §116.417, concerning Modification of an Emergency Order.

Proposed new §35.809, concerning Setting Aside an Emergency Order, requires a proposed or issued order to be set aside if the hearing record does not show that the order should be affirmed or modified. The section is derived from current §116.418, concerning Setting Aside and Emergency Order.

Proposed Subchapter L, concerning On-site Sewage Disposal System, implements TWC, §5.513, which authorizes the issuance of these orders. Proposed §35.901, concerning Emergency Order Concerning On-Site Sewage Disposal System, authorizes the commission to issue an emergency order suspending the registration of an installer of an on-site sewage disposal system, regulating an on-site sewage disposal system, or both, under certain conditions.

#### FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. The effect on state government will be a small reduction

in costs as a result of the delegation of certain actions to the executive director and the overall simplification and standardization of emergency and temporary order provisions. Revenues collected by the commission will increase by \$400 for each order applied for under the provisions of these rules. The effect on local governments will be an increase of \$400 in application fees under the proposed increase from \$100 to \$500. Any other implications for units of local government making application for orders under these proposed sections will be similar to those effects on any applicant.

#### PUBLIC BENEFIT

Mr. Minick has also determined that for the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be improved consistency between commission regulations and statutory authority for emergency and temporary orders, more uniform requirements for such orders, and more cost-effective administration and processing of orders. The costs to persons, including small businesses, required to comply with the sections as proposed are the proposed increase in application fee for an order from \$100 to \$500 and the stipulation that an applicant is required to reimburse the commission for any costs of public notice incurred by the commission on behalf of the applicant. The costs of notice will vary on a case-by-case basis with the type of application and the number of parties to whom notice for a particular application is required. Some minor cost savings from the simplification and standardization of emergency and temporary orders may also accrue to affected parties, but these effects have not been determined and are not anticipated to be significant for most applicants. No other economic costs are anticipated for any person required to comply with the sections as proposed.

#### DRAFT REGULATORY IMPACT ANALYSIS

Staff has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not major environmental rules because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, §5.501. The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. The rules will also provide for the delegation of authority to issue emergency orders by the commission to the executive director, consolidate agency procedural rules, and make certain processes consistent among different agency programs. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules.

## COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rules under 31 TAC §505.22, and found that the proposed rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the proposed rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the administrative policies and the policies for specific activities related to: construction and operation or solid waste treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of these proposed rules is consistent with the applicable CMP goals and policies because the proposed rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies

because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

The commission invites public comment on the consistency of the proposed rules.

#### PUBLIC HEARING

A public hearing on this proposal will be held August 3, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, located at 12100 Park 35 Circle, Austin. 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 occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97142-035-AD. Comments must be received by 5:00 p.m., August 3, 1998. For further information, please contact Brian Christian, Policy Research Division, (512) 239-1760.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

#### STATUTORY AUTHORITY

The new sections are proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority;

§382.051, which establishes the commission's authority to adopt rules concerning air permits;  
§382.0513, which establishes the commission's authority to adopt rules concerning permit conditions;  
§401.011, which establishes the commission's authority over radioactive substances; §401.051, which  
establishes the commission's authority to adopt rules for the control of radiation; §401.056, which  
establishes the commission's authority to issue emergency orders concerning radiation; and §401.412,  
which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new sections implement TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011,  
26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513,  
401.011, 401.051, 401.056, and 401.412.

**CHAPTER 35 : EMERGENCY AND TEMPORARY ORDERS AND PERMITS; TEMPORARY  
SUSPENSION OR AMENDMENT OF PERMIT CONDITIONS  
SUBCHAPTER A : PURPOSE, APPLICABILITY, AND DEFINITIONS**

**§§35.1-35.3**

**§35.1. Purpose.**

The purpose of this chapter is to implement the commission's authority under Texas Water Code, Chapter 5, Subchapter L, to issue temporary or emergency mandatory, permissive, or prohibitory orders and by those orders to issue temporary permits or temporarily suspend or amend permit conditions.

**§35.2. Applicability.**

This chapter applies to any application under Texas Water Code, Chapter 5, Subchapter L, to issue temporary or emergency mandatory, permissive, or prohibitory orders.

**§35.3. Definitions.**

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Emergency order** - An order which must be issued immediately, in order to protect human health or safety or the environment, or for other reasons specified by statute. Specific requirements for an emergency order are specified in the rules in this chapter relating to each program.

(2) **Severe property damage** - Substantial physical damage to property, damage to treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a discharge. Severe property damage does not mean economic loss caused by delays in production.

(3) **Temporary order** - An order of short duration which must be issued as quickly as possible or which might allow an authorization for a short term activity, setting conditions and limitations that will adequately protect human health or safety or the environment, or for the reasons specified in §35.302 of this title (relating to Application for Emergency and Temporary Orders to Discharge). Specific requirements for a temporary order are specified in the rules in this chapter relating to each program.

## **SUBCHAPTER B : AUTHORITY OF EXECUTIVE DIRECTOR**

### **§§35.11-35.13**

#### **STATUTORY AUTHORITY**

The new sections are proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits;

§382.0513, which establishes the commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new sections implement TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.11. Purpose and Applicability.**

The purpose of this subchapter is to delegate authority to the executive director and to specify applications for emergency orders on which the executive director may take action on behalf of the commission under this chapter.

**§35.12. Authority of Executive Director.**

(a) The executive director may receive applications and issue emergency orders under this chapter. If an emergency order is issued without notice and a hearing, notice shall be issued and a hearing by the commission to affirm, modify, or set aside shall be set. If a hearing request is received,

and the commission grants the request, the commission shall either hold a contested case hearing, or remand the case to SOAH.

(b) The executive director may authorize, in writing, a representative or representatives to act on the executive director's behalf under this chapter.

**§35.13. Eligibility of Executive Director.**

Upon assumption of national pollutant discharge elimination system permit authority, the executive director, or the executive director's representative or representatives, may act under this chapter on Texas pollutant discharge elimination system (TPDES) permits or other TPDES-related approvals only if he or she meets the qualifications set out for the executive director in §50.41 of this title (relating to Eligibility of Executive Director).

## **SUBCHAPTER C : GENERAL PROVISIONS**

### **§§35.21-35.30**

#### **STATUTORY AUTHORITY**

The new sections are proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits;

§382.0513, which establishes the commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new sections implement TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.21. Action by Commission or Executive Director.**

For the purposes of, and in the manner provided by this chapter, the commission may issue a temporary order; and the commission or the executive director may issue an emergency, mandatory, permissive, or prohibitory order; and the commission by temporary order, or the executive director or commission by emergency order, may:

(1) issue a temporary permit; or

(2) temporarily suspend or amend a permit condition.

**§35.22. Term and Renewal of Orders.**

Unless otherwise provided by this chapter, an emergency order issued under this chapter is limited to a reasonable time specified by the order, which may not exceed 180 days and may be renewed once for an additional period not to exceed 180 days by submittal of a new application. A temporary order must be limited to a reasonable time specified by the order.

**§35.23. Effect of Orders.**

An emergency or temporary order issued under this chapter does not vest any rights in the permit holder or recipient and expires in accordance with its terms.

**§35.24. Application for Emergency or Temporary Order.**

(a) A person wanting an emergency or temporary order under this chapter shall submit a written application to the chief clerk. Unless the person submitting the application is the executive director or the executive director's representative, the application must be sworn.

(b) If the State of Texas has been authorized to administer the national pollutant discharge elimination system program, and a person seeks an emergency or temporary order for a bypass of untreated or partially treated wastewater, as that term is defined in §305.2 of this title (relating to Definitions), from a facility that is subject to a Texas pollutant discharge elimination system permit, the

filing of the application for an emergency or temporary order constitutes prior notice of an anticipated bypass. Filing of the application for bypass shall be done, if possible, at least ten days before the date of the bypass. The person must comply with all bypass requirements under §305.535 of this title (relating to Bypasses from TPDES Permitted Facilities).

(c) The application must:

(1) state the name, address, and telephone number of the applicant, the person submitting the application on the applicant's behalf, and the person signing the application on the applicant's behalf;

(2) contain information sufficient to identify the facility and location to be affected by the order;

(3) describe the condition of emergency or other condition justifying the issuance of the order;

(4) allege facts to support any findings required under this chapter;

(5) estimate the dates on which the proposed order should begin and end and the dates on which the activity proposed to be allowed, mandated, or prohibited should begin and end;

(6) describe the action sought and the activity proposed to be allowed, mandated, or prohibited;

(7) include any other statement or information required by this chapter; and

(8) be accompanied by payment of any application fees required by the commission.

(d) A copy of the application must be provided to the division director of the appropriate program on behalf of the executive director, and to the public interest counsel, at the same time it is filed with the chief clerk. The division director may designate another representative of the executive director for this service.

(e) All applications shall be signed as follows.

(1) For a corporation, the application shall be signed by a responsible corporate officer. For purposes of this paragraph, a responsible corporate officer means a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. Corporate procedures governing authority to sign permit applications may provide for

assignment or delegation to applicable corporate positions rather than to specific individuals.

Documentation of authority to sign must be provided with the application.

(2) For a partnership or sole proprietorship, the application shall be signed by a general partner or the proprietor, respectively.

(3) For a municipality, state, federal, or other public agency, the application shall be signed by either a principal executive officer or a ranking elected official. For purposes of this paragraph, a principal executive officer of a federal agency includes the chief executive officer of the agency, or a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., regional administrator of the United States Environmental Protection Agency).

(4) For the executive director, the application shall be signed by the executive director or any duly authorized representative;

(5) A person other than the executive director or the executive director's representative signing an application shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my

knowledge and belief, true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(6) For hazardous solid waste applications, the owner and operator of a facility must sign the application.

(7) For radioactive material license applications under Chapter 336 of this title (relating to Radioactive Substance Rules), the applicant or person duly authorized to act for and on the applicant's behalf must sign the application.

**§35.25. Notice and Opportunity for Hearing.**

(a) An emergency order under this chapter may be issued with notice and an opportunity for hearing, or without notice and an opportunity for hearing, as provided by this chapter.

(b) If an emergency order is issued under this chapter without a hearing, the order shall set a time and place for a hearing to affirm, modify, or set aside the order to be held before the commission or its designee as soon as practicable after the order is issued.

(c) Except as otherwise provided by this chapter, notice of a hearing to affirm, modify, or set aside an emergency order under this chapter shall be given not later than the tenth day before the date

set for the hearing. This notice shall provide that an affected person may request an evidentiary hearing on issuance of the emergency order.

(d) Temporary orders require a hearing before the issuance of the order. Notice of a hearing on a temporary order shall be given not later than the 20th day before the hearing on the order. This notice of hearing shall provide that an affected person may request an evidentiary hearing on issuance of the temporary order.

(e) In addition to the notice requirements provided elsewhere in these rules, notice shall be provided as follows.

(1) For water quality temporary orders, notice of a hearing that is held before issuance of the order shall be provided:

(A) by mail to persons requesting public notice of certain applications, in accordance with §39.7 of this title (relating to Mailing Lists) and to persons or agencies identified in §39.13 of this title (relating to Mailed Notice);

(B) by publication by the applicant in a newspaper of largest general circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county in which the facility is located or proposed to be located, the notice must be published in the newspaper of general circulation in the county in which the facility is located or

proposed to be located. The applicant must file an affidavit with the chief clerk certifying facts that constitute compliance with the publication requirements. The deadline to file the affidavit is 15 days after publication of the notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice; and

(C) at least 20 days before the hearing.

(2) For water quality emergency orders, notice of the issuance of the order and the hearing to affirm, set aside, or modify if a hearing is held shall be provided in accordance with paragraph (1)(A) and (C) of this subsection.

(3) For nonhazardous underground injection control (UIC) emergency orders, notice shall be mailed and published at least 30 days before the hearing to affirm, modify, or set aside the emergency order, as is required by Chapter 39 of this title (relating to Public Notice) for notice of a hearing on an application for a UIC permit.

(4) For nonhazardous solid waste emergency orders, notice shall be mailed and published not later than the tenth day before the hearing to affirm, modify, or set aside the emergency order, as is required by Chapter 39 of this title for notice of a hearing on an application for a nonhazardous waste permit.

(5) For hazardous solid waste emergency orders, including UIC emergency orders, notice shall be mailed and published at least 30 days before the hearing to affirm, modify or set aside the emergency order, as required by Chapter 39 of this title for notice of a hearing on an application for a hazardous waste permit. The commission must also give at least 45 days for public comment before issuing the order.

(6) For suspension of beneficial inflows under Texas Water Code, §11.148, notice shall be published in a newspaper or newspapers of general circulation in the affected area not later than the 15th day before the hearing to all affected persons.

(7) For water utility emergency orders for operation of a utility, notice shall be mailed or hand delivered to the utility not later than the tenth day before the hearing to affirm modify or set aside.

(8) For water utility temporary rate increase orders, notice shall be mailed or delivered to the affected ratepayers not later than the tenth day before the hearing to affirm, modify or set aside.

(9) For air catastrophe emergency orders, notice shall be published in a newspaper of general circulation in the nearest municipality not later than the tenth day before the hearing.

(10) For generalized condition of air pollution emergency orders, the timing, method, and recipients of notice shall be as practicable under the circumstances.

(11) For radioactive substances emergency orders, notice shall be provided by personal service or certified mail to those named in the order not later than the tenth day before the hearing to affirm, modify, or set aside.

(12) For radioactive material impoundment, notice shall be provided by personal service or certified mail to those named in the order not later than the tenth day before the hearing to affirm, modify, or set aside.

