

The Texas Natural Resource Conservation Commission (TNRCC or Commission) proposes an amendment to §304.21, Watermaster Operations.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The proposed rule changes would clarify language concerning formal commission enforcement of the requirement of reasonable use as between domestic and livestock users and move appropriate portions of Chapter 297, pertaining to domestic and livestock use, to Chapter 304 to facilitate enforcement in areas covered by the commission watermaster programs.

SECTION BY SECTION DISCUSSION

Proposed amendments to 30 TAC §297.21(c), which are also published in the issue of the Texas Register, provide that a person's domestic and livestock use cannot unreasonably interfere with another person's domestic and livestock use, and that any domestic and livestock dam exempt from permitting under §297.21(b) must allow sufficient inflows to pass through for the benefit of domestic and livestock users downstream. While this is an accurate statement of the law, staff working in some of the regional offices have found administration of this rule to be nonenforceable.

Texas Water Commission and TNRCC staff have traditionally advised domestic and livestock users of the necessity to share with one another during times of shortage. Often this type of intervention has been successful in facilitating agreement between the landowners involved on an equitable sharing arrangement. Institutionalizing this procedure into a rule, however, was a change that added some features that are difficult to manage. For example, most domestic and livestock users do not meter their flows; therefore, in order to enforce this provision, staff must decide by visual examination if passage of inflows is sufficient, or if the domestic and livestock use is reasonable. This is usually easy to do on an informal basis, but not so easy to determine with the precision necessary for a formal

enforcement proceeding. The commission has not received statutory guidance on these issues. Also, there often is not sufficient staff in the region to police these inflow passage requirements in addition to their other duties. For these reasons, the commission proposes to return to the former, informal procedure. When facilitation by the commission is unsuccessful, the appropriate venue for formal action is a private action in court between the disputing domestic and livestock users.

There is an exception to this general statement. In watermaster districts, there are specialized personnel whose role it is to regulate diversions during shortage. For that reason, this amendment also includes a proposal to move the requirement that domestic and livestock exempt reservoirs pass inflows to other domestic and livestock users from §297.21(c), which is being amended, to a new §304.21(d)(3).

Watermasters have broad authority under Texas Water Code (TWC), Chapter 11 to regulate water usage during drought. Under §297.327, watermasters, in times of water shortage, may regulate the works of reservoirs and regulate the distribution of water among water right holders. Chapter 304 is an appropriate place for requiring domestic and livestock exempt reservoirs to pass inflows because watermasters are familiar with the water rights in their areas, have staff that work solely on water rights enforcement, and have statutory authority to apportion flows in times of drought.

Section 304.21(d) provides what a watermaster may do when sufficient flow is not available to meet water right holder's existing declarations of intent to take water or meet the needs of domestic and livestock users. Section 304.21(d)(2) provides that the watermaster can require water right holders with reservoirs to pass inflows to honor these downstream water rights. Proposed new §304.21(d)(3) would provide that domestic and livestock reservoir owners exempt from permitting under TWC, §11.142

must allow inflows to pass through when necessary for the protection of downstream domestic and livestock users. The commission does not regard this amendment as a change in the law.

Watermasters already have this authority under statute, and §304.21(d)(2) can already be read to include domestic and livestock users as persons who can be required to pass inflows. This new §304.21(d)(3) simply makes that authority explicit in the rule.

FISCAL NOTE

Jeff Grymkoski, Director, Strategic Planning and Appropriations, has determined that for the first five-year period that this rule is in effect, there will be no adverse fiscal implications for the commission and other units of state and local government as a result of administration or implementation of the proposed amendment.

The proposed amendment would clarify that watermasters may require persons with reservoirs exempt from permitting under TWC, §11.142 to allow inflows to pass through such reservoirs for the protection of downstream domestic and livestock users. Adding this provision to §304.21(d)(3) is not anticipated to have a fiscal impact on this agency or any other state or local agency because it will not increase the enforcement duties of the commission or cause other agencies to assume this enforcement duty. The watermaster has this authority and this proposed amendment is intend to clarify that authority.

