

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: January 30, 2013

DATE OF REQUEST: January 11, 2013

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Michael Parrish, (512) 239-2548

CAPTION: Docket No. 2012-2126-RUL. Consideration for publication of, and hearing on, proposed amendment to 30 TAC Chapter 297, Water Rights, Substantive.

The proposed rulemaking would amend the definition of "Municipal Use" in Section 297.1(32) to allow use of return flows authorized under Texas Water Code, Section 11.042 for watering of parks, golf courses, and parkways as a municipal use, after that use of return flows has been authorized by the commission. The proposed rulemaking would also expand the authorized uses to include the watering of other public or recreational spaces. (Jennifer Allis, James Aldredge) (Rule Project No. 2012-039-297-OW)

L'Oreal Stepney, P.E.

Deputy Director

Kellye Rila

Division Director

Michael Parrish

Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: January 11, 2013

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

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

Docket No.: 2012-2126-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 297, Water Rights, Substantive
Municipal Use Definition Change
Rule Project No. 2012-039-297-OW

Background and reason(s) for the rulemaking:

On June 21, 2012, Bickerstaff Heath Delgado Acosta LLP submitted a rulemaking petition on behalf of the City of Irving. In their petition, the City of Irving requested that the commission amend the definition of "Municipal Use" in 30 Texas Administrative Code (TAC) §297.1(32) to allow indirect reuse of treated wastewater effluent, referred to hereinafter as use of return flows, for watering of parks, golf courses, and parkways as a municipal use, after that use of return flows has been authorized by the commission. At the TCEQ's agenda on August 8, 2012, the commission approved the initiation of a rulemaking based on this petition.

As requested in the petition, the commission proposes to amend the definition of municipal use to add reference to the use of return flows in addition to reclaimed water for the uses authorized by the existing rule. The commission also proposes to expand the authorized uses to include the watering of other public or recreational spaces and proposes to reference Texas Water Code (TWC), §11.042, since authorizations for the use of return flows are issued by the commission under this statute.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

The rule proposes to amend §297.1(32) to change the definition of municipal use to add the watering of "other public or recreational spaces" to the list of authorized water uses and to allow use of return flows for all of those uses.

B.) Scope required by federal regulations or state statutes:

There are no changes required by federal rule. At the TCEQ's agenda on August 8, 2012, the commission approved the initiation of a rulemaking based on the City of Irving's petition. This rulemaking proposes to change the definition of municipal use.

C.) Additional staff recommendations that are not required by federal rule or state statute:

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Staff also proposes to expand the authorized uses to include other public or recreational spaces and proposes to reference TWC, §11.042, since authorizations for the use of return flows are issued by the commission under this statute.

Statutory authority:

TWC, §5.102, §5.103, and §5.105

Effect on the:

A.) Regulated community:

Municipal water rights holders could gain the flexibility to use permitted return flows for public purposes without the expense of treating the water to make it potable or the expense of amending existing permits for the use of return flows to add irrigation use.

B.) Public:

The public will not be affected by this rulemaking.

C.) Agency programs:

For the Water Availability Division's Water Rights Permitting and Availability Section, the rulemaking would eliminate the need of an amendment for some municipal water right holders with permitted return flows. Changes to procedures, staff requirements, guidance documents and agency funding will not be necessary.

Stakeholder meetings:

No stakeholder meeting will be held for this rulemaking; however, the agency will hold a rule public hearing on March 12, 2013.

Potential controversial concerns and legislative interest:

Staff does not expect any controversial concerns or legislative interest.

Will this rulemaking affect any current policies or require development of new policies?

This rulemaking will not affect any current policies or require development of new policies.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If this rulemaking does not go forward, staff would not be following the direction they were given by the commission at the August 8, 2012 agenda.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: January 30, 2012

Anticipated *Texas Register* publication date: February 15, 2013

Public hearing date (if any): March 12, 2013

Public comment period: February 15, 2013 - March 18, 2013

Anticipated adoption date: June 26, 2013

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Agency contacts:

Jennifer Allis, 239-0027, Water Availability Division
James Aldredge, 239-2496
Michael Parrish, 239-2548

Attachments

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Tucker Royall
Office of General Counsel
Jennifer Allis
Michael Parrish

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §297.1.