(13) For petroleum storage tank emergency orders, notice shall be provided by certified mail, hand delivery, or if that fails, one time in the *Texas Register* or published once in the county newspaper not later than the tenth day before the hearing to affirm, modify, or set aside.

(14) For imminent and substantial endangerment emergency orders, notice shall be given by certified mail for hand delivery to the person named in the order, and if that fails, published once in the *Texas Register* and once in the newspaper of general circulation not later than the tenth day before the hearing to affirm, modify, or set aside.

(15) For on-site sewage and disposal system emergency orders, notice shall be mailed to those in the order not later than ten days before the hearing to affirm, modify, or set aside.

(f) Statutes or rules requiring notice of hearing or setting procedures for the issuance of permits do not apply to a hearing on an emergency order issued under this chapter unless they specifically require notice for an emergency order.

(g) If the commission acts on an application for a temporary order, or the commission or executive director acts on an application for an emergency order, the chief clerk or the office designated by the executive director shall mail notice of the action to the applicant, the executive director, public interest counsel, and other persons who have filed hearing requests or public comment.

**§35.26. Contents of Emergency or Temporary Order.**

An emergency or temporary order issued under this chapter shall contain at least the following:

(1) the name and address of the applicant and information sufficient to identify the facility or location affected by the order;

(2) a description of the condition of emergency or other condition justifying the issuance of the order;

(3) any findings of facts required under this chapter;

(4) a statement of the term of the order, including the dates on which it shall begin and end and the dates on which the activity proposed to be allowed, mandated, or prohibited shall begin and end;

(5) a description of the action sought and the activity proposed to be allowed, mandated, or prohibited;

(6) if the order was issued without a hearing, a statement to that effect and a provision setting a time and place for a hearing before the commission or its designee; and

(7) any other statement or information required by this chapter.

**§35.27. Hearing Required.**

A hearing shall be held before the issuance of each temporary order and either before or after the issuance of each emergency order. If no hearing is held before the issuance of an emergency order, a hearing to affirm, modify, or set aside the order shall be held before the commission or its designee as soon as practicable after the order is issued.

**§35.28. Hearing Requests.**

(a) The executive director, the applicant, or an affected person as defined by Texas Water Code, §5.115(a) may request a contested case hearing.

(b) The commission is not required to hold a hearing if it determines that the basis of a person's request for a hearing as an affected person is not reasonable or is not supported by competent evidence.

(c) All relevant factors shall be considered in the evaluation of a person's request for a hearing as an affected person, including, but not limited to, the following:

(1) whether the interest claimed is one protected by the law under which the application will be considered;

(2) distance restrictions or other limitations imposed by law on the affected interest;

(3) whether a reasonable relationship exists between the interest claimed and the activity regulated;

(4) likely impact of the regulated activity on the health, safety, and use of property of the person;

(5) likely impact of the regulated activity on use of the impacted natural resource by the person; and

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

(d) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

(1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

(2) the interests the group or association seeks to protect are germane to the organization's purpose; and

(3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

**§35.29. Procedures for a Hearing.**

(a) Hearings before the commission under this chapter shall be conducted in accordance with Chapter 10 of this title (relating to Commission Meetings). Contested case hearings shall be conducted under the APA and Chapter 80 of this title (relating to Contested Case Hearings).

(b) If a contested case hearing is requested on the application, and the commission grants the request, the commission shall either conduct the contested case hearing or remand the matter to SOAH.

(c) The commission or judge may, consistent with the requirements of the APA, reduce the time periods specified in the commission's rules governing contested case hearings.

(d) For any hearing on a temporary or emergency order, the following procedures will apply:

(1) parties will be designated by the commission or judge. To be designated as a party, the person seeking party status must show a justiciable interest. For each hearing under this section, the applicant, the public interest counsel, and the executive director are parties by rule;

(2) the testimony of all witnesses will be under oath, with an opportunity for questioning by the commission or judge and cross-examination by the other parties;

(3) other parties to the hearing will be given an opportunity to present rebuttal evidence and testimony;

(4) the applicant will have the burden of proving its need for an emergency or temporary order, and will have the right to open and close the evidentiary parts of the hearing. The fact that an emergency order was issued without a hearing, standing alone, will not constitute evidence of the need for such authorization;

(5) the commission or judge will have the right to limit the number of witnesses; to limit the time for direct questioning or cross-examination of a witness; to refuse illustrative and documentary evidence; and to limit argument.

(e) If a hearing request is denied, the procedures contained in §80.271 and §80.273 of this title (relating to Motion for Rehearing; and Decision Final and Appealable ) apply.

**§35.30. Application Fees.**

The application fee for an emergency or temporary order under this chapter is \$500 plus the actual cost of the required notice. The fee is payable at the time the application is filed, and is not refundable.

## **SUBCHAPTER D : EMERGENCY SUSPENSION OF BENEFICIAL INFLOWS**

### **§35.101**

#### **STATUTORY AUTHORITY**

The new section is proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the

commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new section implements TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.101. Emergency Suspension of Permit Conditions Relating to Beneficial Inflows to Affected Bays and Estuaries and Instream Uses.**

(a) The purpose of this section is to set forth the procedures and criteria to be used by the commission or the executive director in its review and action on an application by a water right holder for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an emergency, under Texas Water Code, §5.506 and §11.148. The emergency relief provided by this section shall only be used when the commission finds that:

(1) emergency conditions exist that present an imminent threat to the public health, safety, and welfare and that override the necessity to comply with general procedures and criteria for changing the conditions in a water right; and

(2) there are no feasible, practicable alternatives to the emergency authorization.

(b) The commission may approve an application filed by the affected water right holder for the temporary suspension of all or a part of conditions in a water right relating to beneficial inflows to affected bays and estuaries and instream uses if the commission finds that an emergency exists and there is no feasible, practicable alternative to the suspension. The burden of demonstrating that the application should be granted in accordance with this section is on the applicant. For purposes of this section, an emergency is a condition where water supplies available to the applicant have been reduced or impaired to such an extent that an imminent peril to the public health, safety, or welfare exists. This condition may include, but not be limited to:

(1) the reduction of public water supplies to critical levels as a result of a severe and sustained drought;

(2) the failure of a dam for a public water supply reservoir;

(3) the significant contamination of a public water supply; or

(4) the failure or destruction of public water supply pipelines or other distribution systems.

(c) The application shall be filed in accordance with and must contain the information required by §35.24 of this title (relating to Application for Emergency or Temporary Order), and the following:

(1) copies of the affected permits, certificates of adjudication, or certified filings;

(2) a description of the emergency's impact on public health, safety, and welfare;

(3) a description of all existing and potential water supplies available to the applicant and their corresponding uses and costs;

(4) a summary of the examination made by the applicant of whether feasible, practicable alternatives exist to the suspension of permit conditions and reasons why those alternatives do not exist;

(5) the amount of water over and above available supplies that are necessary to alleviate emergency conditions;

(6) copies of the water right holder's water conservation and drought contingency plans, if any, and a summary of their status and implementation, including the reasons why any

remaining conservation or drought contingency measures provided by the plans have not or will not be implemented:

(7) a copy of the reservoir operating procedures, if applicable; and

(8) the proposed conditions and trigger levels for the suspension and reinstatement of the releases or other affected permit conditions.

(d) A copy of the application must be filed by the applicant with the Texas Parks and Wildlife Department (TPWD) at the same time it is filed with the chief clerk.

(e) Upon receipt of the application, the chief clerk shall provide notice of the time and location of the commission's consideration of the application to the TPWD, executive director, and public interest counsel as soon as practicable after receipt of the application, but in no event shall the petition be considered less than 72 hours after receipt of notice by the TPWD.

(f) The TPWD, executive director, and public interest counsel shall be provided an opportunity to submit comments on the application before the commission action. The applicant shall be afforded opportunity to respond to all comments at the time of the commission's consideration of the matter.

(g) The commission's order shall set out the extent of any suspension and any special condition upon which a suspension is granted. The commission's initial order may also indicate the referral of the matter to SOAH for an expedited hearing under subsection (i) of this section.

(h) Published notice of the initial suspension of water right conditions, if granted, shall be provided and paid for by the applicant immediately following a favorable commission initial decision by publication in a newspaper or newspapers of general circulation in the affected area. The published notice may not be smaller than 96.8 square centimeters or 15 square inches with the shortest dimension at least 7.6 centimeters or three inches. Such published notice must contain a summary of the information contained in the application as provided by subsection (c) of this section and the time and location of the subsequent commission hearing provided by subsection (i) of this section. Such publication shall occur not later than seven calendar days before this hearing. For the purposes of this rule, the affected area shall be each county, in whole or in part, downstream of the diversion point or impoundment authorized under the affected water right. The applicant shall file with the chief clerk a publisher's affidavit as proof that such notice was published in accordance with this subsection.

(i) If the commission initially grants an emergency suspension of permit conditions without a hearing, the commission shall hold the hearing required by §35.25 of this chapter (relating to Notice and Opportunity for Hearing) as soon as practicable, but in no event later than 15 days after the initial emergency suspension is granted to determine whether to affirm, modify, or set aside the initial emergency suspension. Written notice of the hearing shall be provided to the TPWD and affected persons not later than ten days before the hearing.

(j) An emergency order granted under this section may be for a period of not more than 120 days if the commission finds that emergency conditions exist that present an imminent threat to public health, safety, and welfare and that override the necessity to comply with permit conditions and there are no feasible, practicable alternatives to the emergency authorization. This emergency authorization may be renewed once for not longer than 60 days.

(k) In determining whether feasible, practicable alternatives exist to the suspension of water right conditions, the commission shall examine:

(1) the amount and purposes of use for water currently being used by the applicant;

(2) all evidence relating to the availability of alternative, supplemental water supplies to the applicant; and

(3) the applicant's efforts to curtail water use not essential for the protection of the public health, safety, and welfare.

(l) If the water right holder has a water conservation plan and/or drought contingency plan, the suspension of water right conditions may be contingent upon the full implementation of those plans and measures corresponding to the staged reduction of releases for existing instream uses and beneficial inflows. If the water right holder does not have a water conservation plan and drought contingency plan in accordance with Chapter 288 of this title (relating to Water Conservation Plans, Guidelines, and

Requirements), the order granting an application under this section shall require the permittee to develop and implement those plans within a prescribed time period as provided in the order.

(m) In granting an application, all existing instream flows shall be passed up to that amount necessary to maintain water quality standards for the affected stream. Additional flows necessary to protect a species in accordance with the federal Endangered Species Act or other species that are considered to be of “high interest” (self-sustaining wild populations that are endemic to the affected stream, have significant scientific value, or commercial value) may also be required.

(n) In order to assist in the preparation and planning for water management during an emergency, the commission may provide conditions in a water right necessary for relief consistent with applicable portions of this section when the water right is initially granted or subsequently amended. These conditions may include, but shall not be limited to, a staged approach to the reduction in the pass-through amounts that provide for the pass-through of water for instream uses and bays and estuaries when it is available, and allow water to be captured or diverted for the protection of the public health, safety, and welfare during an emergency, subject to the protection of stream flows necessary under subsection (m) of this section for the maintenance of water quality standards. These conditions may also include full implementation by the water right holder of water conservation and drought contingency plans as a precondition for obtaining relief.

(o) If the applicant’s water right already contains provisions for the temporary, total, or partial suspension of permit conditions for the maintenance of instream flows or freshwater inflows to bays and

estuaries, further or different relief requested in an application submitted under this section generally will be denied unless the applicant can show new or changed circumstances or an emergency condition not contemplated when the water right condition was issued.

## **SUBCHAPTER E : EMERGENCY ORDERS FOR UTILITIES**

### **§35.201, §35.202**

#### **STATUTORY AUTHORITY**

The new sections are proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control.. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits;

§382.0513, which establishes the commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new sections implement TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.201. Emergency Order for Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver.**

(a) The commission or executive director may appoint a person by emergency order under Texas Water Code, §5.507 and §13.4132, to temporarily manage and operate a utility that has discontinued or abandoned operations, or which is being referred to the attorney general for the appointment of a receiver under Texas Water Code, §13.412.

(b) An emergency order may be issued under this section under the provisions of §291.142 and §291.143 of this title (relating to Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver and Operation of a Utility by a Temporary Manager).

(c) Notice of an action under this section is adequate if the notice is mailed or hand-delivered to the last known address of the utility's headquarters.

**§35.202. Emergency Order for Rate Increase in Certain Situations.**

(a) The commission or executive director may authorize an emergency rate increase under Texas Water Code, §5.508 and §13.4133 for a utility:

(1) for which a person has been appointed under Texas Water Code, §13.4132; or

(2) for which a receiver has been appointed under Texas Water Code, §13.412; and

(3) when the increase is necessary to ensure the provision of continuous and adequate services to the utility's customers.

(b) Notwithstanding the provisions of §35.22 of this title (relating to Term and Renewal of Orders), an emergency rate increase may be granted under this section for a period not to exceed 15 calendar months from the date on which the increase takes effect. The commission shall schedule a hearing to establish a final rate within that period.

(c) A request for an emergency rate increase must be filed by the utility in accordance with, and must contain the information required by, §35.24 of this title (relating to Application for Emergency or Temporary Order) and the following:

(1) the effective date of the rate increase;

(2) sufficient information to support the computation of the proposed rates; and

(3) any other information requested by the executive director.

(d) The effective date must be the first day of a billing cycle, unless otherwise authorized by the commission or the executive director.

(e) Any emergency rate increase related to charges for actual consumption will be for consumption after the effective date. An increase or the portion of an increase which is not related to consumption may be billed at the emergency rate on the effective date or the first billing after approval by the commission or the executive director.