PUBLIC BENEFIT

Mr. Grymkoski has also determined for each of the first five years that the proposed rule is in effect,

the public benefit of the proposed amendment will be clarification of existing authority of a watermaster and increased understanding of agency rules by water right holders. The proposed rule amendment should have no adverse economic on any person, business, or industry.

SMALL BUSINESS AND MICRO-BUSINESS ANALYSIS

No fiscal implications are anticipated to any person, small business, or micro-business as a result of the proposed rule amendment. This proposed amendment does not change the enforcement practice of this agency because watermasters already have this authority and it is a clarification of that authority only. This rule amendment will not change any enforcement on businesses with a water right. Therefore, it will have no economic impact on a small or micro-business.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of 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. “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 section of the state. This proposed rule will not adversely affect the economy, productivity, competition, jobs, the environment, or public health and safety. In addition, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state

law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This rule amendment does not meet any of these four applicability requirements of a major environmental rule. This rule implements state law, not federal, and simply clarifies the watermaster's authority.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this rule pursuant to Texas Government Code, §2007.43. The following is a summary of that assessment. The purpose of this rule is to clarify that the watermaster can require a domestic and livestock user with exempt reservoirs to pass inflows to another domestic and livestock user when flows are low. This is not a change in interpretation or policy of this agency. The watermaster has always had this authority. This is not a burden on private real property because the fact that domestic and livestock exempt reservoirs may be required to pass inflows is a current rule of law and does not affect the property value of the right.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has reviewed the proposed rulemaking and found that the rule amendment is neither identified in Texas Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to actions and rules subject to the Texas Coastal Management Program (CMP), nor will it affect any

action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11.

Therefore, the proposed rule amendment is not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1999-078-297-WT. Comments must be received by 5:00 p.m., May 22, 2000. For further information, please contact Bruce Moulton, Policy and Regulations Division, at (512) 239-4809.

STATUTORY AUTHORITY

The amendment is proposed under TWC, §5.103 and §5.105, which authorize the commission to adopt rules necessary to carry out its responsibilities and duties under the TWC and other laws of Texas.

No other codes or states will be affected by this proposal.

SUBCHAPTER C : ALLOCATION OF AVAILABLE WATERS

§304.21

§304.21. Allocation of Available Waters.

(a) The allocation of water between water rights holders shall be on the basis of seniority, which may be modified as provided in subsection [sub section] (b) of this section. The watermaster shall allocate waters in such a way as to maximize the beneficial utilization of state water, to minimize the potential impairment of senior water rights by the diversions of junior water rights holders, and to prevent waste or use in excess of quantities to which the holders of water rights are lawfully entitled.

(b) In administering water rights, the watermaster shall take into account any exceptions to the priority system as directed by the commission relative to the Wagstaff Act, Texas Water Code (TWC), §11.028.

(c) (No change.)

(d) When available flow is not sufficient to meet the demands of existing declarations of intent for downstream senior rights, demands for domestic and livestock purposes that are not included under any water right, or other minimum streamflow requirements that the commission determines necessary for purposes other than protection of downstream senior and superior water rights, the watermaster may:

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

(3) order that persons with reservoirs exempt from permitting under TWC, §11.142 allow inflows to pass through such reservoirs for the protection of downstream domestic and livestock users. Failure to comply with a watermaster's order under this subsection is a violation of TWC, §11.081.

(4) [(3)] order that diverters limit or cease diversions to the extent necessary to honor downstream senior water rights, demands for domestic and livestock purposes, minimum streamflow requirements, minimum release requirements, and other conditions; and/or

(5) [(4)] take any other action necessary to ensure that downstream senior water rights, demands for domestic and livestock purposes, minimum streamflow requirements, minimum release requirements, and other conditions, are administered in accordance with the laws of Texas.