Background and Summary of the Factual Basis for the Proposed Rule

On June 21, 2012, Bickerstaff Heath Delgado Acosta LLP submitted a rulemaking petition on behalf of the City of Irving (Project Number 2012-034-PET-NR). In their petition, the City of Irving requested that the commission amend the definition of "Municipal use" in §297.1(32) to allow indirect reuse of treated wastewater effluent, referred to hereinafter as use of return flows, for watering of parks, golf courses, and parkways as a municipal use, after that use of return flows has been authorized by the commission. At the TCEQ's agenda on August 8, 2012, the commission approved the initiation of a rulemaking based on this petition.

As requested in the petition, the commission proposes to amend the definition of "Municipal use" to add a reference to the use of return flows in addition to reclaimed water for the uses authorized by the existing rule. The commission also proposes to expand the authorized uses to include watering of other public or recreational spaces and proposes to reference Texas Water Code (TWC), §11.042, since authorizations for the use of return flows are issued by the commission under this statute.

Section Discussion

§297.1, Definitions

The existing definition of "Municipal use" in §297.1(32) allows for the use of reclaimed water in lieu of potable water for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways. The commission proposes to amend §297.1(32) to change the definition of municipal use to add watering of "other public or recreational spaces" to the list of authorized water uses and to allow use of return flows authorized pursuant to TWC, §11.042, for all of those uses. Other public or recreational spaces could include areas such as athletic fields, neighborhood common areas, and other spaces within a community or municipality and its environs with public uses. The definition of reclaimed water in §297.1(39) requires that its quality be suitable for its intended use. Similarly, proposed §297.1(32)(C) includes language to ensure that any return flows diverted under this rule that are intended for human consumption as defined in §290.38(32) are of suitable quality for their intended use.

Under a revised definition of municipal use, certain water needs could be satisfied by non-potable return flows, preserving potable supplies for human consumption.

Additionally, municipal water right holders could gain the flexibility to use permitted return flows for public purposes without the expense of treating the water to make it potable or the expense of amending existing permits for the use of return flows to add

irrigation use. The use of return flows is a water planning strategy being explored by many municipal water right holders to stretch existing supplies. The change proposed in this rule could help enable municipal water right holders to implement that strategy. To accommodate these changes, the commission also proposes to reformat the proposed rule language by re-lettering and re-numbering the existing language. The commission proposes the amendment based on a petition for rulemaking.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule would amend the definition of "Municipal use" to expand the authorized uses of treated wastewater effluent to include watering of public or recreational spaces other than golf courses, parks, and parkways. The proposed change also would reference TWC, §11.042, since authorizations for the use of return flows are issued by the commission under this statute. The proposed rule will allow those with existing authorizations to use return flows to irrigate other public or recreational spaces without having to amend their water right permit.

Currently, there are approximately 48 authorizations for use of return flows. Only 11 of these 48 authorizations currently do not have authority for irrigation. The other 37 authorizations currently have irrigation use authorized. All 11 of the authorizations are held by governmental entities.

Those governmental entities with the 11 authorizations would gain the flexibility to use permitted return flows for public purposes without the expense of amending existing permits for the use of return flows to add irrigation use. Under the proposed rule, permit holders would not have to fill out an application for additional irrigation use, submit the \$100 application fee, or treat the water to make it potable. Cost savings for these permit holders and any future applicants for permits for use of return flows are not expected to be significant. Under the proposed rule, the agency may process fewer permit amendments, but any revenue loss is not expected to be significant.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the change seen in the proposed rule will be continued protection of the environment and public health while allowing municipal water right holders to explore the use of return flows as a water planning strategy to stretch existing water supplies.