(f) A utility receiving authorization for an emergency rate increase shall provide notice of the increase to each ratepayer as soon as possible, but not later than the effective date for the new rate.

The notice shall contain the following:

(1) the utility's name and address, the previous rates, the emergency rates, the effective date of the rate increase, and the classes of utility customers affected; and

(2) this statement: "This emergency rate increase has been approved by the Texas Natural Resource Conservation Commission under authority granted by the Texas Water Code, §5.508 and §13.4133, to ensure the provision of continuous and adequate service to the utility's customers. The commission is also required to schedule a hearing to establish a final rate within 15 months after the date on which the emergency rates take effect. The utility is required to provide notice of the hearing to all customers at least 10 days before the date of the hearing. The additional revenues collected under this emergency rate increase are subject to refund if the commission finds that the rate increase was larger than necessary to ensure continuous and adequate service."

(g) The utility shall maintain adequate books and records for a period not less than 12 months to allow for the determination of a cost of service as set forth in §291.31 of this title (relating to Cost of Service).

(h) During the pendency of the emergency rate increase, the commission may require that the utility deposit all or part of the rate increase into an interest-bearing escrow account as set forth in §291.30 of this title (relating to Escrow of Proceeds Received Under Rate Increase).

## **SUBCHAPTER F : WATER QUALITY EMERGENCY AND TEMPORARY ORDERS**

### **§§35.301-35.303**

#### **STATUTORY AUTHORITY**

The new sections are proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits;

§382.0513, which establishes the commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new sections implement TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.301. Emergency and Temporary Orders Authorized.**

The commission may issue temporary orders, and the commission or executive director may issue emergency orders, relating to the discharge of waste or pollutants into or adjacent to any water in the state under Texas Water Code, §5.509 when necessary to enable action to be taken more expeditiously than is otherwise provided by Texas Water Code, Chapter 26 to effectuate the policy and purposes of that chapter.

**§35.302. Application for Emergency and Temporary Orders to Discharge.**

(a) A person desiring to obtain an order to discharge waste into the waters in the state under this subchapter shall submit an application in accordance with §35.24 of this title (relating to

Application for Emergency or Temporary Order). The application must contain the information required by that section and the following:

(1) statements that:

(A) the order is necessary to enable action to be taken more expeditiously than is otherwise provided by Texas Water Code, Chapter 26, to effectuate the policy and purposes of that chapter;

(B) the discharge is unavoidable to:

(i) prevent loss of life, serious injury, or severe property damage, in an application filed either before or after the State of Texas is authorized to administer the national pollutant discharge elimination system (NPDES) program;

(ii) if the State of Texas is not authorized to administer the NPDES program, prevent severe economic loss, to ameliorate serious drought conditions, or to make necessary and unforeseen repairs to the facility; or

(iii) if the State of Texas is authorized to administer the NPDES program, to ameliorate serious drought conditions to the extent consistent with the requirements of the federal Clean Water Act for authorization of the NPDES program.

(C) there is no feasible alternative to the proposed discharge;

(D) the discharge will not cause significant hazard to human life and health, unreasonable damage to property of persons other than the applicant, or unreasonable economic loss to persons other than the applicant; and

(E) the proposed discharge will not present a significant hazard to the uses that may be made of the receiving water after the discharge;

(2) if the State of Texas is authorized to administer the NPDES program, statements that there are no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass from occurring during normal periods of equipment downtime or preventive maintenance;

(3) a statement of the volume and quality of the proposed discharge;

(4) an explanation of measures proposed to minimize the volume and duration of the discharge;

(5) an explanation of measures proposed to maximize the waste treatment efficiency of units not taken out of service or facilities provided for interim use; and

(6) for temporary orders, a list of potentially affected persons in accordance with §305.48(a)(2) of this title (relating to Additional Contents for Applications for Wastewater Discharge Permits).

(b) A person desiring to obtain an order to discharge adjacent to waters in the state under this subchapter shall submit an application in accordance with §35.24 of this title. The application must contain the information required by that section and the following:

(1) statements that:

(A) the order is necessary to enable action to be taken more expeditiously than is otherwise provided by Texas Water Code, Chapter 26, to effectuate the policy and purposes of that chapter;

(B) the discharge is unavoidable to:

(i) prevent loss of life, serious injury, severe property damage, or severe economic loss;

(ii) ameliorate serious drought conditions; or

(iii) make necessary and unforeseen repairs to a facility;

(C) there is no feasible alternative to the proposed discharge;

(D) the discharge will not cause significant hazard to human life and health, unreasonable damage to property of persons other than the applicant, or unreasonable economic loss to persons other than the applicant; and

(E) the proposed discharge will not present a significant hazard to the area of or surrounding the discharge;

(2) a statement of the volume and quality of the proposed discharge;

(3) an explanation of measures proposed to minimize the volume and duration of the discharge;

(4) an explanation of measures proposed to maximize the waste treatment efficiency of units not taken out of service or facilities provided for interim use; and

(5) for temporary orders, a list of potentially affected persons in accordance with §305.48(a)(2) of this title.

**§35.303. Emergency Orders and Temporary Orders.**

(a) The commission or executive director may issue emergency orders, and the commission may issue temporary orders, under this subchapter only if it is found that:

(1) the order is necessary to enable action to be taken more expeditiously than is otherwise provided by Texas Water Code, Chapter 26 to effectuate the policy and purposes of that chapter;

(2) for discharges into water in the state, the discharge is unavoidable to:

(A) prevent loss of life, serious injury, or severe property damage, in an order which is issued either before or after the State of Texas is authorized to administer the national pollutant discharge elimination system (NPDES) program;

(B) if the State of Texas is not authorized to administer the NPDES program, to prevent severe economic loss, ameliorate serious drought conditions, or to make necessary and unforeseen repairs to a facility; or

(C) if the State of Texas is authorized to administer the NPDES program, to ameliorate serious drought conditions, to the extent consistent with the requirements of the federal Clean Water Act for authorization of the NPDES program.

(3) for discharges adjacent to waters in the state, the discharge is unavoidable to prevent loss of life, serious injury, severe property damage, to ameliorate serious drought conditions, or to make necessary and unforeseen repairs to a facility;

(4) there is no feasible alternative to the proposed discharge;

(5) the discharge will not cause significant hazard to human life and health, unreasonable damage to property of persons other than the applicant, or unreasonable economic loss to persons other than the applicant;

(6) the proposed discharge will not present a significant hazard either to the uses that may be made of the receiving water after the discharge, or the area surrounding the discharge;

(7) the dates on which the proposed discharge will begin and end and the volume and quality of the proposed discharge are reasonable and attainable; and

(8) the measures proposed to minimize the volume and duration of the discharge and the measures proposed to maximize the waste treatment efficiency of units not taken out of service or facilities provided for interim use are reasonable.

(b) After assumption of the NPDES program, the issuing authority may issue emergency orders and temporary orders to discharge waste or pollutants into water in the state under this subchapter only if the discharge is from an NPDES or Texas pollutant discharge elimination system-permitted treatment facility.

**SUBCHAPTER G : SOLID WASTE AND URANIUM BY-PRODUCT EMERGENCY ORDERS**

**§35.401, §35.402**

**STATUTORY AUTHORITY**

The new sections are proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks, and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits;

§382.0513, which establishes the commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new sections implement TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.401. Emergency Orders for Non-hazardous Solid Waste Activities and Underground Injection of Uranium By-product Materials.**

(a) The commission or executive director may issue a mandatory or prohibitory emergency order under Texas Water Code, §5.512, regarding any activity of solid waste management within its jurisdiction, if it determines that an emergency exists requiring immediate action to protect public health and safety or the environment.

(b) An emergency order issued under this section shall not exceed 90 days, but may be renewed once.

(c) An emergency order affecting an underground injection control permit may be issued for a time no longer than that required to prevent the hazard, and may not be renewed. The injection authorized by the emergency order may not result in the movement of fluids into underground sources of drinking water.

**§35.402. Emergency Actions Concerning Hazardous Waste.**

(a) Whenever there is good reason to believe that the storage, processing, or disposal of hazardous waste should be authorized to alleviate an imminent and substantial endangerment to human health or safety or the environment; and if there are no alternative, permitted facilities reasonably available for the proper management of the waste, the commission or executive director, on its own motion, or at the request of the executive director or any other party, may issue an emergency order under Texas Water Code, §5.512, authorizing the processing, storage, or disposal of the hazardous waste at a nonpermitted facility or at a permitted facility with no authorization under its permit to receive the hazardous waste in need of immediate management.

(b) In addition to the information required under §35.24 of this title (relating to Application for Emergency or Temporary Order) a party, other than the executive director, requesting such an emergency order shall include a description of any alternatives investigated.

(c) The executive director shall review the request and may require the requesting party to supply additional information as may be reasonably required to assist in making the findings set out in subsection (a) of this section.

(d) An emergency order issued under this section:

(1) shall not exceed 90 days in duration;

(2) shall clearly specify the hazardous wastes to be received, and the manner and location of their processing, storage, or disposal;

(3) may be terminated by the commission at any time without notice and hearing if it determines that termination is appropriate to protect human health or the environment;

(4) shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of this chapter and Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste); and

(5) for underground injection control permits issued under this section, shall be for no longer duration than required to prevent the hazard. The injection authorized may not result in the movement of fluids into underground sources of drinking water.

(e) Public notice shall accompany the emergency order, shall allow at least 45 days for public comment, and shall be given at least 30 days before the hearing on the emergency order. Public notice of the order may be given at the same time as public notice and opportunity for comment on the order, and the two notices may be combined. The notice shall include:

(1) the name and address of the applicant;

(2) the name and location of the hazardous waste management facility;

(3) a brief description of the wastes involved;

(4) a brief description of the action authorized or to be authorized, and the reasons for authorization;

(5) the duration of the emergency order; and

(6) the name and address of the commission (the office granting the order).

## **SUBCHAPTER H : RADIOACTIVE SUBSTANCES AND MATERIALS EMERGENCY**

### **ORDERS**

#### **§35.501, §35.502**

#### **STATUTORY AUTHORITY**

The new sections are proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority;

§382.051, which establishes the commission's authority to adopt rules concerning air permits;  
§382.0513, which establishes the commission's authority to adopt rules concerning permit conditions;  
§401.011, which establishes the commission's authority over radioactive substances; §401.051, which  
establishes the commission's authority to adopt rules for the control of radiation; §401.056, which  
establishes the commission's authority to issue emergency orders concerning radiation; and §401.412,  
which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new sections implement TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011,  
26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513,  
401.011, 401.051, 401.056, and 401.412.

**§35.501. Emergency Orders Relating to Radioactive Substances.**

(a) When an emergency exists as a result of a matter under the commission's jurisdiction that requires immediate action to protect the public health or safety or the environment, the commission or executive director may issue an emergency order under Texas Water Code, §5.516, and Texas Health and Safety Code, §401.056.

(b) The commission or executive director may issue an emergency order directing any action or corrective measure needed to correct or remove the threat to public health or safety or the environment when the commission or executive director determines that radioactive substances under its

jurisdiction threatens the public health or safety or the environment and that the licensee managing the radioactive substances is unable to remove the threat.

(c) An emergency order issued under this section takes effect immediately. A person to whom an emergency order is directed shall comply immediately with that order.

(d) The emergency order shall be delivered to the person to whom the order is directed by hand delivery or by certified mail, return receipt requested. Affidavit of personal service, proof of mailing to the proper address, or the receipt shall be conclusive evidence of service.

(e) If the commission or executive director issues the emergency order without notice or hearing, the commission shall provide the person to whom the order is directed an opportunity for a hearing on written request within 30 days of the date of the order. If a hearing is requested, notice of the hearing shall be given to the person to whom the order is directed by hand delivery or certified mail, return receipt requested, at least ten days before the hearing. A requested hearing shall be held not earlier than the 11th day and not later than the 20th day following the date of receipt of the hearing request.

(f) All provisions of the emergency order shall remain in full force and effect during the pendency of a hearing, unless otherwise altered by the commission. At the conclusion of the hearing and after the proposal for decision is made, the commission shall make a determination to affirm,

modify, or revoke the emergency order and may modify, revoke, or suspend the license based on the determination made.

(g) The commission shall use the financial assurance mechanism provided by a licensee to pay the costs of actions and corrective measures that are taken or that are to be taken under this section. The commission shall use this financial assurance mechanism under the procedure set out in Texas Health and Safety Code, Chapter 401.

(h) If the costs of actions and corrective measures require more funds than the financial assurance mechanism has provided, the commission shall request the attorney general to seek reimbursement from the licensee or person causing the threat.

(i) The commission shall seek reimbursement through a commission order or shall request the attorney general to file suit for reimbursement if the commission uses the funds provided by the licensee for security under Texas Health and Safety Code, Chapter 401, to pay for actions or corrective measures to remedy spills or contamination by radioactive material resulting from a violation of the Texas Radiation Control Act (TRCA), the rules of this chapter, or a license or order issued by the commission under the TRCA or this chapter.

**§35.502. Emergency Impoundment of Radioactive Material.**

(a) In the event of an emergency, the commission or the executive director shall have the authority to impound or order the impoundment of radioactive material possessed by any person not equipped to observe or failing to observe the provisions of the Texas Radiation Control Act (TRCA), the rules of Chapter 336 of this title (relating to Radioactive Substance Rules), or a license or order issued by the commission under the TRCA or Chapter 336 of this title.

(b) As determined by the commission, the impounded radioactive material may be:

(1) returned to a properly licensed owner who did not cause the emergency;

(2) released as evidence to police or courts;

(3) returned to a licensee after the emergency conditions have ceased and any compliance action is settled;

(4) sold;

(5) disposed of at an authorized disposal facility; or

(6) otherwise appropriately transferred or disposed.

(c) If disposition of the impounded radioactive material is necessary to protect the public health and safety, no prior notice need be given the owner or possessor. If action is not necessary to protect the public health and safety, the commission shall give written notice to the owner and/or possessor of the intention to dispose of the material. Notice shall be given by personal service or certified mail, return receipt requested. The owner or possessor shall have 30 days from the date of personal service or mailing to make a written request for a hearing. If no hearing is requested within that time, the commission may take the proposed action.

(d) Upon disposition of impounded radioactive material, the commission may notify the owner and/or possessor of any expense the commission may have incurred during the impoundment and/or disposition and request reimbursement. If the amount is not paid within 60 days from the date of notice, the commission may request the attorney general to file suit against the owner or possessor for the amount requested. If the owner or possessor desires to contest the amount of this charge, he may request a hearing.

(e) If the commission determines from the facts available that impounded radioactive material is abandoned, with no reasonable evidence showing the owner or possessor, the commission may make such disposition of the material as it sees fit.

## **SUBCHAPTER I : STORAGE TANK EMERGENCY ORDERS**

### **§35.601**

#### **STATUTORY AUTHORITY**

The new section is proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the

commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new section implements TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.601. Emergency Order Concerning Underground or Aboveground Storage Tanks.**

(a) The commission or executive director may issue orders under Texas Water Code, §5.510, to the owner or operator of an underground storage tank (UST) regulated under Texas Water Code, Chapter 26, and Chapter 334 of this title (relating to Underground and Aboveground Storage Tanks), if it finds that:

(1) there is an actual or threatened release of a regulated substance from a UST; and

(2) more expeditious corrective action than is otherwise provided for under Texas Water Code, Chapter 26 is necessary to protect the public health and safety or the environment.

(b) An order issued under subsection (a) of this section may prohibit a person from allowing or continuing a release or threatened release and may require the person to take the actions necessary to eliminate the release or threatened release.

(c) An emergency order issued under this section must be:

(1) mailed by certified mail, return receipt requested, to each person identified in the order;

(2) hand delivered to each person identified in the order; or

(3) on failure of service by certified mail or hand delivery, published one time in the *Texas Register*, and one time in a newspaper with general circulation in each county in which any of the persons identified in the order had a last known address.

## **SUBCHAPTER J : IMMINENT AND SUBSTANTIAL ENDANGERMENT**

### **§35.701**

#### **STATUTORY AUTHORITY**

The new section is proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the

commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new section implements TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.701. Emergency Orders.**

The commission or the executive director may issue an emergency administrative order under Health and Safety Code, §361.272, in the manner provided by this chapter.

## **SUBCHAPTER K : AIR ORDERS**

### **§§35.801-35.809**

#### **STATUTORY AUTHORITY**

The new sections are proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits;

§382.0513, which establishes the commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new sections implement TWC, §§5.103, 5.105, 5.501-5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.801. Emergency Orders Because of Catastrophe.**

The commission or executive director may issue emergency orders under Texas Water Code, §5.515, to authorize immediate action for the addition, replacement, or repair of facilities or control equipment, and authorizing associated emissions of air contaminants, whenever a catastrophic event necessitates such construction and emissions otherwise precluded under the TCAA. For purposes of this section, a catastrophic event is an unforeseen event including, but not limited to, an act of God, an act of war, severe weather conditions, explosions, fire, or other similar occurrences beyond the reasonable control of the operator, which renders a facility or its functionally related appurtenances inoperable.

**§35.802. Application for an Emergency Order.**

The owner or operator of a facility desiring to obtain an order under this subchapter shall submit an application in accordance with §35.24 of this title (relating to Application for Emergency or Temporary Order). The application must contain the information required by that section and the following:

(1) a statement that the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, or severe economic loss not attributable to the applicant's actions, and are necessary for the addition, replacement, or repair of facilities or control equipment necessitated by a catastrophic event;

(2) a description of the catastrophic event;

(3) a statement that there are no practicable alternatives to the proposed construction and emissions;

(4) a statement that the emissions will not cause or contribute to a condition of air pollution;

(5) a statement that the proposed construction and emissions will occur only at the property where the catastrophic event occurred or on other property owned by the owner or operator of

the damaged facility, which produces the same intermediates, products, or by-products, providing that no more than a *de minimus* increase will occur in the predicted concentration of the air contaminants at or beyond the property line at such other property;

(6) a description of the proposed construction and the type and quantity of air contaminants to be emitted;

(7) an estimate of the dates on which the proposed construction and emissions will begin and end;

(8) an estimate of the date on which the facility will begin operation; and

(9) any other information or item the executive director may require to support or explain the need for, or to expedite the issuance of, an emergency order; including information regarding the applicability of and compliance with any federal requirements for new or modified sources.

**§35.803. Public Notification.**

The commission or executive director shall publish notice of the issuance of an emergency order in the *Texas Register* as soon as practicable after issuance of the order. If the order is issued prior to a hearing, the order shall fix a time and location for a hearing which is to be held as soon as

practicable after the order is issued. Notice of any hearing shall be published in a newspaper of general circulation in the nearest municipality not later than ten days before the hearing. Notice of the issuance and notice of the hearing may be consolidated for publication in the newspaper.

**§35.804. Issuance of Order.**

The commission or executive director may issue an order under this subchapter if it is found that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment that is necessitated by a catastrophic event;

(2) there are no practicable alternatives to the proposed construction and emissions;

(3) the emissions will not cause or contribute to a condition of air pollution;

(4) the proposed construction or emissions will occur only:

(A) at property where the catastrophic event occurred; or

(B) at other property owned by the owner or operator of the damaged facility which produces the same intermediates, products, or by-products, so long as there will be no more than a *de minimis* increase in the predicted concentration of the air contaminants at or beyond the property line at such other property;

(5) the time limits in the order for the beginning and completion of the proposed construction and emissions are reasonable; and

(6) the schedule in the order for submission of a complete permit application is reasonable.

**§35.805. Contents of an Emergency Order.**

In addition to the requirements of §35.26 of this title (relating to Contents of Emergency or Temporary Order), an emergency order issued under this subchapter shall contain at least the following:

(1) a description of the emergency construction and emissions to be authorized;

(2) reasonable time limits for the beginning and the completion of the proposed construction and emissions;

(3) authorization for action only at the property where the catastrophic event occurred or on other property owned by the owner or operator of the damaged facility, which also produces the same intermediates, products, or byproducts, provided there will be no more than a *de minimis* increase in the concentration of air contaminants at or beyond the property line at such other property; and

(4) a schedule for submission of a complete construction permit application under provisions of TCAA, §382.0518.

**§35.806. Requirement to Apply for a Permit or Modification.**

The owner or operator of a facility for which an emergency order has been issued under this subchapter shall submit an application within 60 days of issuance of the order under TCAA, §382.063, and in accordance with provisions of TCAA, §382.0518, and with Chapter 116, Subchapter B of this title (relating to New Source Review Permits). The application shall be reviewed and acted upon by the executive director without regard to construction activity authorized by the emergency order. The appropriate permit fee shall be due and payable under §§116.140, 116.141, and 116.143 of this title (relating to Permit Fees). Costs and expenses related to additions, replacement, or repair of facilities or control equipment shall not be a consideration in any determination in the review of this application.

**§35.807. Affirmation of an Emergency Order.**

The commission shall affirm a proposed or issued order if the applicant shows at the hearing, by a preponderance of the evidence, that:

(1) the proposed construction and emissions are essential to prevent loss of life, serious injury, severe property damage, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment that is necessitated by a catastrophic event;

(2) there are no practicable alternatives to the proposed construction and emissions;

(3) the emissions will not cause or contribute to a condition of air pollution;

(4) the proposed construction or emissions will occur only:

(A) at property where the catastrophic event occurred; or

(B) at other property owned by the owner or operator of the damaged facility which produces the same intermediates, products, or by-products, so long as there will be no more than a *de minimis* increase in the predicted concentration of the air contaminants at or beyond the property line at such other property;

(5) the time limits in the order for the beginning and completion of the proposed construction and emissions are reasonable; and

(6) the schedule in the order for submission of a complete permit application is reasonable.

**§35.808. Modification of an Emergency Order.**

The commission shall modify a proposed or issued order if the hearing record shows that:

(1) construction and emissions otherwise precluded under the TCAA are essential to prevent loss of life, serious injury, severe property damage, or severe economic loss not attributable to the applicant's actions and are necessary for the addition, replacement, or repair of facilities or control equipment that is necessitated by a catastrophic event;

(2) there is no practicable alternative to such construction and emissions; and

(3) modification of certain terms of the proposed or issued order is necessary to make the order, construction, and/or emissions meet the requirements stated in §35.807 of this title (relating to Affirmation of an Emergency Order).

**§35.809. Setting Aside an Emergency Order.**

The commission shall set aside a proposed or issued order if it is not shown, in accordance with §35.807 of this title (relating to Affirmation of an Emergency Order) or §35.808 of this title (relating to Modification of an Emergency Order), that the order should be either affirmed or modified and adopted as modified.

## **SUBCHAPTER L : ON-SITE SEWAGE DISPOSAL SYSTEM**

### **§35.901**

#### **STATUTORY AUTHORITY**

The new section is proposed under TWC, Chapter 5, Subchapter L, which establishes the commission's authority concerning emergency and temporary orders. Other relevant sections of the TWC under which the commission takes this action include: §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §5.235, as amended by Article VI, Rider 9, House Bill 1, 75th Legislature, 1997, which establishes fee authority; §11.148, which establishes the commission's authority to issue orders relating to beneficial inflows to affected bays and estuaries and instream uses; §13.041, which establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13; §26.011, which establishes the commission's authority over water quality in the state; §26.351, which establishes the commission's authority concerning corrective action; §26.354, which establishes the commission's authority to issue emergency orders concerning petroleum storage tanks; and §27.019, which establishes the commission's authority to adopt rules concerning underground injection control. Additionally, relevant sections of the HSC include: §361.011, which establishes the commission's jurisdiction over municipal solid waste; §361.017, which establishes the commission's jurisdiction over industrial hazardous waste; §361.024, which establishes the commission's authority to establish rules for the control of solid waste; §366.012, which establishes the commission's authority to establish rules for on-site disposal systems; §382.017, which establishes the commission's rulemaking authority; §382.051, which establishes the commission's authority to adopt rules concerning air permits; §382.0513, which establishes the

commission's authority to adopt rules concerning permit conditions; §401.011, which establishes the commission's authority over radioactive substances; §401.051, which establishes the commission's authority to adopt rules for the control of radiation; §401.056, which establishes the commission's authority to issue emergency orders concerning radiation; and §401.412, which establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed new section implements TWC, §§5.103, 5.105, 5.501, 5.502, 5.503, 5.504, 5.505, 5.506, 5.507, 5.508, 5.509, 5.510, 5.511, 5.512, 5.513, 5.514, 5.515, 5.516, 5.517, 11.148, 13.041, 26.011, 26.351, and 26.354; and HSC, §§361.011, 361.017, 361.024, 366.012, 382.017, 382.051, 382.0513, 401.011, 401.051, 401.056, and 401.412.

**§35.901. Emergency Order Concerning On-site Sewage Disposal System.**

The commission may issue an emergency order suspending the registration of the installer of an on-site sewage disposal system, regulating an on-site sewage disposal system, or both, if the commission finds that an emergency exists and that the public health and safety is endangered because of the operation of an on-site sewage disposal system that does not comply with Texas Health and Safety Code, Chapter 366, or a rule adopted under that chapter.

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §116.410, concerning emergency orders. The commission also proposes the repeal of §§116.411-116.418, concerning emergency orders. This action also constitutes a revision to the state implementation plan. This action is part of the commission's implementation of Senate Bill (SB) 1876, 75th Legislature, 1997, which consolidated the commission's emergency and temporary order authority.

In addition to these amendments and repeals, the commission is concurrently proposing to consolidate agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently proposing amendments to emergency and temporary order provisions in §§291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: §§291.10, 291.13, 297.57, 305.22-305.28, 305.30, and 305.32. The commission is also proposing new §297.57 and §305.30. These changes are published in this edition of the *Texas Register*.

#### EXPLANATION OF PROPOSED RULES

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the

commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances. TWC, §5.515, as added by SB 1876, expressly authorizes the commission to issue these emergency orders.

The proposed amendments to §116.410, concerning Applicability, add a reference to new Chapter 35, make a conformity change, and delete the definition of a catastrophic event, which is defined in proposed new §35.801, concerning Emergency Orders Because of Catastrophe.

The proposed repeals concern provisions incorporated into the new Chapter 35. These provisions are moved in their entirety to proposed new Chapter 35, Subchapter K. In that proposal, the commission does propose changes to notice requirements. Proposed new §35.803 would require the commission or executive director to publish notice of the emergency order and the hearing to affirm, modify, or set aside in a newspaper of general circulation in the nearest municipality not later than the tenth day before the hearing. This is a change from current §116.412, which requires *Texas Register* notice as soon as practicable after issuance. The commission also proposes conforming changes, as well as regulatory reform changes to terminology that were identified during the commission's review of Chapter 116 under Article IX, §167, of House Bill 1, 75th Legislature, 1997, the General Appropriations Act.

#### FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

#### PUBLIC BENEFIT

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be enhanced consistency in the issuance of emergency and temporary orders. The sections will also allow the commission or executive director to act expeditiously to address unforeseen circumstances. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

#### DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not a major environmental rule because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, §5.501. The rules also

concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L, concerning emergency and temporary orders. The rules will also consolidate agency procedural rules and make certain processes consistent among different agency programs. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rules are not subject to the CMP.