No fiscal implications are anticipated for individuals, and no significant fiscal implications are anticipated for businesses as a result of the implementation or administration of the proposed rule. Any business that obtains a municipal permit for the use of return flows will not have to incur the cost to amend that permit for irrigation of other public or recreational spaces, nor will they have to treat the water to make it potable. These cost savings are not expected to be significant. However, there may be additional cost savings from using water reuse as a strategy to conserve existing water supplies.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration or enforcement of the proposed rule. Businesses that obtain municipal permits for the use of return flows will not have to incur the cost to amend those permits nor will they have to treat non-potable water if they choose to irrigate other public or recreational spaces. These cost savings are not expected to be significant.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years

that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

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

First, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to expand the definition of municipal use to include the use of

return flows for certain purposes.

Second, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed rule would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. It is not anticipated that the cost of complying with the proposed rule would be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rulemaking and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The commission proposed the rule for the specific purpose of clarifying that use of return flows for purposes already identified in the existing definition qualifies as municipal use. In all instances, a municipality operating under this rule amendment

will be exercising control over property already belonging to it pursuant to an authorization to use return flows issued by the TCEQ.

A "taking" under Texas Government Code, Chapter 2007 means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%.

Because no taking of private real property will occur by amending the definitions as proposed, the commission has determined that promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the proposed rule neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rule. Therefore, the proposed rule would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rule, 31 TAC

§505.11(b)(4), relating to Actions and Rules Subject to the Coastal Management Program, and will, therefore, require that the goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on March 12, 2013 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes

prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2012-039-297-OW. The comment period closes March 18, 2013. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Jennifer Allis, Water Rights Permitting and Availability Section, at (512) 239-0027.

SUBCHAPTER A: DEFINITIONS AND APPLICABILITY
§297.1

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule.

The proposed rule implements TWC, §5.102, §5.103, and §5.105.

§297.1. Definitions.

The following words and terms, when used in this chapter and in Chapters 288 and 295 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements; and Water Rights, Procedural, respectively), shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agriculture or agricultural--means any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management;

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure; and

(G) aquaculture as defined in Texas Agriculture Code, §134.001, which reads "'aquaculture' or 'fish farming' means the business of producing and selling cultured species raised in private facilities. Aquaculture or fish farming is an agricultural activity."

(2) Agricultural use--Any use or activity involving agriculture, including irrigation.

(3) Appropriations--The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water.

(4) Appropriative right--The right to impound, divert, store, take, or use a specific quantity of state water acquired by law.

(5) Aquifer Storage and Retrieval Project--A project with two phases that anticipates the use of a Class V aquifer storage well, as defined in §331.2 of this title (relating to Definitions), for injection into a geologic formation, group of formations, or part of a formation that is capable of underground storage of appropriated surface water for subsequent retrieval and beneficial use. Phase I of the project requires commission authorization by a temporary or term permit to determine feasibility for ultimate storage and retrieval for beneficial use. Phase II of the project requires commission authorization by permit or permit amendment after the commission has determined that Phase I of the project has been successful.

(6) Baseflow or normal flow--The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, agricultural, or other uses of ground or surface waters may be included at times.)

(7) Beneficial inflows--Freshwater inflows providing for a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(8) Beneficial use--Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

(9) Certificate of adjudication--An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of

Texas Water Code, §11.323, or the final judgment and decree in State of Texas v. Hidalgo County Water Control and Improvement District No. 18, 443 S.W.2d 728 (Texas Civil Appeals - Corpus Christi 1969, writ ref. n.r.e.).

(10) Certified filing--A declaration of appropriation or affidavit which was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, §14, as amended.

(11) Claim--A sworn statement filed under Texas Water Code, §11.303.

(12) Commencement of construction--An actual, visible step beyond planning or land acquisition, which forms the beginning of the on-going (continuous) construction of a project in the manner specified in the approved plans and specifications, where required, for that project. The action must be performed in good faith with the bona fide intent to proceed with the construction.

(13) Conservation--Those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(14) Conserved water--That amount of water saved by a water right holder through practices, techniques, or technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from the storage, transportation, distribution, or application of the water. Conserved water does not mean water made available simply through its non-use without the use of such practices, techniques, or technologies.

(15) Dam--Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam. A structure used only for diverting water from a watercourse by gravity is a diversion dam.

(16) Diffused surface water--Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)

(17) District--Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(18) Domestic use--Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary

purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

(19) Drought of record--The historic period of record for a watershed in which the lowest flows were known to have occurred based on naturalized streamflow.

(20) Firm yield--That amount of water, that the reservoir could have produced annually if it had been in place during the worst drought of record. In performing this simulation, naturalized streamflows will be modified as appropriate to account for the full exercise of upstream senior water rights is assumed as well as the passage of sufficient water to satisfy all downstream senior water rights valued at their full authorized amounts and conditions as well as the passage of flows needed to meet all applicable permit conditions relating to instream and freshwater inflow requirements.

(21) Groundwater--Water under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.

(22) Habitat Mitigation--Actions taken to off-set anticipated adverse environmental impacts from a proposed project. Such actions and their sequence include:

(A) avoiding the impact altogether by not taking a certain action or parts of an action or pursuing a reasonably practicable alternative;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(23) Hydropower use--The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(24) Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric, but does not include agricultural use.

(25) Instream use--The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other instream use recognized by law. An instream use is a beneficial use of water. Water necessary to protect instream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

(26) Irrigation--The use of water for the irrigation of crops, trees, and pasture land, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(27) Irrigation water efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include but are not limited to evapotranspiration needs for vegetative maintenance and growth and salinity management and leaching requirements associated with irrigation.

(28) Livestock use--The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in §142.001 of the Agriculture Code, and the terms game animals and fur-bearing animals are to be used as defined in §63.001 and §71.001, respectively, of the Parks and Wildlife Code.

(29) Mariculture--The propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.

(30) Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(31) Municipal per capita water use--The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(32) Municipal use--

(A) The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, other public or recreational spaces; or

(B) the use of reclaimed water in lieu of potable water for the preceding purposes; or

(C) the use of return flows authorized pursuant to Texas Water Code, §11.042, in lieu of potable water for the preceding purposes. Return flows used for human consumption as defined in §290.38(32) of this title (relating to Definitions) must be of a quality suitable for the authorized beneficial use as may be required by applicable commission rules; or

(D) the application of municipal sewage effluent on land, under a Texas Water Code, Chapter 26, permit where:

(i) [(A)] the application site is land owned or leased by the Chapter 26 permit holder; or

(ii) [(B)] the application site is within an area for which the commission has adopted a no-discharge rule.

(33) Navigable stream--By law, Natural Resources Code, §21.001(3), any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more, at which point it becomes statutorily nonnavigable.

(34) Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(35) One-hundred-year flood--The flood peak discharge of a stream, based upon statistical data, which would have a 1.0% chance of occurring in any given year.

(36) Permit--The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.

(37) Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful or detrimental to humans, animal life, vegetation, or property, or the public health, safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(38) Priority--As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law.

(39) Reclaimed water--Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or

agricultural tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized beneficial use.

(40) Recreational use--The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including aquatic and wildlife enjoyment, and aesthetic land enhancement of a subdivision, golf course, or similar development.

(41) Register--The *Texas Register*.

(42) Reservoir system operations--The coordinated operation of more than one reservoir or a reservoir in combination with a direct diversion facility in order to optimize available water supplies.

(43) Return water or return flow--That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(44) Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use

and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(45) River basin--A river or coastal basin designated by the Texas Water Development Board as a river basin under Texas Water Code, §16.051. The term does not include waters originating in bays or arms of the Gulf of Mexico.

(46) Runoff--That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(47) Secondary use--The reuse of state water for a purpose after the original, authorized use.

(48) Sewage or sewage effluent--Water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with any groundwater infiltration and surface waters with which it may be commingled.

(49) Spreader dam--A levee-type embankment placed on alluvial fans or within a flood plain of a watercourse, common to land use practices, for the purpose of overland spreading of diffused waters and overbank flows.

(50) State water--The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, and watercourse in the state. State water also includes water which is imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state. Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water. State water does not include percolating groundwater; nor does it include diffuse surface rainfall runoff, groundwater seepage, or springwater before it reaches a watercourse.

(51) Stormwater or floodwater--Water flowing in a watercourse as the result of recent rainfall.

(52) Streamflow--The water flowing within a watercourse.

(53) Surplus water--Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law. Water that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

(54) Unappropriated water--The amount of state water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.