#### PUBLIC HEARING

A public hearing on this proposal will be held August 3, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, located at 12100 Park 35 Circle, Austin. 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 occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97142-035-AD. Comments must be received by 5:00 p.m., August 3, 1998. For further information, please contact Brian Christian, Policy Research Division, (512) 239-1760.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

#### STATUTORY AUTHORITY

The amendment is proposed under TWC, §§5.103, 5.105, and 5.501 and Texas Health and Safety Code, §§382.017, 382.051, and 382.0513. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 382.017 establishes the commission's authority to adopt rules. Section 382.051 establishes the power of the commission to adopt rules concerning permits. Section 382.0513 establishes the power of the commission to establish certain permit conditions.

The proposed amendment implements TWC, §§5.103, 5.105, 5.515 and Texas Health and Safety Code, §§382.017, 382.051, and 382.0513.

**CHAPTER 116**

**CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR  
MODIFICATION**

**SUBCHAPTER E : EMERGENCY ORDERS**

**§116.410**

**§116.410. Applicability.**

The owner or operator of a facility may apply to the commission or the executive director for an emergency order under Texas Water Code, §5.515, and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions), to authorize immediate action for the addition, replacement, or repair of facilities or control equipment, and authorizing associated emissions of air contaminants, whenever a catastrophic event necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act. [For purposes of this section, a catastrophic event is an unforeseen event including, but not limited to, an act of God, an act of war, severe weather conditions, explosions, fire, or other similar occurrences beyond the reasonable control of the operator, which renders a facility or its functionally related appurtenances inoperable.]

## **SUBCHAPTER E : EMERGENCY ORDERS**

### **§§116.411-116.418**

#### **STATUTORY AUTHORITY**

The repeals are proposed under Texas Water Code, §§5.103, 5.105, and 5.501 and Texas Health and Safety Code, §§382.017, 382.051, and 382.0513. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 382.017 establishes the commission's authority to adopt rules. Section 382.051 establishes the power of the commission to adopt rules concerning permits. Section 382.0513 establishes the power of the commission to establish certain permit conditions.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 5.515 and Texas Health and Safety Code, §§382.017, 382.051, and 382.0513.

**§116.411. Application for an Emergency Order.**

**§116.412. Public Notification.**

**§116.413. Public Hearing for an Emergency Order.**

**§116.414. Affirmation of an Emergency Order.**

**§116.415. Contents of an Emergency Order.**

**§116.416. Requirement to Apply for a Permit or Modification.**

**§116.417. Modification of an Emergency Order.**

**§116.418. Setting Aside an Emergency Order.**

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §291.10 and §291.13, concerning procedural rules related to utilities. The commission also proposes amendments to §§291.14, 291.22, 291.142, and 291.143, concerning emergency orders and the operations of certain utilities. This action includes certain changes related to the operation of certain utilities necessary to implement Senate Bill (SB) 1, 75th Legislature, 1997. This action is also part of the commission's implementation of SB 1876, 75th Legislature, 1997, which consolidated the commission's emergency and temporary order authority.

In addition to these amendments, the commission is concurrently proposing to consolidate agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently proposing amendments to emergency and temporary order provisions in §§116.410, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: §§116.411-116.418, 297.57, 305.22-305.28, 305.30, and 305.32. The commission also proposes new §297.57 and §305.30. These changes are published in this edition of the *Texas Register*.

#### EXPLANATION OF PROPOSED RULES

SB 1 amended Texas Water Code (TWC), §13.412, to expand the definition of abandonment and modified TWC, §13.4132, to allow a person who has been appointed to temporarily manage a utility to

access all utility system components. The commission is proposing changes to Chapter 291 that will make the rules conform to these amendments.

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new TWC, Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances. TWC, §5.507 and §5.508, as added by SB 1876, expressly authorize the commission to issue emergency orders for the appointment of a temporary utility manager, and for rate increases under certain conditions.

The proposed repeal of §291.10, concerning Request for Public Hearing, removes procedural requirements that are duplicative of those in Chapter 55, concerning Requests for Contested Case Hearings; Public Comment. The commission takes this action to continue the consolidation of agency procedural rules.

The proposed repeal of §291.13, concerning Record of Proceeding, eliminates the requirement that a record be kept of all proceedings before the commission. This requirement is duplicative of requirements in current commission procedural rules and is therefore unnecessary.

The proposed amendments to §291.14, concerning Emergency Orders, make nonsubstantive clarifying and conforming changes to reference TWC, §5.507 and §5.508, and the new Chapter 35.

The proposed amendment to §291.22, concerning Notice of Intent to Change Rates, amends subsection (g) to reference the new Chapter 35 and make conformity changes. The amendment also eliminates specific requirements governing emergency rate increases that have been moved to proposed §35.202, concerning Emergency Order for Rate Increase in Certain Situations.

The proposed amendments to §291.142, concerning Operation of a Utility that Discontinues Operation or is Referred for Appointment of a Receiver, implement both SB 1 and SB 1876. The section is amended to allow the commission or the executive director to authorize a willing person to temporarily manage and operate a utility that is being referred to the attorney general for appointment of a receiver for having expressed an intent to abandon operation of its facilities. Additionally, the definition of abandonment is expanded in accordance with TWC, §13.412, as amended by SB 1. Finally, the section is amended to reference new Chapter 35 and remove the provision that notice of the action is adequate if the notice is mailed or hand-delivered to the last known address of the utility's headquarters. This provision is moved to proposed new §35.201, and is therefore unnecessary.

The proposed amendments to §291.143, concerning Operation of a Utility by a Temporary Manager, also implement both SB 1 and SB 1876. The section is amended to expressly grant to a person appointed to temporarily manage and operate a utility the power to take certain actions. The amendment also allows the person, in addition to the previously existing duties, to access all system components. These changes implement TWC, §13.4132, as amended by SB 1. Finally, the amendments make nonsubstantive conforming changes to reference TWC, §5.507, and the proposed new Chapter 35.

#### FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

#### PUBLIC BENEFIT

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the section will be enhanced consistency in the issuance of emergency and temporary orders. In addition, the proposed rules will make it easier for the agency to appoint a temporary receiver to manage a system that was failing to protect public health. The sections will also allow the commission or executive director to act expeditiously to address unforeseen circumstances. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

#### DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not a major environmental rule because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly authorized by statute to adopt rules. The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, §13.412 and §13.4132, and TWC, Chapter 5, Subchapter L, concerning emergency and temporary orders relating to utilities. The rules will also consolidate agency procedural rules and make certain processes consistent among different agency programs. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rules are not subject to the CMP.

#### PUBLIC HEARING

A public hearing on this proposal will be held August 3, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, located at 12100 Park 35 Circle, Austin. 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 occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97142-035-AD. Comments must be received by 5:00 p.m., August 3, 1998. For further information, please contact Brian Christian, Policy Research Division, (512) 239-1760.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

#### STATUTORY AUTHORITY

The repeals are proposed under TWC, §§5.103, 5.105, 5.501, 13.041, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 13.041 establishes the commission's authority to adopt rules to exercise its jurisdiction over TWC, Chapter 13. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed repeals implement TWC, §§5.103, 5.105, 5.507, 5.508, 13.041, 13.412, 13.4132, and 26.011.

**CHAPTER 291**

**WATER RATES**

**SUBCHAPTER A : GENERAL PROVISIONS**

**§291.10, §291.13**

**§291.10. Request for Public Hearing.**

**§291.13. Record of Proceeding.**

**CHAPTER 291**

**WATER RATES**

**SUBCHAPTER A : GENERAL PROVISIONS**

**§291.14**

**STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code, §§5.103, 5.105, 5.501, 13.041, and 26.011.

Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 13.041 establishes the commission's authority to adopt rules to exercise its jurisdiction over Texas Water Code, Chapter 13. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendment implements Texas Water Code, §§5.103, 5.105, 5.507, 5.508, 13.041, 13.412, 13.4132, and 26.011.

**§291.14. Emergency Orders.**

- (a) The commission may issue emergency orders, with or without a hearing:

(1) to compel a water or sewer service provider that has obtained or is required to obtain a certificate of public convenience and necessity to provide continuous and adequate water service, sewer service, or both, if the discontinuance of the service is imminent or has occurred because of the service provider's actions or failure to act. These orders may contain provisions requiring specific utility actions to ensure continuous and adequate utility service and compliance with regulatory guidelines;

(2) to compel a retail public utility to provide an emergency interconnection with a neighboring retail public utility for the provision of temporary water or sewer service, or both, for not more than 90 days if service discontinuance or serious impairment in service is imminent or has occurred; and/or

(3) to establish reasonable compensation for the temporary service required under subsection (a)(2) of this section and may allow the retail public utility receiving the service to make a temporary adjustment to its rate structure to ensure proper payment\_[:]

(b) The commission or executive director may also issue orders under Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions):

(1) [(4)] to appoint a temporary manager under [the] Texas Water Code, §5.507 and §13.4132 [§13.4134]; and/or

(2) [(5)] to approve an emergency rate increase under Texas Water [the] Code, §5.508  
and §13.4133.

(c) [(b)] If an order is issued under [subsection (a) of] this section without a hearing, the order shall fix a time, as soon after the emergency order is issued as is practicable, and place for a hearing to be held before the commission.

**CHAPTER 291**

**SUBCHAPTER B : RATES, RATE-MAKING, AND RATE/TARIFF CHANGES**

**§291.22**

**STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code, §§5.103, 5.105, 5.501, 13.041, and 26.011.

Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 13.041 establishes the commission's authority to adopt rules to exercise its jurisdiction over Texas Water Code, Chapter 13. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendment implements Texas Water Code, §§5.103, 5.105, 5.507, 5.508, 13.041, 13.412, 13.4132, and 26.011.

**§291.22. Notice of Intent to Change Rates.**

(a) - (f) (No change.)

(g) Emergency rate increase in certain circumstances [Emergency Rate Increase in Certain Circumstances].

[(1)] After receiving a request, the commission or executive director may authorize an emergency rate increase under Texas Water Code, §5.508 and §13.4133 and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) for a utility:

(1) [(A)] for which a person has been appointed under [the] Texas Water Code, §13.4132; or

(2) [(B)] for which a receiver has been appointed under [the] Texas Water Code, §13.412; and

(3) [(C)] if the increase is necessary to ensure the provision of continuous and adequate services to the utility's customers.

[(2)] A request for an emergency rate increase must include the following:]

[(A) the effective date of the rate increase;]

[(B) a summary of the reasons for the rate increase;]

[(C) sufficient information to support the computation of the proposed rates;

and]

[(D) any other information requested by the executive director.]

[(3) The effective date must be the first day of a billing cycle unless otherwise authorized by the commission.]

[(4) Any emergency rate increase related to charges for actual consumption will be for consumption after the effective date. An increase or the portion of the increase which is not related to consumption may be billed at the emergency rate on the effective date or the first billing after approval by the commission.]

[(5) The utility, after receiving authorization for the emergency rate increase, shall provide notice of the rate increase to each ratepayer as soon as possible, but not later than the effective date for the new rate. This notice shall contain the following information:]

[(A) the utility name and address, the previous rates, the emergency rates, the effective date of the rate increase, and the classes of utility customers affected; and]

[(B) the following statement: "This emergency rate increase has been approved by the Texas Natural Resource Conservation Commission under authority granted by the Texas Water Code, §13.4133 to ensure the provision of continuous and adequate service to the utility's customers. The commission is also required to schedule a hearing to establish a final rate within 15 months after the date on which the emergency rates take effect. The utility is required to provide notice

of the hearing to all customers at least ten days prior to the date of the hearing. The additional revenues collected under this emergency rate increase are subject to refund if the commission finds that the rate increase was larger than necessary to ensure continuous and adequate service."]

[(6) The utility shall maintain adequate books and records for a period not less than 12 months to allow for the determination of a cost of service as set forth in § 291.31 of this title (relating to Cost of Service).]

[(7) During the pendency of the emergency rate increase, the commission may require that the utility deposit all or part of the rate increase into an interest-bearing escrow account as set forth in §291.30 of this title (relating to Escrow of Proceeds Received Under Rate Increase).]

(h) (No change.)

**CHAPTER 291**

**SUBCHAPTER J : ENFORCEMENT, SUPERVISION, AND RECEIVERSHIP**

**§291.142, §291.143**

**STATUTORY AUTHORITY**

The amendments are proposed under Texas Water Code, §§5.103, 5.105, 5.501, 13.041, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 13.041 establishes the commission's authority to adopt rules to exercise its jurisdiction over Texas Water Code, Chapter 13. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendments implement Texas Water Code, §§5.103, 5.105, 5.507, 5.508, 13.041, 13.412, 13.4132, and 26.011.

**§291.142. Operation of Utility that Discontinues Operation or is Referred for Appointment of a Receiver.**

(a) The commission or the executive director, after providing to the utility notice and an opportunity for a hearing, may authorize a willing person to temporarily manage and operate a utility that [has]:

(1) has discontinued or abandoned operations or the provision of services; or

(2) is being referred to the attorney general for the appointment of a receiver under [the] Texas Water Code, §13.412 for:

(A) having expressed an intent to abandon or abandoned operation of its facilities; or

(B) - (C) (No change.)

(b) The commission or the executive director may appoint a person under this section by emergency order under Chapter 35 of this title (relating to Emergency and Temporary Order and Permits; Temporary Suspension or Amendment of Permit Conditions [, and notice of the action is adequate if the notice is mailed or hand-delivered to the last known address of the utility's headquarters.] A corporation may be appointed a temporary manager.

(c) Abandonment includes, but is not limited to:

(1) failure to pay a bill [utility bills;] or obligation owed to a retail public utility or to an electric or gas utility with the result that the utility service provider has issued a notice of discontinuance of necessary services;

(2) failure to provide appropriate water or wastewater treatment so that a potential health hazard results;

(3) [(2)] failure to adequately maintain facilities or to provide sufficient facilities resulting in potential health hazards, extended outages, or repeated service interruptions; [make necessary and timely repairs to maintain continuous and adequate service.]

(4) failure to provide customers adequate notice of a health hazard or potential health hazard;

(5) failure to secure an alternative available water supply during an outage;

(6) displaying a pattern of hostility toward or repeatedly failing to respond to the commission or the utility's customers; and

(7) failure to provide the commission or its customers with adequate information on how to contact the utility for normal business and emergency purposes.

(d) (No change.)

**§291.143. Operation of a Utility by a Temporary Manager.**

(a) By emergency order under [the] Texas Water Code, §5.507 and §13.4132, the commission or the executive director may appoint a person under Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Suspension and Amendment of Permit Conditions) to temporarily manage and operate a utility that has discontinued or abandoned operations or the provision of services, or which has been or is being referred to the attorney general [Attorney General] for the appointment of a receiver under [the] Texas Water Code, §13.412.

(b) A person appointed under this section has the powers and duties necessary to [and shall] ensure the continued operation of the utility and the provision of continuous and adequate services to customers, including the power and duty to [. The duties of the temporary manager appointed by the commission will include]:

- (1) read [reading] meters;
- (2) bill [billing] for utility services;
- (3) collect [collecting] revenues;
- (4) disburse [disbursing] funds;

(5) request [requesting] rate increases if needed;

(6) access all system components;

(7) [(6)] conduct required sampling;

(8) [(7)] make [making] necessary repairs; and

(9) [(8)] perform [performing] other acts necessary to assure continuous and adequate utility service as authorized by the commission.

(c) - (i) (No change.)

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §297.57 and new §297.57, concerning emergency suspension of permit conditions. This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

In addition to this action, the commission is concurrently proposing to consolidate agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently proposing amendments to emergency and temporary order provisions in §§116.410, 291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: §§116.411-116.418, 291.10, 291.13 305.22-305.28, 305.30, and 305.32. The commission also proposes new §§305.30. These changes are published in this edition of the *Texas Register*.

#### EXPLANATION OF PROPOSED RULES

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency

orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are to be applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances.

TWC, §5.506, as added by SB 1876, concerns the emergency suspension of a permit condition relating to beneficial inflows to affected bays and estuaries and instream uses.

The proposed repeal provides for moving existing requirements from §297.57, concerning Emergency Suspension of Permit Conditions, into the new Chapter 35. These provisions may be found in proposed Chapter 35, Subchapter D, concerning Emergency Suspension of Beneficial Inflows. There are no substantive changes to the requirements as they currently exist.

The proposed new §297.57 simply references the commission's authority under TWC, §5.506, and the new Chapter 35. The section also allows the executive director to act, as authorized by TWC, §5.501.

#### FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

#### PUBLIC BENEFIT

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be enhanced consistency in the

issuance of emergency and temporary orders. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

#### DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not a major environmental rule because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly authorized by TWC, §5.501 to take this action. The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. The rules will also consolidate agency procedural rules and make certain processes consistent among different agency programs. The rules will substantially advance these specific purposes by providing specific provisions

on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rules under 31 TAC §505.22, and found that the proposed rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the proposed rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the administrative policies and the policies for specific activities related to: construction and operation or solid waste treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of these proposed rules is consistent with the applicable CMP goals and policies because the proposed rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen

circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

The commission invites public comment on the consistency of the proposed rules.

#### PUBLIC HEARING

A public hearing on this proposal will be held August 3, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, located at 12100 Park 35 Circle, Austin. 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 occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97142-035-AD. Comments must be received by 5:00 p.m., August 3, 1998. For further information, please contact Brian Christian, Policy Research Division, (512) 239-1760.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

#### STATUTORY AUTHORITY

The repeal is proposed under TWC, §§5.103, 5.105, 5.501, 11.148, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 11.148 establishes the commission's authority to suspend permit conditions relating to beneficial inflows to affected bays and estuaries. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed repeal implements TWC, §§5.103, 5.105, 5.506, 13.041, 11.148, 26.011.

**CHAPTER 297**

**WATER RIGHTS, SUBSTANTIVE**

**SUBCHAPTER E : ISSUANCE AND CONDITIONS OF WATER RIGHTS OR CERTIFICATE**

**OF ADJUDICATION**

**§297.57**

**§297.57. Emergency Suspension of Permit Conditions.**

**CHAPTER 297**

**WATER RIGHTS, SUBSTANTIVE**

**SUBCHAPTER E: ISSUANCE AND CONDITIONS OF WATER RIGHTS OR**

**CERTIFICATE OF ADJUDICATION**

**§297.57**

**STATUTORY AUTHORITY**

The new section is proposed under Texas Water Code, §§5.103, 5.105, 5.501, 11.148, and 26.011.

Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 11.148 establishes the commission's authority to suspend permit conditions relating to beneficial inflows to affected bays and estuaries. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed new section implements Texas Water Code, §§5.103, 5.105, 5.506, 13.041, 11.148, 26.011.

**§297.57. Emergency Suspension of Permit Conditions.**

The commission or executive director may review and act, under Texas Water Code, §5.506 and §11.148, and under §35.51 of this title (relating to Emergency Suspension of Permit Conditions

Relating to Beneficial Inflows to Affected Bays and Estuaries and Instream Uses on a petition by a water right holder for the temporary suspension of conditions in the water right relating to beneficial inflows to bays and estuaries and instream uses during an emergency.

The commission proposes amendments to §§305.21, 305.29, 305.31, and 305.535, concerning emergency and temporary orders. The commission also proposes the repeal of §§305.22-305.28, 305.30, and 305.32, concerning emergency orders. Finally, the commission proposes new §305.30, concerning emergency actions. This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

In addition to these amendments and repeals, the commission is concurrently proposing to consolidate agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently proposing amendments to emergency and temporary order provisions in §§116.410, 291.14, 291.22, 291.142, 291.143, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, 321.258, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: §§116.411-116.418, 291.10, 291.13, and 297.57. The commission is also proposing new §297.57. These changes are published in this edition of the *Texas Register*.

#### EXPLANATION OF PROPOSED RULES

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the

commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and hearing requirements that are applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances. TWC, §5.509, as added by SB 1876, concerns temporary or emergency orders relating to the discharge of waste or pollutants. TWC, §5.512, concerns emergency orders relating to solid waste management. TWC, §5.516, concerns emergency orders issued under Health and Safety Code, §401.056, concerning Emergency Orders.

The proposed amendment to §305.21, concerning Emergency Orders and Temporary Orders Authorized, provides reference to the commission's authority under TWC, §5.509, and the new Chapter 35. The amendment also makes conforming changes.

The proposed repeals of §305.22, concerning Application for Orders or Authorizations to Discharge; §305.23, concerning Emergency Orders; and §305.25, concerning Executive Director Authorizations to Discharge, delete provisions that have been moved to proposed Chapter 35, Subchapter F, concerning Water Quality Emergency and Temporary Orders.

The proposed repeals of §305.24, concerning Notice; §305.26, concerning Hearings for Temporary Orders, Executive Director Authorizations and Emergency Orders; §305.27, concerning Application Fees; and §305.28, concerning Renewals of Emergency and Temporary Orders, delete provisions that are addressed in proposed Chapter 35, Subchapter C, concerning General Provisions.

The proposed amendments to §305.29, concerning Emergency Orders for Solid Waste Activities, provide reference to the commission's authority under TWC, §5.512, and the new Chapter 35, and makes conforming changes. The amendments also delete provisions that have been moved to proposed Chapter 35, Subchapter G, concerning Solid Waste and Uranium By-product Emergency Orders.

The proposed new §305.30, concerning Emergency Actions Concerning Hazardous Waste, provides reference to the commission's authority under TWC, §5.512, and the new Chapter 35 and contains conforming changes. The repeal of current §305.30, concerning Emergency Actions Concerning Hazardous Waste, deletes provisions that have been moved to proposed Chapter 35, Subchapter G.

The proposed amendments to §305.31, concerning Emergency Orders Relating to Radioactive Substances and §305.32, concerning Emergency Impoundment of Radioactive Material, provide reference to the commission's authority under TWC, §5.512, and the new Chapter 35 and makes conforming changes. The amendments also delete provisions that have been moved to proposed Chapter 35, Subchapter H, concerning Radioactive Substances and Materials Emergency Orders.

The proposed amendments to §305.535, concerning Bypasses from TPDES Permitted Facilities, make conforming changes to reflect the proposed new Chapter 35. The section is also amended to grant to the commission the authority to determine if the required conditions for authorizing a bypass are met. The executive director has that authority in the rules as they currently exist.

#### FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

#### PUBLIC BENEFIT

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be enhanced consistency in the issuance of emergency and temporary orders. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

#### DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not a major environmental rule because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by statute. The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. The rules will also consolidate agency procedural rules and make certain processes consistent among different agency programs. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rules under 31 TAC §505.22, and found that the proposed rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the proposed rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the administrative policies and the policies for specific activities related to: construction and operation or

solid waste treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of these proposed rules is consistent with the applicable CMP goals and policies because the proposed rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

The commission invites public comment on the consistency of the proposed rules.

#### **PUBLIC HEARING**

A public hearing on this proposal will be held August 3, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, located at 12100 Park 35 Circle, Austin. 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 occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97142-035-AD. Comments must be received by 5:00 p.m., August 3, 1998. For further information, please contact Brian Christian, Policy Research Division, (512) 239-1760.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

#### STATUTORY AUTHORITY

The amendments are proposed under TWC, §§5.103, 5.105, 5.501, and 26.011 and Texas Health and Safety Code, §§361.011, 361.017, 361.024, 401.011, 401.051, 401.056, and 401.412. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state. Section 361.011 establishes the commission's jurisdiction over municipal solid waste. Section 361.017 establishes the commission's jurisdiction over industrial hazardous waste. Section 361.024 establishes the commission's authority to establish rules for the control of solid waste. Section 401.011 establishes the commission's authority over radioactive substances. Section 401.051 establishes the commission's

authority to adopt rules for the control of radiation. Section 401.056 establishes the commission's authority to issue emergency orders concerning radiation. Section 401.412 establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed amendments implement TWC, §§5.103, 5.105, 5.506, 13.041, 26.011, and Texas Health and Safety Code, §§361.011, 361.017, 361.024, 401.011, 401.051, 401.056, and 401.412.

**CHAPTER 305**

**CONSOLIDATED PERMITS**

**SUBCHAPTER B : EMERGENCY ORDERS, TEMPORARY ORDERS, AND EXECUTIVE**

**DIRECTOR AUTHORIZATIONS**

**§§305.21-305.31**

**§305.21. Emergency Orders and Temporary Orders Authorized.**

The commission or executive director may issue emergency orders, or the commission may issue temporary orders, relating to the discharge of waste or pollutants into or adjacent to any water in the state under Texas Water Code, §5.509, and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [, where the discharge is regulated by a Texas pollutant discharge elimination system (TPDES) permit or where a TPDES permit is not required, when necessary to enable action to be taken more expeditiously than is otherwise provided by the Texas Water Code, Chapter 26, to effectuate the policy and purposes of this chapter].

**§305.29. Emergency Orders for Solid Waste Activities.**

[(a)] The commission or executive director may issue a mandatory or prohibitory emergency order regarding any activity of solid waste management within its jurisdiction under Texas Water Code, §5.512 and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits;

Temporary Suspension or Amendment of Permit Conditions) [, whether the activity is covered by a permit or not, if the commission determines that an emergency exists requiring immediate action to protect public health and safety or the environment. The order may be issued without notice and hearing, or with such notice and hearing as the commission deems practicable under the circumstances.]

[(b) If an emergency order is issued without a hearing, the commission shall fix a time and place for a hearing before the commission to affirm, modify, or set aside the order.]

[(c) The requirements of Health and Safety Code §361.088, relating to notice do not apply to a hearing to affirm, modify or set aside an emergency order issued under this section, but such general notice of the hearing shall be given in accordance with commission rules.]

[(d) An emergency order issued under this section shall not exceed 90 days in duration but may be renewed. For emergency orders affecting UIC permits, the duration may be no longer than required to prevent the hazard].

**§305.30. Emergency Actions Concerning Hazardous Waste.**

The commission or executive director may issue an emergency administrative order relating to hazardous waste under Texas Water Code, §5.512 and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions).

**§305.31. Emergency Orders Relating to Radioactive Substances.**

[(a)] When an emergency exists as a result of a matter under the commission's jurisdiction that requires immediate action to protect the public health or safety or the environment, [the executive director may recommend and] the commission or executive director may [, without notice or hearing,] issue an order under Texas Water Code, §5.516, Texas Health and Safety Code, §401.056, and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) stating the existence of the emergency and requiring that actions be taken to meet the emergency.