(55) Underflow of a stream--Water in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(56) Waste--The diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system, or the diversion or use of water in any manner that causes or threatens to cause pollution of water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance

with all applicable rules and standards prior to its discharge into or adjacent to water in the state so that it may be subsequently beneficially used.

(57) Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for preventing or reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate planning document or may be contained within another water management document(s).

(58) Water in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(59) Watercourse--A definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The

water may flow continuously or intermittently, and if the latter with some degree of regularity, depending on the characteristics of the sources.)

(60) Water right--A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water.

(61) Watershed--A term used to designate the area drained by a stream and its tributaries, or the drainage area upstream from a specified point on a stream.

(62) Water supply--Any body of water, whether static or moving, either on or under the surface of the ground, available for beneficial use on a reasonably dependable basis.

(63) Wetland--An area (including a swamp, marsh, bog, prairie pothole, playa, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in

water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including, but not limited to, impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts. This definition does not apply to man-made wetlands described under this subparagraph constructed or created on or after August 28, 1989. If this definition conflicts with the federal definition in any manner, the federal definition prevails.

Bickerstaff Heath Delgado Acosta LLP

3711 S. MoPac Expressway Building One, Suite 300 Austin, Texas 78746 (512) 472-8021 Fax (512) 320-5638 www.bickerstaff.com

June 21, 2012

Via Courier

Bridget C. Bohac
Office of the Chief Clerk
MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

RE: Petition for Rulemaking

Dear Ms. Bohac:

Enclosed please find for filing the original Petition for Rulemaking submitted on behalf of the City of Irving, Texas. Please file-stamp the extra copy of the Petition and return it to our courier.

Thank you for your assistance in this matter. Please contact us, at (512) 472-8021 or at dearoom@bickerstaff.com and smaxwell@bickerstaff.com, if any additional information or documentation is required or if we can be of assistance in any way.

Sincerely,



Susan M. Maxwell

SM/cg

Enclosure

cc: Todd Reck, City of Irving
David Cardenas, City of Irving
Charles Anderson, City of Irving
Kuruvilla Oommen, City of Irving

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bickerstaff Heath Delgado Acosta LLP

3711 S. MoPac Expressway Building One, Suite 300 Austin, Texas 78746 (512) 472-8021 Fax (512) 320-5638 www.bickerstaff.com

June 21, 2012

Via Courier

Mr. Zak Covar
Executive Director
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Petition for Rulemaking

Dear Mr. Covar:

Enclosed please find a Petition for Rulemaking submitted on behalf of the City of Irving, Texas, pursuant to Texas Government Code § 2001.021 and 30 TAC § 20.15. As set forth in the Petition, the City petitions the Commission to amend its current definition of "Municipal Use," 30 TAC § 297.1 (32).

Thank you for your assistance in this matter. Please contact us, at (512) 472-8021 or at dearoom@bickerstaff.com and smaxwell@bickerstaff.com, if any additional information or documentation is required or if we can be of assistance in any way.

Sincerely,



Susan M. Maxwell

SM/cg
Enclosure

cc: Todd Reck, City of Irving
David Cardenas, City of Irving
Charles Anderson, City of Irving
Kuruvilla Oommen, City of Irving

DOCKET NO. _____

BEFORE THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

PETITION FOR RULEMAKING

TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Pursuant to Texas Government Code § 2001.021 and 30 TAC §20.15, the City of Irving (“Petitioner”) petitions the Texas Commission on Environmental Quality (the “Commission”) to adopt an amendment to its current definition of “Municipal Use.” In support of its petition, Irving would show the following:

1. **Petitioner:**

The City of Irving is the Petitioner. Its address is City of Irving, 825 West Irving Boulevard, Irving, Texas 75060. Petitioner may be contacted regarding this petition through counsel, undersigned below.

2. **Proposed Rule:**

Petitioner requests that the definition of “Municipal Use,” 30 TAC 297.1(32), be modified as reflected below:

(32) Municipal use--The use of

(A) potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, or

(B) ~~or~~ the use of reclaimed water or reuse authorized pursuant to § 297.16 of this title in lieu of potable water for the preceding purposes, or

(C) ~~or~~ the application of municipal sewage effluent on land, under a Texas Water Code, Chapter 26, permit where:

(i) (A) the application site is land owned or leased by the Chapter 26 permit holder; or

(ii) (B) the application site is within an area for which the commission has adopted a no-discharge rule.

3. **Explanation of Proposed Rule:**

As the rule is currently drafted direct reuse of treated wastewater effluent for watering municipal parks, golf courses, parkways and other purposes is considered a municipal use. This promotes conservation by allowing the substitution of treated wastewater for potable

water from the municipal supply. However, indirect reuse of treated wastewater for many of these same purposes is not considered a “municipal use” under the current definition because the definition of “reclaimed water,” 30 TAC § 297.1(39), requires that the treated wastewater be “under the direct control of the treatment plant operator.”

The proposed amendment of the “Municipal Use” definition would allow indirect reuse of treated wastewater effluent for watering of parks, golf courses, and parkways as a municipal use, after that indirect reuse had been authorized by the Commission pursuant to Texas Water Code § 11.042 and 30 TAC § 297.16. All appropriate environmental and water availability reviews would have already occurred as part of obtaining the “bed and banks” authorization. Like the existing authorization for direct reuse of treated effluent for these purposes, the proposed amendment would promote conservation by allowing indirect reuse of treated effluent, thus relieving demands that otherwise might have to be supplied from potable municipal water.

4. Statutory Authority:

The Commission has authority to adopt the proposed rule amendment under Texas Water Code § 5.103.

5. Injury or Inequity Resulting from Failure to Adopt the Proposed Rule:

Without the proposed amendment, municipalities desiring to indirectly utilize treated wastewater effluent for watering golf courses, parks and parkways are required to amend their underlying water right authorization to include “agricultural use.” Not only is obtaining such an amendment potentially time consuming and expensive for the municipality, and burdensome on the TCEQ staff, it is not logical – watering such municipal facilities with reuse water in order to relieve the potable water demand on the municipal supply system *is* a municipal use, not an agricultural use.

6. Alternative Language:

The purpose of the proposed amendment is to modify the “Municipal Use” definition to allow indirect reuse of treated wastewater effluent to meet a demand that otherwise might have had to be satisfied from the municipal potable water supply, much as direct reuse of treated effluent is already authorized for this purpose. The language proposed by this Petition, above, is not the only way to accomplish this goal. Petitioner would not object to alternative language or modification of the proposed language, if such is determined to be preferable by TCEQ staff, so long as it accomplishes the intended purpose.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that the Commission adopt the proposed revision of the "Municipal Use" definition to allow indirect reuse of treated effluent to qualify as a municipal use.

Respectfully submitted,

BICKERSTAFF HEATH
DELGADO ACOSTA LLP
Douglas G. Caroom
Texas Bar No. 03832700
Susan M. Maxwell
Texas Bar No. 24026869
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
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Facsimile: (512) 320-5638

By: Susan Maxwell
Douglas G. Caroom *For*

Attorneys for City of Irving, Texas

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**DECISION OF THE COMMISSION
REGARDING THE PETITION FOR RULEMAKING
FILED BY THE CITY OF IRVING**

Docket No. 2012-1262-RUL

On August 8, 2012, the Texas Commission on Environmental Quality (Commission) considered the petition for rulemaking filed by the City of Irving. The petition, filed on July 21, 2012, requests that the agency initiate rulemaking to amend the definition of "Municipal Use" in §297.1(32) to allow indirect reuse of treated wastewater effluent for watering of parks, golf courses, and parkways as a municipal use, after that indirect reuse had been authorized by the commission.

IT IS THE DECISION OF THE COMMISSION pursuant to Administrative Procedure Act, Texas Government Code, § 2001.021 and Texas Water Code, § 5.102 to instruct the Executive Director to examine the issues in the petition and to initiate rulemaking.

This Decision constitutes the decision of the Commission required by the Texas Government Code, § 2001.021(c).

Issued date: **AUG 14 2012**

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

A handwritten signature in black ink that reads "Bryan W. Shaw".

Bryan W. Shaw, Ph.D., Chairman