[(b) The commission may, without notice or hearing, issue an emergency order directing any action or corrective measure needed to correct or remove the threat to public health or safety or the environment:]

[(1) when the executive director determines that byproduct material, as defined in subparagraph (B) of the definition of "byproduct material" in §336.2 of this title (relating to Definitions), or the operation generating the byproduct material threatens the public health or safety or the environment; or]

[(2) to a person responsible for an activity, including a past activity, concerning the recovery or processing of source material or the disposal of byproduct material, as defined in subparagraph (B) of the definition of "byproduct material" in §336.2 of this title, if it appears that there

is an actual or threatened release of source material or byproduct material that presents an imminent and substantial danger to the public health or safety or the environment, regardless of whether the activity was lawful at the time; or]

[(3) when the commission determines that radioactive substances under its jurisdiction threaten the public health or safety or the environment and that the licensee managing the radioactive substances is unable to remove the threat.]

[(c) An emergency order issued under subsection (b)(2) of this section may restrain the person to whom the order is directed from allowing or continuing the release or threatened release and require the person to take any action necessary to provide and implement an environmentally-sound remedial action plan designed to eliminate the release or threatened release.]

[(d) An emergency order issued under this section takes effect immediately. A person to whom an emergency order is directed shall comply immediately with that order.]

[(e) The emergency order shall be delivered to the person to whom the order is directed by hand delivery or by certified mail, return receipt requested. Affidavit of personal service, proof of mailing to the proper address, or the receipt shall be conclusive evidence of service. In the case of an order issued under subsection (b)(2) of this section, if delivery by hand delivery or certified mail fails, the order may be served on the person by publication once in the Texas Register and once in a newspaper of general circulation in each county of the person's last known address.]

[(f) If the commission issues the emergency order without notice or hearing:]

[(1) In the case of an order issued under subsection (a) or (b)(3) of this section, the commission shall provide the person to whom the order is directed an opportunity for a hearing on written request within 30 days of the date of the order. If a hearing is requested, notice of the hearing shall be given to the person to whom the order is directed by hand delivery or certified mail, return receipt requested, at least ten days before the hearing. A requested hearing shall be held not earlier than the 11th day and not later than the 20th day following the date of receipt of the hearing request.]

[(2) In the case of an order issued under subsection (b)(1) or (2) of this section, the order shall set a time, at least ten but not more than 30 days following the date of issuance of the order, and a place for a hearing to be held.]

[(g) All provisions of the emergency order shall remain in full force and effect during the pendency of a hearing, unless otherwise altered by the commission. At the conclusion of the hearing and after the proposal for decision is made, the commission shall make a determination to affirm, modify, or revoke the emergency order and may modify, revoke, or suspend the license based on the determination made.]

[(h) The commission shall use the financial assurance mechanism provided by the licensee to pay the costs of actions and corrective measures that are taken or that are to be taken under this section.

The commission shall send to the Comptroller of Public Accounts a copy of its order and the necessary documents authorizing the Comptroller of Public Accounts to:]

[(1) enforce the financial assurance mechanism supplied by the licensee;]

[(2) convert the necessary amount of the financial assurance mechanism into cash; and]

[(3) disburse from the Radiation and Perpetual Care Fund the amount necessary to pay the costs of the commission's actions and corrective measures.]

[(i) If the costs of actions and corrective measures require more funds than the financial assurance mechanism has provided, the commission shall request the Attorney General to seek reimbursement from the licensee or person causing the threat.]

[(j) The commission shall seek reimbursement through a commission order or shall request the Attorney General to file suit for reimbursement if the commission uses the Radiation and Perpetual Care Fund to pay for actions or corrective measures to remedy spills or contamination by radioactive material resulting from a violation of the Texas Radiation Control Act (TRCA), the rules of this chapter, or a license or order issued by the commission under the TRCA or this chapter.]

**CHAPTER 305**

**CONSOLIDATED PERMITS**

**SUBCHAPTER B : EMERGENCY ORDERS, TEMPORARY ORDERS, AND EXECUTIVE**

**DIRECTOR AUTHORIZATIONS**

**§§305.22-305.28, 305.30, 305.32**

**STATUTORY AUTHORITY**

The repeals are proposed under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011 and Texas Health and Safety Code, §§361.011, 361.017, 361.024, 401.011, 401.051, and 401.412. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state. Section 361.011 establishes the commission's jurisdiction over municipal solid waste. Section 361.017 establishes the commission's jurisdiction over industrial hazardous waste. Section 361.024 establishes the commission's authority to establish rules for the control of solid waste. Section 401.011 establishes the commission's authority over radioactive substances. Section 401.051 establishes the commission's authority to adopt rules for the control of radiation. Section 401.056 establishes the commission's authority to issue emergency orders concerning radiation. Section 401.412 establishes the commission's authority concerning licenses for radioactive substance disposal.

The proposed repeals implement Texas Water Code, §§5.103, 5.105, 5.506, 13.041, 26.011 and Texas Health and Safety Code, §§361.011, 361.017, 361.024, 401.011, 401.051, 401.056, and 401.412.

**§305.22. Application for Orders or Authorizations to Discharge.**

**§305.23. Emergency Orders.**

**§305.24. Notice.**

**§305.25. Executive Director Authorizations to Discharge.**

**§305.26. Hearings for Temporary Orders, Executive Director Authorizations and Emergency Orders.**

**§305.27. Application Fees.**

**§305.28. Renewals of Emergency Orders and Temporary Orders.**

**§305.30. Emergency Actions Concerning Hazardous Waste.**

**§305.32. Emergency Impoundment of Radioactive Material.**

**SUBCHAPTER O : ADDITIONAL CONDITIONS AND PROCEDURES FOR WASTEWATER  
DISCHARGE PERMITS AND SEWAGE SLUDGE PERMITS**

**§305.535**

**STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011 and Texas Health and Safety Code, §§361.011, 361.017, 361.024, 401.011, 401.051, and 401.412. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendment implements Texas Water Code, §§5.103, 5.105, 5.506, 13.041, and 26.011.

**§305.535. Bypasses from TPDES Permitted Facilities; Minimum Requirements for TPDES**

**Permitted Facilities.**

(a) (No change.)

(b) Notice.

(1) Anticipated bypass. In accordance with the procedures described in Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [§§305.21, 305.22, and 305.23 of this title (relating to Emergency Orders, Temporary Orders, and Executive Director Authorizations)], if the permittee knows in advance of the need for a bypass, it shall submit prior notice under §35.24 of this title (relating to Application for Emergency or Temporary Order) if possible at least ten days before the date of the bypass.

(2) (No change.)

(c) Prohibition of bypass.

(1) (No change.)

(2) The commission may approve an anticipated bypass in accordance with the procedures described in Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [§§305.21, 305.22, and 305.23 of this title (relating to Emergency Orders, Temporary Orders, and Executive Director Authorizations)], after considering its adverse effects, if the commission [executive director] determines that it will meet the three conditions listed in paragraph (1) of this subsection.

(d) (No change.)

The commission proposes amendments to §§321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, and 321.258, concerning emergency and temporary orders. This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

In addition to these amendments, the commission is concurrently proposing to consolidate agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently proposing amendments to emergency and temporary order provisions in §§116.410, 291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, and 334.83, and the repeal of the following rules relating to emergency and temporary orders: §§116.411-116.418, 291.10, 291.13, 297.57, 305.22-305.28, 305.30, and 305.32. The commission is also proposing new §297.57 and §305.30. These changes are published in this edition of the *Texas Register*.

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and

hearing requirements that are applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances.

The proposed amendments make nonsubstantive changes to make cross-references to the new Chapter 35, as well as to Chapter 70, concerning Enforcement. The commission also proposes nonsubstantive changes to terminology for regulatory reform purposes.

#### FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections are in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections.

#### PUBLIC BENEFIT

Mr. Minick also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be enhanced consistency in the issuance of emergency and temporary orders. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

#### DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that

statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rules are not a major environmental rule because their primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, §5.501. The rules also concern procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of these rules is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. The rules will also consolidate agency procedural rules and make certain processes consistent among different agency programs. The rules will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they concern commission procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11,

and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rules under 31 TAC §505.22, and found that the proposed rules are consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the proposed rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the administrative policies and the policies for specific activities related to: construction and operation or solid waste treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of these proposed rules is consistent with the applicable CMP goals and policies because the proposed rules will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because they will allow the commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

The commission invites public comment on the consistency of the proposed rules.

#### PUBLIC HEARING

A public hearing on this proposal will be held August 3, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, located at 12100 Park 35 Circle, Austin. 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 occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97142-035-AD. Comments must be received by 5:00 p.m., August 3, 1998. For further information, please contact Brian Christian, Policy Research Division, (512) 239-1760.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

#### STATUTORY AUTHORITY

The amendment is proposed under TWC, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the

commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendment implements TWC, §§5.103, 5.105, 5.501, and 26.011.

**CHAPTER 321**

**CONTROL OF CERTAIN ACTIVITIES BY RULE**

**SUBCHAPTER E : SURFACE COAL MINING, PREPARATION, AND RECLAMATION**

**ACTIVITIES**

**§321.80**

**§321.80. Associated Facilities.**

The provisions of this section are applicable to discharges from a coal preparation plant and coal preparation plant associated areas.

(1) - (2) (No change.)

(3) In order to prevent immediate harm to human health or the environment which is not otherwise avoidable, or to allow necessary maintenance and repair work, the commission may, under Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [pursuant to §305.21 of this title (relating to Emergency Orders and Temporary Orders Authorized)], grant a temporary or emergency order authorizing the discharge of process or other wastewater regulated by this subchapter.

(4) (No change.)

**SUBCHAPTER H : DISCHARGE TO SURFACE WATERS FROM TREATMENT OF  
PETROLEUM SUBSTANCE CONTAMINATED WATERS**

**§321.132, §321.134**

**STATUTORY AUTHORITY**

The amendments are proposed under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendments implement Texas Water Code, §§5.103, 5.105, 5.501, and 26.011.

**§321.132. Applicability.**

(a) The purpose of this subchapter is to regulate by rule the surface discharge of water contaminated by a release of a petroleum substance into or adjacent to water in the state, within the statutory jurisdiction of the commission [TNRCC] to regulate and not otherwise prohibited elsewhere in the rules of the commission [TNRCC], and:

(1) - (2) (No change.)

(b) Commission [TNRCC] registration in accordance with §321.133 or §321.134 of this title is not required if one of the following conditions exists:

(1) free product is removed and the remaining contaminated water is routed to an existing commission [TNRCC] permitted wastewater treatment system capable of treating the wastes;

(2) petroleum substance contaminated water is land applied on-site with no runoff if:

(A) the volume to be land applied is 500 gallons or less during any quarter.

However, the general and specific conditions of §321.133 or §321.134 of this title, excluding notification of the commission [TNRCC] region office, monitoring/reporting requirements, and any other condition not appropriate to the land application of petroleum substance contaminated water, shall apply to any discharge. The responsible party must be able to demonstrate that any discharge under [pursuant to] this exclusion was compliant with discharge limits based on laboratory analysis or the petroleum substance contaminated water is treated by a properly operated and maintained system to produce a compliant effluent; and

(B) (No change.)

(3) the discharge is drainage from a facility where preparation and implementation of a Spill Prevention Control and Counter-measure Plan is required under [pursuant to] 40 Code of Federal Regulations, Part 112;

(4) - (5) (No change.)

(c) For discharges located in or within ten miles upstream of the Edwards Aquifer recharge zone as defined in Chapter 313 of this title (relating to Edwards Aquifer), the executive director may require a responsible party to obtain a permit or other authorization from the commission [TNRCC] for such a discharge, in accordance with §321.138 of this title (relating to Reservation).

(d) An application for an emergency order, temporary order, or permit as provided by Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [Chapter 305 of this title (relating to Consolidated Permits)] must be submitted and the order or permit issued [by the TNRCC] either before water contaminated by any substance not regulated by this subchapter can be discharged or as an alternative to compliance with the requirements of this subchapter.

(e) - (f) (No change.)

**§321.134. Discharge of Water Contaminated by Other Petroleum Substances.**

(a) Registration. Except as provided in §321.132 of this title (relating to Applicability) and §321.135 of this title (relating to Telephone Utilities), a registration form must be submitted to the Watershed Management Division, Texas Natural Resource Conservation Commission (TNRCC)

[TNRCC] Austin office. The registration form shall be submitted a minimum of 60 days prior to the expected date of discharge, except for:

(1) an emergency as defined in Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [§305.23(a) of this title (relating to Emergency Orders)] where the registration form may be submitted at any time but a discharge cannot occur until approved by the executive director or designated representative as provided by this section; or

(2) water contaminated by a diesel release may be discharged upon the submission of the registration form less the following items but subject to the discharge limits and the monitoring/reporting requirements of this section and shall include:

(A) - (B) (No change.)

(C) a written description of the discharge route. Submittal of the registration form (excluding diesel fuel contaminated water) does not constitute an authorization to discharge. The commission [TNRCC] will review requests for registration on a case-by-case basis and [the agency] may request additional information, including additional sampling and analytical data. Submittal of a registration form is acknowledgment that the responsible party or their agent has determined that the requirements of this subchapter are applicable to the proposed discharge, and that all criteria for discharge will be satisfied. If the registration is approved, the executive director or designated

representative shall notify the responsible party or their agent in writing and this notification shall constitute an authorization to discharge wastewater. Requirements in addition to those listed in subsection (c)(2)(A) of this section may be specified on a case-by-case basis.

(b) (No change.)

(c) Specific Requirements for Discharge. Except as provided in §321.135 of this title (relating to Telephone Utilities), the following specific requirements apply.

(1) (No change.)

(2) Effluent limitations and monitoring requirements.

(A) - (D) (No change.)

(E) Discharge of wastewater shall cease within 24 hours of the time that the responsible party or their agent learns that any one of the polynuclear aromatic hydrocarbons has been detected at a concentration of 0.01 mg/liter or greater. A written report shall be provided to the TNRCC Austin and regional office within five working days. Discharge may not be resumed under the provisions of this subchapter without written authorization from the executive director. The executive director may require the responsible party to obtain a permit from the commission [TNRCC] for such a discharge.

(F) (No change.)

(G) Sample containers, holding times, preservation methods and the physical, chemical and microbiological analyses of effluent shall meet the requirements specified in regulations published in 40 Code of Federal Regulations Part 136 under [pursuant to] the Federal Water Pollution Control Act, §304(g), and be conducted according to this federal regulation or the latest edition of "Standard Methods for the Examination of Water and Wastewater."

(3) Reporting Requirements. All analytical results shall be reported to the Watershed Management Division, TNRCC Austin office using the "Petroleum Substance Contaminated Water Report" form provided by the executive director. Results of sampling activities shall be submitted to the commission [TNRCC] no later than the 20th day of the month following the discharge unless the discharge occurs one day per quarter based on the frequency of discharge noted on the registration form and reports for these discharges are due no later than the 20th day in the months of April, July, October, and January. Any report form reflecting that a discharge limit was exceeded must be accompanied by a report prepared in accordance with subsection (b)(5) of this section.

**SUBCHAPTER J : DISCHARGES TO SURFACE WATERS FROM READY-MIXED  
CONCRETE PLANTS AND/OR CONCRETE PRODUCTS PLANTS OR ASSOCIATED  
FACILITIES**

**§321.152, §321.158**

**STATUTORY AUTHORITY**

The amendments are proposed under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendments implement Texas Water Code, §§5.103, 5.105, 5.501, and 26.011.

**§321.152. Purpose and Applicability.**

(a) - (b) (No change.)

(c) If the executive director denies a registration application under this subchapter, the facility must obtain a permit under [pursuant to the] Texas Water Code, Chapter 26.

(d) Facilities which do not meet the requirements of §321.154 and §321.155 of this title and do not discharge or transport facility wastewater to a publicly owned treatment works (POTW) which has a wastewater discharge permit issued by the executive director must apply for an emergency order, temporary order, or permit as provided by Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [Chapter 305, Subchapter B of this title (relating to Consolidated Permits)] for the discharge of wastewater into or adjacent to water in the state.

**§321.158. Enforcement and Revocation.**

If any registrant or facility regulated by this subchapter fails to comply with the terms of this subchapter, the executive director may take enforcement action as provided by the Texas Water Code and under Chapter 70 [in accordance with Chapter 337] of this title (relating to Enforcement). The executive director may revoke any registration granted to a registrant or facility due to noncompliance with the requirements of this subchapter, after notice to the registrant and opportunity for hearing, and such registrant shall cease any discharge until such time as the facility is issued a wastewater discharge permit, an emergency order, or temporary order as provided by Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [Chapter 305, Subchapter B of this title (relating to Consolidated Permits)] for the discharge of wastewater into or adjacent to water in the state.

## **SUBCHAPTER L : DISCHARGE TO SURFACE WATERS FROM MOTOR VEHICLES**

### **CLEANING FACILITIES**

#### **§321.219**

#### **STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendment implements Texas Water Code, §§5.103, 5.105, 5.501, and 26.011.

#### **§321.219. Enforcement and Revocation.**

If any registrant or facility regulated by this subchapter fails to comply with the terms of this subchapter, the executive director may take enforcement action as provided by the Texas Water Code and under Chapter 70 [in accordance with Chapter 337] of this title (relating to Enforcement). The executive director may revoke any registration granted to a registrant or facility due to noncompliance with the requirements of this subchapter, after notice to the registrant and opportunity for hearing, and such registrant shall cease any discharge until such time as the facility is issued a wastewater discharge permit, an emergency order, or temporary order as provided by Chapter 35 of this title (relating to

Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit

Conditions) [Chapter 305, Subchapter B of this title (relating to Consolidated Permits)] for the discharge of wastewater into or adjacent to water in the state. The executive director may require a motor vehicle cleaning facility defined as exempt from registration under §321.212 of this title (relating to Purpose and Applicability) to obtain a registration when an exempt facility is causing water pollution that could be avoided through compliance with the requirements of this subchapter.

**SUBCHAPTER M : DISCHARGES TO SURFACE WATERS FROM PETROLEUM BULK**

**STATIONS AND TERMINALS**

**§321.232, §321.239**

**STATUTORY AUTHORITY**

The amendments are proposed under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendments implement Texas Water Code, §§5.103, 5.105, 5.501, and 26.011.

**§321.232. Purpose and Applicability.**

(a) - (c) (No change.)

(d) An application for an emergency order, temporary order, or permit as provided by Chapter Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [Chapter 305, Subchapter B of this title (relating to Consolidated Permits)] must be submitted for the discharge of any other wastewater not authorized by this rule to the water in the state.

(e) - (h) (No change.)

(i) If the executive director denies a registration application under this subchapter, the facility must obtain a permit under [pursuant to the] Texas Water Code, Chapter 26.

**§321.239. Enforcement and Revocation.**

If any registrant or facility regulated by this subchapter fails to comply with the terms of this subchapter, the executive director may take enforcement action as provided by the Texas Water Code and in accordance with Chapter 70 [337] of this title (relating to Enforcement). The executive director may revoke any registration granted to a registrant or facility due to noncompliance with the requirements of this subchapter, after notice to the registrant and opportunity for hearing, and such registrant shall cease any discharge until such time as the facility is issued a wastewater discharge permit, an emergency order, or temporary order as provided by Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [Chapter 305, Subchapter B of this title (relating to Consolidated Permits)] for the discharge of wastewater into or adjacent to water in the state. The executive director may require a small PBST defined as exempt from registration under § 321.232(h) of this title (relating to Purpose and Applicability) to register under the terms of this subchapter if an exempt facility is causing water pollution that could be avoided through compliance with the requirements of this subchapter.

**SUBCHAPTER N : HANDLING OF WASTES FROM COMMERCIAL FACILITIES**

**ENGAGED IN LIVESTOCK TRAILER CLEANING**

**§321.258**

**STATUTORY AUTHORITY**

The amendment is proposed under Texas Water Code, §§5.103, 5.105, 5.501, and 26.011. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of Texas Water Code, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state.

The proposed amendment implements Texas Water Code, §§5.103, 5.105, 5.501, and 26.011.

**§321.258. Enforcement and Revocation.**

If any registrant or facility regulated by this subchapter fails to comply with the terms of this subchapter, the executive director may take enforcement action as provided by the Texas Water Code and in accordance with Chapter 70 [337] of this title (relating to Enforcement). The executive director may revoke any registration granted to a registrant or facility due to noncompliance with the requirements of this subchapter, after notice to the registrant and opportunity for hearing, and such registrant shall cease any discharge until such time as the facility is issued a wastewater discharge permit, an emergency order, or temporary order as provided by Chapter 35 of this title (relating to

Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit

Conditions) [Chapter 305, Subchapter B of this title (relating to Consolidated Permits)] for the discharge of wastewater into or adjacent to water in the state.

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §334.83, concerning emergency orders. This action implements Senate Bill (SB) 1876, 75th Legislature, 1997, and continues the commission's effort to consolidate agency procedural rules and make certain processes consistent among different agency programs.

In addition to this action, the commission is concurrently proposing to consolidate agency emergency and temporary order provisions under a new Chapter 35, concerning Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. The commission is also concurrently proposing amendments to emergency and temporary order provisions in §§116.410, 291.14, 291.22, 291.142, 291.143, 305.21, 305.29, 305.31, 305.535, 321.80, 321.132, 321.134, 321.152, 321.158, 321.219, 321.232, 321.239, and 321.258, and the repeal of the following rules relating to emergency and temporary orders: §§116.411-116.418, 291.10, 291.13, 297.57, 305.22-305.28, 305.30, and 305.32. The commission is also proposing new §297.57 and §305.30. These changes are published in this edition of the *Texas Register*.

SB 1876 consolidated various statutory provisions governing emergency and temporary orders under new Texas Water Code (TWC), Chapter 5, Subchapter L. The new statute expressly authorizes the commission to issue temporary or emergency mandatory, permissive, or prohibitory orders, and issue temporary permits or suspend permit conditions by temporary or emergency order. It allows the commission to issue emergency orders with or without notice. Additionally, it authorizes the commission to delegate authority to the executive director to receive applications and issue emergency orders and authorize representatives to act on his or her behalf. Finally, general application, term, and

hearing requirements that are applicable to all affected programs are included. The statute will allow the commission or the executive director to act expeditiously to address unforeseen circumstances.

TWC, §5.510, as added by SB 1876, provides for emergency and temporary orders for underground or aboveground storage tanks.

The proposed amendment to §334.83, concerning Emergency Orders, provides reference to the commission's authority under TWC, §5.510, and the new Chapter 35. The amendment also makes a conforming change and deletes provisions that have been moved to proposed Chapter 35, Subchapter I, concerning Storage Tank Emergency Orders.

#### FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the section is in effect there will be no significant fiscal implications for state or local government as a result of enforcing or administering the section.

#### PUBLIC BENEFIT

Mr. Minick also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be enhanced consistency in the issuance of emergency and temporary orders. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

#### DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rule is not a major environmental rule because its primary intent is to consolidate already existing emergency and temporary order rules under one chapter. In addition, the applicability requirements do not apply because the commission is expressly granted authority by TWC, §5.501. The rule also concerns procedural requirements of the agency, such as delegation of the authority to issue such orders by the commission to the executive director, and are a result of the commission's continuing regulatory reform effort.

#### TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rule under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to implement the statutory provisions of TWC, Chapter 5, Subchapter L. The rule will also consolidate agency procedural rules and make certain processes consistent among different agency programs. The rule will substantially advance these specific purposes by providing specific provisions on these matters. Promulgation and enforcement of this rule will not burden private real property which is the subject of the rule because it concerns commission procedural rules.

#### COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in the Coastal Coordination Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will, therefore, require that applicable goals and policies of the Coastal Management Program (CMP) be considered during the rulemaking process.

The commission has prepared a consistency determination for the proposed rule under 31 TAC §505.22, and found that the proposed rule is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the proposed rule is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rule include the administrative policies and the policies for specific activities related to: construction and operation or solid waste treatment, storage, and disposal facilities; discharge of municipal and industrial wastewater to coastal areas; nonpoint source water pollution; and appropriations of water. Promulgation and enforcement of the proposed rule is consistent with the applicable CMP goals and policies because the proposed rule will establish clear and consistent requirements governing the issuance of emergency and temporary orders, as authorized by TWC, Chapter 5, Subchapter L. Under the authority granted by statute, the commission may issue emergency or temporary orders to address unforeseen circumstances, such as drought conditions or potential catastrophes. Promulgation and enforcement of the rule will not violate or exceed any standards identified in the applicable CMP goals and policies because it will allow the

commission to take steps to mitigate emergency or potential emergency situations, which will result in environmental benefits for the entire state, including coastal areas.

The commission invites public comment on the consistency of the proposed rule.

#### PUBLIC HEARING

A public hearing on this proposal will be held August 3, 1998, at 2:00 p.m. in Room 2210 of Texas Natural Resource Conservation Commission (TNRCC) Building F, located at 12100 Park 35 Circle, Austin. 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 occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

#### SUBMITTAL OF COMMENTS

Written comments may be mailed to Lisa Martin, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97142-035-AD. Comments must be received by 5:00 p.m., August 3, 1998. For further information, please contact Brian Christian, Policy Research Division, (512) 239-1760.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

#### STATUTORY AUTHORITY

The amendment is proposed under TWC, §§5.103, 5.105, 5.501, 26.011, 26.351, and 26.354. Section 5.103 establishes the commission's general authority to adopt rules. Section 5.105 establishes the commission's authority to set policy by rule. Section 5.501 establishes the commission's authority to adopt rules to implement the emergency and temporary order provisions of TWC, Chapter 5, Subchapter L. Section 26.011 establishes the commission's authority over water quality in the state. Section 26.351 establishes the commission's authority concerning corrective action. Section 26.354 establishes the commission's authority to issue emergency orders concerning petroleum storage tanks.

The proposed amendments implement TWC, §§5.103, 5.105, 5.510, 26.011, 26.351, and 26.354.

**CHAPTER 334**

**UNDERGROUND AND ABOVEGROUND STORAGE TANKS**

**SUBCHAPTER D : RELEASE REPORTING AND CORRECTIVE ACTION**

**§334.83**

**§334.83. Emergency Orders.**

[(a)] Notwithstanding any other provision of this subchapter, the commission or the executive director may issue emergency orders under Texas Water Code, §5.510 and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) [this section] to the owner or operator of an underground storage tank. [, if it appears that:

[(1) there is an actual or threatened release of a regulated substance from an underground storage tank; and]

[(2) the executive director determines that more expeditious corrective action than is otherwise provided for under this subchapter is necessary to protect the public health and safety or the environment.]

[(b) An order issued under subsection (a) of this section may prohibit a person from allowing or continuing the release or the threatened release and require the person to take the actions necessary to eliminate the release or threatened release.]

[(c) An emergency order issued under this section shall be:]

[(1) mailed by certified mail, return receipt requested, to each person identified in the order;]

[(2) hand delivered to each person identified in the order; or]

[(3) on failure of service by certified mail or hand delivery, service by publication one time in the Texas Register and one time in a newspaper with general circulation in each county in which any of the persons identified in the order had a last known address.]

[(d) An emergency order issued under this section does not require notice or an adjudicative hearing before its issuance. If the executive director issues an order under this section, the commission shall fix a time and place for a hearing to affirm, modify, or set aside the emergency order issued by the executive director. The hearing before the commission shall be held as soon as practicable after the issuance of the emergency order.]